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Preface to the First edition.

The Indian Evidence Act, unlike all other enactments consists of a number of abstract and abstruse rules, which are by no means easy to understand According to Lord Erskine the rules of evidence "are founded in the charities of religion—in the philosophy of nature—in the truth of history—and in the experience of common life"* To understand the truth of the observation some knowledge as regards the origin and growth of the rules of evidence is absolutely necessary So the historical treatment of a particular rule is not altogether out of place I have tried my best in these pages to trace the origin and show the development of each and every particular rule of law, in order to enable the reader to have a firm grasp of the principle underlying it "Our law" observed Serjent Plowden, "like all others, consists of two parts, namely of body and soul The letter of the law is the body of the law, and the sense and reason of it is the soul, '*quia ratio legis est anima legis*' And the law may be resembled to a nut, which has a shell, and a kernel within, the letter of the law represents the shell, and the sense of it the kernel So you will receive no benefit by the law if you rely upon the letter"†

It is well known that the Indian Evidence Act in the main is based on the English law of Evidence According to Sir James Fitzjames Stephen, the great jurist and the framer of the Indian Evidence Act "every principle applicable to the circumstances of British India which is contained in 1598 royal octavo pages of *Taylor* on Evidence, is contained in the 167 sections of the Act To understand such an enactment a thorough knowledge of the English law on the subject is *sine qua non* Keeping that point in view, I have stated under each section the English law on the subject either in the *ipsima verba* of the great Judges who have

* 21 How St Tr 966

† *Eyston* v *Studd* Plowd Rep 465, *Wigmore* Vol I p VI

shaped and moulded the law of evidence in its present form or in the language of those text-writers whose statements of law the great Judges themselves felt bound to follow But as the Indian Evidence Act is not a servile copy of the English law of Evidence, it differs in some places from the law to which it owes its origin Whenever such divergence occurs, it is clearly indicated in the book, and the difference between English and Indian law has been stated in full

Under each section I have given the principle underlying that section bearing in mind the following observation of *Joseph Chitty* 'We all confess, but few adequately perceive, why it is so difficult to recollect a dry rule of practice, and we incorrectly impute to a defect of memory what in reality is attributable to our never having adequately known the subject The simple truth is that ***reason or principle is the appropriate food of the mind***, and it follows that no position is received with adequate appetite unless it be associated with the reason upon which it is founded *' This also I offer as an apology for the large number of pages occupied in elucidating the principle underlying the section It is very difficult to remember isolated decisions now-a-days when three dozen of reports (official and non-official) are vying with each other in reporting larger number of cases But the necessity of remembering the majority of these cases will be obviated if once the trouble is taken of mastering the principles thoroughly, because 'the law does not consist in particular instances, though it is explained by particular instances and rules, but the law consists of principles, which govern specific and individual cases as they happen to arise †' Moreover the thorough knowledge of the principle underlying the section will enable the reader to discard cases laying down the wrong law In going through the book it will be seen that some cases decided even by the highest tribunal are not well founded in law

---

* Joseph Chitty Practice of the Law Second Edition Preface to Part II cited in *Wigmore* Vol I p VI

† *Per Lord Mansfield* in *R* v *Bembridge* 22 How St Tr 155 *Wigmore* Vol I p VI

a particular section of the same by citing passages from Dr Greenleaf which have been drawn from by Justice Pitt Taylor himself These rules are explained by Prof Wigmore more fully and comprehensively

Moreover the hands of the commentator are by no means tied by the prejudices of certain Courts because in expounding the rational system of judicial evidence reason is equally welcome —whether it comes from the great Judges of England or the great Jurists on the other side of the Atlantic In this connection it would not be out of place to recall to mind the following passage of *Lord Cockburn C J* in *Scaramanga v Stamp*, 5 C P D 295 at p 303, where he said ' Although the decisions of the American Courts are of course not binding on us *yet the sound and enlightened views of the American lawyers in the adminisration and development of law—a law so far as altered by statutory enactment derived from a common source with our own—entitle their decisions to the utmost respect and confidence in our part*' In *Macmillan Co Limited v K & J Cooper*, 28 C W N 61[?] (P C) at page 620, Lord *Atkinson* after quoting from a judgement of Story reported in the United States Report also said "This decision is, of course not binding on this tribunal, but it is in the opinion of the Board sound able convincing and helpful' Similar observations were made in India by *Sir Lawrence Peel* in *Braddon v Abbot*, Taylor & Bells Reports, 342, 359 360 and in *Malcolm v Smith ibid*, 283 288 and cited by *Woodroffe* J in the Preface of his Evidence Act with approval The only reasonable objection which can be legitimately urged against citing American decisions is thus forcefully put by *Lord Halsbury L C* in *In Re Missouri Steam Ship Co*, 42 Ch D 321 (330) ' *We should treat with great respect the opinion of eminent American lawyers on points which arise before us*, but the practice which seems to be increasing, of quoting American decisions as authorities, in the same way as if they were decisions, of our own Courts, is wrong Among other things, it involves an inquiry, which often is not an easy one, whether the law of America on the subject in which

the point arises is the same as our own." So this objection loses much of its force where it is demonstrated that the English, American and Indian Laws on a particular subject are the same. This, in my humble opinion, is a fit scope of the work of a commentator. A busy judiciary may be unintentionally misled by a still more busy practitioner, but on a subject where a jurist like Prof. Wigmore, whose systematised knowledge in the domain of the Law of Evidence is second to none either in the old world or in the new, undertakes to show similarity and dissimilarity of the English and the American Laws, there is scarcely any reason for the apprehension expressed by His Lordship. Moreover, the advice given by His Lordship is not applicable in the case of commentators, whose duty it is in the first place to establish the similarity of law in both the systems and then to cite cases from the other system.

As the English law of evidence has its own peculiarities and as it is very difficult to have a complete grasp of the same without some knowledge of its origin and growth, I have given a history of the English law of Evidence in the introduction

The book is replete with quotations from the judgments of the great Judges both of India and elsewhere. The quotations from English and American cases are given purposely in as much as the majority of the Indian lawyers have not got English or American Law Reports in their library. Even to the busy lawyers practising in the Presidency towns, these excerpts will be helpful to a certain extent as they will save them much time

In the Appendix I have given the various reports which led to the passing of the Indian Evidence Act and the objects and reasons of subsequent amending Acts as well as Act II of 1855. I have also added in the Appendix the Indian Oaths Act and the Bankers' Books Evidence Act, fully annotated, as these two Acts may well be considered as forming part and parcel of the Indian Evidence Act.

I am conscious of the various shortcomings which will be found in the book But my only apology is that these are unavoidable in the first edition of a book of this size

I shall deem my trouble amply rewarded if the book be of any help to the members of the Bench and the Bar

Konnagar
1st November 1930

N D Basu

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INTRODUCTION.

When we speak of the law of any subject, we are taken to mean those rules by which its consideration is to be governed The laws of honour are the general rules of honourable conduct; the laws of thought are the fundamental principles of thought; the laws of war are the rules and usages recognised and accepted among civilized nations for regulating the conduct of the billigerents, the law of nature is the uniform occurrence of natural phenomena in the same way or order under the same conditions so far as human knowledge goes The law of evidence, and by "evidence," is always to be understood 'legal evidence', consists of those rules statutory or otherwise which regulate the acceptance or rejection of that information to a legal tribunal which will justify a conclusion or judgment upon the matter in issue before it Those rules have been adopted from the experience of ages, not only to regulate what evidence shall be admitted and what excluded, but the way in which it shall be presented or objected to—the mode and order, which its component parts shall assume—what shall be the extent of its recognition and cogency—what quantity and quality of proof, if any, shall be called for with respect to any particular matter submitted Such are broadly the rules of evidence which taken together, are called the 'law of evidence' A rule of evidence is defined by *Barker P J*, in *Lapham* v *Marshall*, 51 Hun (N Y) 561=3 N Y Supp 601, 603, to be the mode and manner of proving the competent facts and circum stances upon which a party relies to establish the fact in dispute in judicial procedure

Meaning of the word "law"

Meaning of "evidence" and "law of evidence".

In Sir *James Stephen's* monumental Digest of the Law of Evidence, he named the great artery of law which defines rights, duties and liabilities, the substantive, and the next in importance by which that substantive law is applied to particular cases, the law of procedure

Division of law into substantive and adjective

Wherever the human race has existed, and under whatever conditions,—whether as some savage tribe in the heart of Africa, or as the most enlightened community of modern times,—the distinct personality of its members has always been prominent Man is, above everything, an individual. However much he may combine for protective, social or commercial purposes it is the distinct personality of the individual which is seen in all the relations which are established In this fact that man is an individual complete in himself and not a component part of some larger personality, lies the idea which distinguishes between mine" and 'yours"—the idea of ownership This idea, implanted in man as a part of his nature is at the basis of all law—upon it the whole system rests Rules which have from the inception of the human race governed human action are developments of this idea These rules made up a large part of the law of the primitive peoples They were rules which expressed general

Beginnings of the Substantive Law

that means exist by which B can enforce his rights in respect to his person and property So too a piece of property—a horse for example——claimed by both A and B, might go to the stranger, though not the one rightfully entitled to it were it not for such means In fact the rules defining the rights and obligations of men however complete and perfect they might be, would be of little use to mankind unless there existed the means of compelling men to conform their actions to them or of inflicting punishment upon them for failure to do so So it happens that, with the growth of the substantive law, another kind of law has been established which relates not to the rights and obligations of men directly, but to the means of enforcing them This is the law which defines the nature and powers of judicial tribunals and then prescribes the methods of procedure therein This is known as the adjective law

Division of law into separate branches

The rules both of substantive and adjective law have attained such vast proportions that for convenience in explaining and discussing them they are generally grouped into classes according to the nature of the subject matter to which they relate Each class is then spoken of by itself, as the law of the particular subject to which it relates, as the law of torts the law of contracts, the law of evidence ' and the like What each subject includes is dependent largely upon the conception of the particular writer handling it for there is no well defined dividing line between many of the subjects

Evidence in its relation to the Adjective law

The adjective law includes all the laws which have built up the judicial system whether they have had their origin in the constitution the legislature or the Courts It embraces too the laws which have fixed the practice in the Courts —the methods of carrying on the work by Judge and jury, the laws prescribing the manner in which litigants might seek relief and carry on their cases are also included, and finally certain rules have grown up as a part of this law which relate not to the machinery of the system but having regard to the imperfections of the machinery are concerned with sorting out and selecting the materials which are supplied to it These last mentioned rules make up the law of evidence

Law of Evidence as defined by Sir James Fitzames Stephens

The law of evidence' says Sir James Fitzjames Stephens is that part of the law of procedure which with a view to ascertain individual rights and liabilities in particular cases decides, (1) what facts may and what may not be proved in such cases, (2) what sort of evidence must be given of a fact which may be proved, (3) by whom and in what manner the evidence must be produced by which any fact is to be proved

Thus before the law of evidence can be understood or applied to any particular case it is necessary to know so much of the substantive law as determines what under given states of facts would be the rights of the parties and so much of the law of procedure as is sufficient to determine what questions it is open to them to raise in the particular proceeding

"Thus in general terms the law of evidence consists of provisions upon the following subjects:—

(1) The relevancy of facts.

(2) The proof of facts.

(3) The production of proof of relevant facts.

"The foregoing observations show that this account of the matter is exhaustive. For if we assume that a fact is known to be relevant, and that its existence is duly proved, the Court is in a position to go on to say how it affects the existence, nature, or extent of the right or liability, the ascertainment of which is the ultimate object of the enquiry, and this is all that the Court has to do.

The matter must, however, be carried further. The three general heads may be distributed more particularly as follows:—

"I. *The Relevancy of Facts.* Facts may be related to rights and liabilities in one of two ways,—

Facts in issue.

(1) They may by themselves, or in connection with other facts, constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them. From the fact that A is the eldest *son of B* there arises of necessity the inference that A is by the law of England the heir at law of B, and that he has such rights as that status *involves*. From the fact that A caused the death of B under certain circumstances, and with a certain intention or knowledge there arises of necessity the inference that A murdered B, and is liable to the punishment provided by law for murder.

"*Facts thus related* to a proceeding may be called facts in issue, unless their existence is undisputed.

Relevant facts.

"(2) Facts which are not themselves *in issue* in the sense above explained may affect the probability of the existence of facts in issue, and be used as the foundation of inferences respecting them: such facts are described in the Evidence Act as relevant facts.

"*All the* facts with which it can in any event be necessary for Courts of Justice to concern themselves, are included in these two classes.

"The first great question, therefore which the law of evidence should decide is, what facts are relevant. The *answer to this* question is to be learnt from the general theory of judicial evidence in chapter II of the Evidence Act.

"What facts are in issue in particular cases is a question to be determined by the substantive law, or in some *instances* by that branch of the law of procedure which regulates the forms of *pleading, Civil or Criminal.*

Proof of relevant facts.

"*II Proof of Relevant Facts.* Whether *any alleged* fact is a fact in issue or a relevant fact, the Court can draw no inference from its existence till it *believes* it to exist; and it is obvious that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the *proceeding* in which its existence is to be determined. The question is whether A *wrote* a *letter*. The letter may have contained the terms of a contract. It may have been a libel. It may have

constituted the motive for the commission of a crime by B It may supply proof of an *alibi* in favour of A It may be an admission or a confession of crime, but whatever may be the relation of the fact to the proceeding, the Court cannot act upon it unless it believes that A did write the letter, and that belief must obviously be produced, in each of the cases mentioned, by the same or similar means If the Court requires the production of the original when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime In short, the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceeding

"Some facts are too notorious to require any proof at all and of these the Court will take judicial notice; but if a fact does require proof the instrument by which the Court must be convinced of it is evidence, by which I mean the actual words uttered, or documents or other things actually produced in Court, and not the facts which the Court considers to be proved by those words and documents Evidence in this sense of the word must be either (1) oral or (2) documentary A third class might be formed of things produced in Court, not being documents, such as the instruments with which a crime was committed or the property to which damage had been done, but this division would introduce needless intricacy into the matter The reason for distinguishing between oral and documentary evidence is that in many cases the existence of the latter excludes the employment of the former, but the condition of material things, other than documents, is usually proved by oral evidence, so that there is no occasion to distinguish between oral and material evidence

1 Judicial notice 2 Oral evidence 3 Documentary evidence

"*III The production of Proof* This includes the subject of the burden of proof the rules upon which answer the question by whom is proof to be given The subject of witnesses the rules upon which answer the question, who is to give evidence and under what conditions ? The subject of the examination of witnesses the rules upon which answer the question, how are the witnesses to be examined, and how is their evidence to be tested ? Lastly, the effect upon the subsequent proceedings, of mistakes in the reception and rejection of evidence, may be included under this head "*

Production of proof

The word relevancy is more fully defined in sections 6 11 of the Evidence Act These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings They are designedly worded very widely, and in such a way as to overlap each other Thus a motive for a fact in issue (s 8) is part of its cause (s 7) Subsequent conduct influenced by it (s 8) is part of its effect (s 7) Facts relevant under section 11 would in most cases be relevant under other sections The object of drawing up the Act in this manner was that the general ground on

Obscurity of the definition

*Stephens' Introduction to the Evidence Act pp 11—15

'Thus in general terms the law of evidence consists of provisions upon the following subjects —

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(2) The proof of facts

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Facts in issue

"Facts thus related to a proceeding may be called facts in issue, unless their existence is undisputed

'(2) Facts which are not themselves in issue in the sense above explained may affect the probability of the existence of facts in issue and be used as the foundation of inferences respecting them such facts are described in the Evidence Act as relevant facts

Relevant facts

'All the facts with which it can in any event be necessary for Courts of Justice to concern themselves, are included in these two classes

'The first great question therefore which the law of evidence should decide is, what facts are relevant The answer to this question is to be learnt from the general theory of judicial evidence in chapter II of the Evidence Act

"What facts are in issue in particular cases is a question to be determined by the substantive law, or in some instances by that branch of the law of procedure which regulates the forms of *pleading*, Civil or Criminal

II Proof of Relevant Facts Whether any alleged fact is a fact in issue or a relevant fact, the Court can draw no inference from its existence till it believes it to exist, and it is obvious that the belief of the Court in the existence of a given fact ought to proceed upon *grounds* altogether independent of the relation of the fact to the object and nature of the proceeding in which its existence is to be determined The question is whether A wrote a letter The letter may have contained the terms of a contract It may have been a libel. It may have

Proof of relevant facts

constituted the motive for the commission of a crime by B It may supply proof of an *alibi* in favour of A It may be an admission or a confession of crime, but whatever may be the relation of the fact to the proceeding, the Court cannot act upon it unless it believes that A did write the letter, and that belief must obviously be produced in each of the cases mentioned, by the same or similar means If the Court requires the production of the original when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime In short, the way in which a fact should be proved depends on the nature of the fact and not on the relation of the fact to the proceeding

1 Judicial notice, 2 Oral evidence 3 Documentary evidence

"Some facts are too notorious to require any proof at all and of these the Court will take judicial notice; but if a fact does require proof the instrument by which the Court must be convinced of it is evidence, by which I mean the actual words uttered, or documents, or other things actually produced in Court, and not the facts which the Court considers to be proved by those words and documents Evidence in this sense of the word must be either (1) oral or (2) documentary A third class might be formed of things produced in Court, not being documents, such as the instruments with which a crime was committed or the property to which damage had been done, but this division would introduce needless intricacy into the matter The reason for distinguishing between oral and documentary evidence is that in many cases the existence of the latter excludes the employment of the former, but the condition of material things, other than documents, is usually proved by oral evidence so that there is no occasion to distinguish between oral and material evidence

Production of proof

"*III The production of Proof* This includes the subject of the burden of proof the rules upon which answer the question, by whom is proof to be given The subject of witnesses the rules upon which answer the question, who is to give evidence and under what conditions? The subject of the examination of witnesses the rules upon which answer the question, how are the witnesses to be examined, and how is their evidence to be tested? Lastly, the effect upon the subsequent proceedings, of mistakes in the reception and rejection of evidence, may be included under this head"*

Obscurity of the definition

The word relevancy is "more fully defined in sections 6 11 of the Evidence Act These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings They are designedly worded very widely and in such a way as to overlap each other Thus a motive for a fact in issue (s 8) is part of its cause (s 7) Subsequent conduct influenced by it (s 8) is part of its effect (s 7) Facts relevant under section 11 would, in most cases be relevant under other sections The object of drawing up the Act in this manner was that the general ground on

*Stephens' Introduction to the Evidence Act pp 11—15

which facts are relevant might be stated in as many and as popular forms as possible, so that if a fact is relevant, its relevancy may be easily ascertained These sections are by far the most important, as they are the most original part of the Evidence Act, as they affirm positively what facts may be proved, whereas the English law assumes this to be known, and merely declares negatively that certain facts shall not be proved *

Definition of logical relevancy

The definition given in sections 6 11 is that of logical relevancy Logical relevancy plays a certain part, in the law of evidence in that no evidence is admissible unless it is logically relevant It does not follow that all evidence which is logically relevant is admissible and in fact much that is logically relevant is excluded Certain rules are laid down founded on various considerations, by which many matters which are logically relevant are declared inadmissible The modern system of Evidence says *Prof Wigmore,* ' rests upon two axioms These underlie its whole structure Implicitly but nevertheless actually and positively, recognised in the practice of Courts and in the utterances of the Judges they were first distinctly formulated by the great master and expounder of the history of our law of Evidence The first is this None but facts having rational probative value are admissible This principle is indeed axiomatic, for any system of Evidence purporting to be rational It assumes no particular doctrine as to the kind of ratiocination implied,—whether practical or scientific, coarse and ready or refined and systematic It prescribes merely that whatever is presented as evidence shall be presented on the hypothesis, that it is calculated according to the prevailing standard of reasoning, to effect rational persuasion The second axiom on which our law of Evidence rests is this All facts having rational probative value are admissible, unless some specific rule forbids '

Two axioms underlying the law of evidence

Law of evidence consists of negative rules

'The great bulk of the Law of Evidence' says Sir James Fitzjames Stephens consists of negative rules declaring what, as the expression runs, is not evidence The doctrine that all facts in issue and relevant to the issue, and no others, may be proved is the unexpressed principle, which forms the centre of and gives unity to all these express negative rules The law has been worked out by degrees by many generation of Judges who perceived more or less distinctly the principle on which it ought to be founded The rules established by them no doubt treat as relevant some facts which cannot perhaps be said to be so More frequently they treat as is relevant facts which *really relevant*, but exceptions excepted, all their rules are reducible to the principle that facts in issue or relevant to the issue, and no others, may be proved '

"Four classes of facts, which in common life would usually be regarded as falling in with this definition of relevancy are excluded *from it by the* Law of Evidence except in certain cases

"1 Facts familiar to but not specifically connected with each other (*Res inter alios acta*)

*Stephens' Introduction p 72

"2 The fact that a person not called as a witness has asserted the existence of any fact (*Hearsay*)

"3 The fact that any person is of opinion that a fact exists (*Opinion*)

"4 The fact that a person's character is such as to render the conduct imputed to him probable or improbable (*Character*)

"To each of those four exclusive rules there are, however important exceptions which are defined by the Law of Evidence"

"The rejection on one or another practical ground of what is really probative is the characteristic thing in the English common law of Evidence, stamping it out as the child of the jury system In the shape it has taken, it is not at all a necessary development of the rational method of proof, so that, where people did not have the jury, or having once had it did not keep it (as on the continent of Europe, although they, no less than we, worked out a rational system), they developed under the head of Evidence no separate and systematized branch of law . The greatest and most remarkable offshoot of the jury was that body of excluding rules which chiefly constitute the English 'Law of Evidence' This judicial oversight and control of the process of introducing evidence to the jury was what gave our system birth, and he who would understand it must keep this fact constantly in mind"*

Characteristic of English common law of evidence

The growth and the characteristic of the English Law of Evidence is thus described by an author of great eminence —"At once, when a man raises his eyes from the common law system of evidence, and looks at foreign methods, he is struck with the fact that English system is radically peculiar Here a great mass of evidential matter, logically important and probative, is shut out from the view of the judicial tribunals by an imperative rule, while the same matter is not thus excluded anywhere else English speaking countries have what we call a 'Law of Evidence' but no other country has it, we alone have generated and evolved this large, elaborate, and difficult doctrine We have done it, not by direct legislation, but, almost wholly, by the slow accumulated rulings of Judge's made in the trying of causes, during the last two or three centuries,—rulings which at first were not preserved in print, but in the practice and tradition of the trial Courts, and only during the last half or two thirds of this period have they been revised, reasoned upon, and generalized by the Courts *in banc* When one has come to perceive these striking facts he is not long in finding the reason for them Indeed the very structure of the system thus produced points to the reason, when we observe its constant, anxious, and over anxious endeavour to prevent the tribunal to which the evidence is principally addressed from being confused and misled and from dealing with questions which it has no right to deal with It might seem strange and not worthwhile to keep alive so long a tribunal which has needed so much watching and so many safeguards, if one did not recall the immense persistence of legal institutions and usages, as well as the deep political significance of the

Peculiarity of English Law of evidence depends on jury system

*Thayer's Pre Treat on Evidence pp 180, 207, 266 500

jury and its relation to what is most valued in the national history and traditions of the English race It is this institution of the jury which accounts for the common law system of evidence,—an institution which English speaking people have had and used, in one or another department of their public affairs, ever since the Conquest Other peoples have had it only in quite recent times, unless, indeed, they may belong to those who began with it centuries ago, and then allowed it to become obsolete and forgotten England alone kept it, and, in a strange fashion, has developed it

This institution the jury, which is thus the occasion of our law of Evidence, and which is also at the bottom of our system of pleading and procedure, and of very much in all branches of the substantive common law, has a peculiar interest for us

"A system of evidence, like ours, thus worked out at the forge of daily experience in the trial of causes not created, or greatly changed, until lately, by legislation, not the fruit of any man's systematic reflection or forecast, is sure to exhibit at every step the marks of its origin It is not concerned with the nice definitions or the exacter academic operations of the logical faculty It is attending to practical ends Its rules originate in the instinctive suggestions of good sense, legal experience, and a sound practical understanding; and they are seeking to determine, not what is or is not, in its nature, probative, but rather, passing by that enquiry, what, among really probative matters, shall, nevertheless, for this or that practical reason, be excluded, and not even heard by the jury From the diversity and multitude of the casual rulings by the Judges,—rulings often hastily made, ill considered, and wrong,—from the endeavour to follow these as precedents and to generalize and theorize upon them from the forgetting by some Courts, in making this attempt, of the accidental and empirical nature of much in these determinations, and the remembering of this fact by others there has resulted plenty of confusion The pressure under which a ruling must be made is often unfavourable to clear thinking and the law of evidence largely shaped at *nisi prius*, took on a general aspect which was vague, confused and unintelligible One thing in particular added greatly to the confusion, namely, the habit of assuming, whenever evidential matter was rejected or received, that the result was attributable to some principle of the law of evidence, while very often indeed, the reason lay wholly in the rules of pleading, procedure or substantive law which happened to control the case In this way the law of evidence came to be monstrously overloaded, and was made to swallow up into itself much which belonged to other branches of law, or to the wide regions of logic and legal reasoning Thus, not only were many of these other subjects clouded and thrown out of focus, but the law of evidence itself was intolerably perplexed"*

A learned author has with infinite pains tabulated a complete survey of the historical development of the English rules of evidence† He separates it into some marked divisions—from the primitive times to the twelfth century, thence

Gradual development of the law of evidence

*Thayer's Pre. Treat on Evidence p 4.

† Wigmore § 8

to the sixteenth, thence to the seventeenth thence to A D 1700, thence to 1830 thence to 1860, and thence to the present time. (1) From the section quoted we gather that up to the year 1200 we have no reliable data, although to the formalities of the earliest tribunals there can be traced the sources of our present rules for the summoning of witnesses, the effect of an oath, and the necessary production of original documents

(2) The next three centuries marked the establishment of the trial by jury In this period, no new specific rules seem to have sprung up The practice for attesting witnesses, oaths, documentary originals is developed The rule for the conclusion of a sealed writing is definitely established But during these three centuries the general process of pleading and procedure is only gradually differentiated from that of proof,—chiefly because the jurors are as yet relied upon to furnish in themselves both knowledge and decision, for they are not commonly caused to be informed by witnesses, in the modern sense

(3) Between 1500 and 1700 the foundation of the present English system was laid In that period we find the regulation of the competency of witnesses, the rules of privilege and privileged communications, the rules for attorneys, the compulsory attendance of witnesses, the privilege against self incrimination, the "parol evidence' rule, and the enactment of the Statute of Frauds The "parol evidence" enlarged its scope and came to include all writings and not merely sealed documents The mark of the new period is seen at the Restoration Justice, on all hands, then begins to mend Crudities which Mathew Hale permitted, under the Commonwealth, Scroggs refused under James II The privilege against self incrimination, the rule for two witnesses in treason, and the character rule—three landmarks of our law of Evidence—find their first full recognition in the last days of the Stuarts

(4) The fourth period of ninety years saw the final establishment of cross examination by counsel, the rule for impeachment and corroboration of witnesses, the 'best evidence' doctrine and the publication of the first treatise on the Law of Evidence by Chief Baron Gilbert in 1726 About the same time the abridgments of Bacon and Comeyns gave many pages to the title of Evidence, but no other treaties appeared for a quarter of a century when the notes of Mr J Bathurst (later Lord Chancellor) were printed, under the significant title of the 'Theory of Evidence Blackstone's commentaries were published in 1768 In this period, besides the rules for impeachment and corroboration of witnesses (which were due chiefly to the development of cross examination), are to be reckoned also the origins of the rules for confessions, for leading questions, and for the order of testimony The various principles affecting documents—such as the authorization of certified (or office) copies and the conditions dispensing from the production of originals—now also received their final shape

(5) The next forty years (1790 1830) saw a tremendous increase of the rulings upon evidence there being more than in the preceding two centuries In this development the dominant influence is plain, it was the increase of the printed reports of Nisi Prius rulings This was at first the cause and afterwards the self multiplying effect, of the detailed development of the rules As soon as Nisi Prius reports, multiplied and became available to all, the circuits must be,

reconciled, the rulings once made and recorded must be followed and the precedents, must be open to the entire profession to be invoked There was, so to speak, a sudden precipitation of all that had hitherto been suspended in solution This effect began immediately to be assisted and emphasized by the appearance or new treatises, summing up the recent acquisitions of precedent and practice In nearly the same year, Peake, for England (1801), and Mac Nally for Ireland printed small volumes whose contents, as compared with those of Gilbert and Buller seem to represent almost a different system so novel were their topics In 1806 Evans' Notes to Pothier on Obligations was made the vehicle of the first reasoned analysis of the rules In this respect it was epoch making In 1814 and then in 1824 came Phillipps and Starkie,—in one hold combining Evans philosophies with Peake's strict reflection of the details of practice There was now indeed a system of Evidence, consciously and fully realized Across the water a similar stage had been reached By a natural interval Peake s treatise was balanced in 1810, by Swift's Connecticut book while Philips and Starkie were replaced by Greenleaf's treatise of 1842

(6) The thirty years ending with 1860 will be ever associated with the names of Bentham, Broughham and Denman. The Theory of Judicial Evidence inspite of or perhaps by reason of, its phillipic tone, created a mighty influence for good—an influence fortified by such doughty legal champions as Brougham and Denman Their efforts culminated in England in the Common Law Procedure Acts of 1852 and 1854, while in the United States, Livingston and Field were the sponsors of similar results

(7) In the period following 1860 there has been no serious emendation of the law of evidence in England later than the Judicature Act of 1875 and the Rules of Court of 1883, and the law of evidence attained rest" It is still over patched and disfigured with multiplicitous fragmentary statutes, especially for documentary evidence But it seems to be harmonious with the present demand of justice and above all to be so certain and settled in its acceptance that no further detailed development is called for *

Sir James Fitzjames Stephens, the framer of the Evidence Act

The Indian Evidence Act is ever associated with the name of Sir James Fitzjames Stephens Q C, the great jurist and Judge who sponsored the amended Evidence Bill on which the present Act is based At the final stage of the Bill he was vehemently criticised by competent critics but time shows how very judicious he was in enacting its provisions

No complete Code before the passing of the Evidence Act

Before the passing of the Indian Evidence Act there was no complete code of evidence enforceable in every part of British India. The town of Calcutta had been from its foundation (1690) an English Colony, governed by English law The early charters empowered the Governor in Council of each settlement to exercise civil and criminal jurisdiction therein, according to the laws of England, and charters of 1726 and 1753 provided at least on paper for more regular tribunals at each of the principal settlements in shape of Mayor's Court for Civil, and Court's 'of Oyer and Terminer' and

* Wigmore § 8.

Quarter Sessions for criminal proceedings These Courts were supposed to decide cases according to English law and adopting English procedure

Since the establishment of the Supreme Courts of Calcutta, Madras and Bombay, the English rules of evidence have systematically been followed in the Presidency towns and several of the reforms made in England by Parliament were from time to time applied to these by the Governor General in Council Thus incompetency on the ground of crime and interest was abolished by Act IX of 1840 and Act VII of 1841 And Act XV of 1852 enabled parties to give evidence except in criminal proceedings and proceedings for adultery or breach of promise

English rules of evidence.

But in the Muffusal there was an absolute absence of any systematic law of evidence The English laws of evidence were not in force in the Muffusal. The Muhammadan laws of evidence as laid down in the Hedaya, as modified by Regulations passed from 1793 to 1834 as well as to a certain extent by English practice and English text books, were generally followed in the Muffusal Courts

Rules in Evidence in Muffusal Courts

The Regulations of Bengal, Bombay and Madras laid down very few rules as regards evidence Under section 15 of the Bengal Regulations III of 1793, a bond was required to be proved at least by two witnesses But such documentary evidence was received without any proof unless objected to, such as copies of judicial proceedings, appearing to be authenticated by the signature of the proper officer, and copies of English correspondence from the Collectors or other Government officers similarly authenticated Even copies of copies were so received Rules as to witness, corresponding those contained in the present Codes of Criminal and Civil Procedure, were made by the following Regulations in Bengal, Beng Reg IV of 1793, ss 6, 14, Beng Reg IX of 1796 ss 2, 3 and 4, Beng Reg IV of 1897, s 7, Beng Reg VIII of 1803, s 25, Beng Reg L of 1803, ss 2, 3 and 4, Beng Reg III of 1812, s 2, Beng Reg XXIII of 1814 ss 33 and 73, Beng Reg XXIV of 1814, s 11 In Madras also rules relating to this subject were contained in several regulations, namely, Mad Reg III of 1802, s 7, Mad Reg IV of 1802, s 18, Mad Reg V of 1802, s 16, Mad Reg VII of 1802, s 18, Mad Reg VII of 1809, s 22, Mad Reg XII of 1809, s 8, Mad Reg IV of 1816 ss 15, 16, Mad Reg VI of 1816 ss 28, 34 Mad Reg VII of 1816, ss 4, 5, Mad. Reg X of 1816 ss 15, 16, Mad Reg XIV of 1816 s 9, Mad Reg IV of 1821, s 10, and Mad Reg VIII of 1832, s 3 Moreover Mad Reg VI of 1816, s 35 and Mad Reg VII of 1816 s 15 have excluded documents not duly stamped Evidence declared by the Muhammadan law-officer to be inadmissible is dealt with by Mad Regs I of 1825 s 8 and VI of 1829, s 2 In Bombay some rules as to witnesses in civil proceedings were made by Bom Reg IV of 1827 and rules as to witnesses in criminal proceedings were prescribed by Regs XII and XIII of the same year All persons who had arrived at years of discretion and were of sane mind were made competent witnesses by Bombay Reg IV of 1827, s 33 and XIII of 1827 s 35 And

Different Regulations dealing with rules of Evidence

the sect on last mentioned contain provisions (wanting in the present law) as to irratic [illegible] elucidation of the case* [illegible] with the law of Evidence was Act [illegible] t Act was made applicable to all the Courts in British India By that Act all the Acts passed by the Governor General in Council could be proved by the mere production of the Gazette purporting to contain it This Act was followed in quick succession by other fragmentary enactments, laying down rules of evidence Incompetency as a witness was abolished by Act XIX of 1837 which was also declared to be in force in all the Courts of British India Hindus and Muhammadans were permitted to make solemn affirmations instead of oath or declaration in the Moffasal Courts by Act V of 1840 That Act had no binding effect on any of the three Supreme Courts of Calcutta, Bombay and Madras Act IX of 1840 declared that if a witness in any of the Supreme Courts were objected to on the ground that the verdict or judgment would be inadmissible in evidence for or against him, he might be examined, and the verdict or judgment should not be so admissible The object of this enactment, which was taken from 3 & 4 Will IV Chap 42 was to render less frequent the rejection of witnesses on the ground of interest Incompetency of a witness on the ground of interest or crime was abolished within the jurisdiction of the Supreme Courts by Act VII of 1844 But the *Act did not* make the party on whose behalf an action was brought or defended a competent witness By Act XV of 1852 parties to a cause were *made competent* witnesses, except in criminal proceedings and proceedings for adultery or breach of promise of marriage By this Act the parties were compelled *to allow inspection* of documents and Acts of State and judicial proceedings could be proved by the production of certified copies alone It made the *register of British ship* and certificates of registry admissible without proof of signature It dispended with the production of the record of a conviction or acquittal *That Act was in force* also in the Supreme Courts Act XIX of 1853 extended some of these reforms to the Civil Courts of the East India Company in the Bengal Presidency By this Act, parties to suits as well as husbands and wives of the parties were made competent witnesses Although there was no *express* prohibition, henceforth, a husband or a wife is enabled to *give evidence* for or against each other Incompetency of a witness on the ground of *relationship* or interest was also abolished and a party could be compelled to *give evidence* and produce documents But a witness was exempted from producing documents *relating to a party's* title deeds, State documents, and irrelevant *documents* Communication between a witness and his professional adviser was also privileged The *Court* could compel a witness to produce any other documents Section 26 of the Act rendered absconding witnesses liable for damage

Acts Previous to the Indian Evidence Act

In 1855 Sir Lawrence Peel introduced a Bill *for the* further improvement of *the* law of evidence which was carried by Sir James Colvile and found place in the Statute Book as Act II of 1855 This Act though *totally* devoid of arrangement

History of the passing of the Indian Evidence Act

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*Whitley Stokes pp 812, 813.

was skilfully worded, and conntained many valuable provisions, which applied to all Courts in British India (*Vide Appendix C infra*) Act X of 1855, which was in force in the Civil Courts of the East India Company in the Presidencies of Fort St George and Bombay, enacted by s 10 a provision like section 26 of Act XIX of 1853 In 1859, the first Civil Procedure Code was passed by Act VIII of 1859 and in 1861 the first Criminal Procedure Code found place in the Statute book Act XV of 1869 provides facilities for obtaining the evidence and appearance in Court of prisoners and for service of process upon them. So it is clear that down to 1872, there was no fixed rules of evidence, except those contained in Act XIX of 1853 and Act II of 1855 which could be applied in the Muffasal Courts The Commissioners appointed in England to prepare a body of substantive laws for India (ignoring the fact that their commission did not comprise adjective law), accordingly framed a draft code, which in October 1868 was introduced by Sir Henry Summer Maine and referred to a Select Committee, as a Bill to define and amend the law of evidence This Bill was published and circulated to local authorities in the usual manner But it was pronounced to be unsuited to India by some competent persons It was far from complete, it was ill arranged, it was not elementary enough for the officers for whose use it was designed, and it assumed an acquaintance with the law of England which could scarcely be expected from them A new Bill was therefore prepared by Sir James Fitzjames Stephens, the worthy successor of Sir Henry, which was printed, circulated and very freely criticised Sir James accordingly recast it, and it was ultimately passed as Act I of 1872* It is on the main based on the English law of Evidence

This enactment purports to consolidate, define and amend the whole law of Evidence with certain exceptions mentioned in sections 1 and 2 But rules contained in the Indian Evidence Act are also thus criticised by *Sir Henry Summer Maine* 'It must always be recollected that the affirmative or positive method of arrangement followed in the Indian Evidence Act does not represent the historical growth of the English law of Evidence So far as it consisted express rules it was in its origin a pure system of exclusion and the great bulk of its present rules were developed as exceptions to rules of the widest application, which prevented large classes of testimony from being submitted to the jury The chief of these were founded on general propositions of which the approximation to truth was but remote Thus the assumptions were made that the statements of litigants as to the matter in dispute were not to be believed, that witnesses interested in the subject matter of the suit were not credible, and that no trustworthy inference can be drawn from assertions which a man makes merely on the information of other men A complete account of it cannot in fact be given unless the mode of its development be kept in view

Sir Henry Summer Maine's criticism on the Indian Evidence Act

Another important reason too, for remembering that our law of Evidence is historically a system of exclusion, is that we cannot in any other way account for its occasional miscarriages The conditions under which it was originally

*Stokes Anglo Indian Code Vol II pp 812 817

developed must still be referred to, in explanation of the difficulty of applying it in certain cases, or of the ill success which attends the attempt to apply it The mechanism of judicial administration which once extended over a great part of Europe, and in which the functions of the Judge were distributed between persons or bodies representing distinct sources of authority—the King, and the country, or the lord and his tenants—in England gradually assumed the shape under which we are all familiar with it in criminal trials and at Nisi Prius A body of men, whose award on questions of fact is in the last resort conclusive, are instructed and guided to a decision by a dignitary, sitting in their presence, who is assumed to have an eminent acquaintance with the principles of human conduct whether embodied or not in technical rules, and who is the sole judge of points of law, and of the admissibility of evidence The system of technical rules, which the procedure carries with it, fails then in the first place, whenever the arbiter of facts—the person who has to draw inferences from or about them—has especial qualifications for deciding on them, supplied to them by experience, study, or the peculiarities of his own character, which are of more value to him than could be any general direction from book or person For this reason, a police man guiding himself by the strict rules of evidence would be chargeable with incapacity, and a General would, be guilty of a military crime

' Again the blending of the duties of the judge of law and of the judge of fact deprives the system of much though not necessarily of all, of its utility An Equity Judge, an Admiralty Judge, a Common Law Judge trying an election petition, an historain, may employ the English rule of Evidence, particularly when stated affirmatively, to steady and sober his judgment But he cannot give general directions to his own mind without running much risk of entangling or enfeebling it, and under the existing conditions of thought he can not really prevent from influencing his decision any evidence which has been actually submitted to him, provided that he believes it Englishmen are extremely prone to do injustice to foreign systems of judicial administration, from forgetting the inherent difficulty of applying the English law of Evidence when the same authority decides both on law and on fact as is mostly the case in other countries

"When India came under the British rule, there were many branches of law in which the political officers of the British Government could find few positive rules of any sort, or, if any could be discovered, they were the special observances of limited classes or castes Thus there was no law of Evidence, in the proper sense of the words, hardly any law of contract, scarcely any of Civil Wrong .. Whole provinces of law became exclusively, or nearly exclusively, English The law of Evidence became wholly Egglish; so did the law of Contract substantially; so did the law of Tort It is quite possible to hold a respectful opinion of many parts of English law, and yet to affirm strongly that its introduction by Courts of Justice into India has amounted to a grievous wrong .. No branch of law had become more thoroughly English at the time when it was first comprehensively dealt with by the Indian Legislature than the law of Evidence, and the practical evils which hence arose were even greater than those which ordinarily result from the adoption of an exotic of system of legal rules, collected

with difficulty from isolated decisions reported in a foreign language The theory of judicial evidence is constantly mis stated or misconceived even in this country The English law on the subject is too often described as being that which it is its chief distinction not to be—that is, an Organon, as a sort of contrivance for the discovery of truth which English lawyers have patented In India, several special causes have contributed to disguise its true character There is much probability that our English law of Evidence would never have come into existence if we had not continued much longer than other western societies the separation of the province of the Judge from the province of the jury, and, in fact the English rules of Evidence are never very scrupulously attended to by tribunals which like the Court of Chancery, adjudicate both on law and on fact through the same organs and same procedure Now, an Indian functionary, when he acts as a civil Judge and for the most part when he acts as a criminal Judge, decides both on law and on fact He it is who applies the rules of Evidence to himself, and not to a body distinct from himself, and he has often to perform the delicate achievment of preventing his decision from being affected by sources of information which in reality have been opened to him

'The effects of their peculiar experience on many distinguished Indian functionaries may be seen to be of two kinds In some minds there is a complete scepticism as to the value of the rules of Evidence, and though the man who for the time being is a Judge may attempt to apply them, he is intimately persuaded that he has gone into bondage to a foolish technical system under compulsion from the Court of Appeal above him With others the consequences are of a different sort, but practically much more serious They accept from the lawyers the doctrine that the law of Evidence is of the extremest importance, and unconsciously allow this belief to influence them not only in their judicial, but in their executive and administrative duties It is often said in India that the servile reliance upon the English law of Evidence, which now a days characterizes many of the servants of Government, is producing a paralysis of administration, and though the assertion may be exaggerated it is far from impossible that it may have a basis of truth '*

Prof Wigmore's criticism

'The jury trial system of rules of Evidence' says *Prof Wigmore* is *not* the only safe system of investigation in matters of liberty and property, for other nations have had a long experience of successful justice without it Nor is it correct to assume that the general wisdom of experience which is represented in the system at large is represented in all the detailed rules rigidly enforced, quite the contrary What is commonly forgotten is that most of the rules—nineteen twentieths, let us say—are merely rules of caution i e they are based upon a *possibility* of error, so that the failure to observe the rule is perfectly consistent with a high probability of truth The rule for example requiring the original of a document to be produced is merely a rule against possibilities, for thousands of banks and business houses daily deal with millions of wealth on the faith of copies not originals, to assert that truth was certainly missed because a copy

*Village Communities in the East and West,

was used, is an absurdity So, too with the hearsay rule, it aims to guard against possibilities, and is sound enough, as a rule, but all history of the past and all public news of the present, is learned by hearsay, for less than a million of our population really knew by personal observation, that our soldiers fought in a war with Germany, and the entire financial and economic operations of the country are built on a complex structure of hearsay which is as solid as a steel and concrete building

'A second thing to remember is that the jury trial rules are intended for a constantly changing tribunals of fact composed of inexperienced jury men dealing with hundred types of cases When the tribunal is composed *of experienced professional men* habitually inquiring day after day into the *same limited class of facts*, an expert weighing of evidence can generally be counted upon The cautions represented by the exclusionary jury rules can and will be applied by such a tribunal in weighing the evidence without the actual exclusion of it Sir Henry Summer Maine s comment on this feature repre ents a general truth And in a community where the major part of such offices are filled by men already trained in the law, it is certain that the general wisdom of the cautions embodied in the jury rules of evidence will be employed by them"

Prof Greenleaf at the end of his famous book on Evidence says 'The student will not *fail to observe* the symmetry and beauty of this branch of the law . and will *rise from the* study of its principles convinced with *Lord Erskine*, that they are founded in the charities of religion, in the philosophy of nature, in the truths of history and in the experience of common life, Commenting on this statement, says Prof *James Bradley Thayer* "I think that it would be juster and more exact to say that our law of evidence is a piece of illogical, but by no means irrational patch work not at all to be admired, nor easily to be found intelligible, *except* as a product of the jury system, as the outcome of the quantity of rulings by sagacious lawyers, while settling practical *questions in* presiding over Courts where ordinary, untrained citizens are acting as judges of fact Largely irrational in any other aspect in this point of view *it is full of* good sense,—a good sense indeed that occasionally nods, that sub*mits too* often to a mistaken application of its precedents that is often short-sighted *and ill instructed*, and that needs to be taken in hand by the jurist and illuminated simplified, and invigorated by a reference to general principles

Nature of the English rules of evidence

" I have said that our law of *evidence is* ripe for the hand of the jurist I do not mean for the hand of the codifier, it is not but for a treatment which beginning with a full historical examination of the *subject* and continuing with a criticism of the cases *shall* end with a re-statement of the existing law and with *suggestions for* the course of its future development Such an undertaking worthily executed, if it should commend itself to the bench, could need only a slight co-operation from the legislature to give to the law of evidence a consistency, simplicity, and capacity for growth which would make it a far worthier instrument of justice than it is"

Duty of a legislature in framing the law of Evidence

ADDENDA

S 4—Presumptions are of two kinds, presumptions of law and presumptions of fact Presumptions of law are true presumptions A I R 1932 Mad 343 = 35 M L W. 495 = 1932 M W N 264

S 4—Where one fact is declared by law to be conclusive proof of another the court cannot allow evidence to be given in rebuttal A I R 1932 All 35 = 1931 A L J 360

S 6—Evidence of witness that complainant informed them about theft long after the incident is not admissible—A I R 1934 Cal 17 = 57 C L J 447

S 8—A letter written by the deceased some months before his death to the Commissioner of Police requesting police protection against apprehended assaults by the second accused is admissible in evidence under s 8 of the Evidence Act as containing statements which accompany and explain the conduct of the deceased 34 Bom L R 1087

S 8—Statements of persons writing alleged forged deed and one presenting same for registration are admissible under s 8 as accompanying and explaining their conduct 1933 M W N 96

S. 8—Where direct evidence as to commission of offence is not available, evidence as to motive need not be considered A I R 1933 Oudh 265

S 8—Where a particular ... he statement and act so blended together a
143 Ind Cas 17 = 34 Cr L J

S 8—Though the statement made by the accused to the police may be inadmissible under s 162 Cr Pro Code evidence of their conduct is certainly admissible under s 8 A I R 1932 Mad 391 Fact of production of share property by an accused is admissible as conduct under s 8 A I R 1932 Bom 286 = 56 B 172

S 9—Section 88 of the Evidence Act is no bar to telegram being considered along with the rest of the evidence and be admissible under s 9 for the purposes covered by that section even when the original of telegram is not proved to be in the hand writing of the sender A I R 1933 Pat 96 = 142 Ind Cas 809 = 13 P L T 802

S 10—Where the accused have been charged under the Arms Act for possessing arms and for conspiracy to commit a dacoity the fact that one of the accused was seen showing a revolver to companion with whom it is alleged he was conspiring to commit a dacoity would be relevant as evidence of preparation under s 11 A I R 1932 Cal 474

S 10—Statement during trial is not as conspirator in furtherance of common intention of conspiracy A I R 1933 Oudh 86 = 34 Cr L J 124 = 141 Ind Cas 192 The question whether a post card written by the accused after his arrest to another accused person is admissible in evidence depends on whether the provisions of section 10 have been complied with A I R 1932 Cal 557 = 33 Cr L J 450 = 137 Ind Cas 317, A I R 1933 A 690

S 11—Recitals in deed are not inadmissible for proving how lands are dealt with by landlord A I R 1934 Pat 81

S 11—Display of arms by one conspirators to his co-conspirators is relevent under s 11 of the Evidence Act A I R 1932 Cal 474 = 59 C 1361 = 55 C. L J 439

S 11—Highly probable meaning of A I R 933 A 690

S 13—Judgment not interpartes can only be used as evidence of transaction but can be admitted as proof of title of the person in whose favour it was passed 36 C W N 866, see also *56 C L J 369 = A I R 1933* Cal 222 = 143 Ind Cas 179

S

S 13—Recitals in sale deed though not evidence of grant, can be used to show nature of title A I R 1933 Pat 656

S 13—Recitals in a *kobala* that a land is rent free, cannot be admitted in evidence in a suit between landlord and tenant in as much as the landlord is not a party in the *kobala* 59 C 454=A I R 1932 Cal 427

S 13—Custom recognized in previous judgments are admissible in evidence, but they are not conclusive A I R 1933 Lah 553, see also A I R 1933 Oudh 246

S 13—Right in section 13 means incorporeal right and cannot possibly refer to any question of ownership of property in contradistinction to incorporeal rights A I R 1933 Pat 285

S 13—Previous judicial decisions making mention of status of pre emptor are admissible in evidence under ss 13 and 42—140 Ind Cas 566=A I R 1933 Lah 57=33 P L R 1054

S 13—Section 13 (*a*) refers to admissibility of transaction by which a right is asserted A I R 1932 Cal 398=54 C L J 353=137 Ind. Cas 658, see also A I R 1932 Bom 291=34 Bom L R 236

S 13—Partition deed between two persons could not be admissible to show permanency or otherwise of tenancy A I R 1932 Cal 398

S 14—In a prosecution under s 415 of the I P Code evidence would be relevent on the question whether the accused was in embarrassed circum stances at the date when he entered into his contract A I R 1932 Bom 273=34 Bom L R 313

S 15—Where conduct alleged and proved against accused is susceptible of more than one interpretation evidence of similar acts is admissible to show that conduct was systematic and not capable of favourable interpretation 142 Ind. Cas 274=A I R 1933 Cal 136=132 Ind Cas 274.

S 16—Posting of letter cannot be held to prove delivery as postal servants are not always diligent A I R 1933 Rang 76

S 17—In case of admision the entire statement must be considered together in order to treat it as admission Particular passages which may be favourable cannot be selected and other ignored A I R 1933 Lah 179=141 Ind Cas 204=34 P L R 149=14 Lah 218

S 18—A party s admission should be accepted as true until contrary is proved A I R 1932 All 199=1932 A L J 77, A I R 1932 Cal 538=58 C 541

S. 18—A person called by a party as his witness cannot however be regarded as his agent within the meaning of s 18—A I R 1932 B 117=34 Bom L R 35

S 18—Proceeding refers to proceeding in which matter stated by party is an issue or is relevant A I R 1933 Rang 292

S 18—Admision shifts burden of proof to party making admission A I R 1933 Lah 725=34 P L R 482

S 18—Where S and R attested a will which recited that L was wedded wife of G *Held* that S and R had practically admitted lawful marriage between L and G 142 Ind Cas 13=34 P L R 365=A I R 1933 Lah 347

S 18—Where admission is based on erroneous state of affairs it is not binding 142 Ind Cas 720=33 P L R 819=A I R 1932 Lah 651

S 18—Gratuitous admission can alway be withdrawn A I R 1933 Oudh 26=140 Ind Cas 580=9 O W N 923

S 20—For purposes of reference to a third party under s 20, it is not necessary that the reference should be a question of fact within the knowlege of the referee A I R 1933 A 861

S 20—Where both parties agree to abide by the statement of the referee the statement of the referee would then be the admission of both the parties binding upon them. A I R 1933 A 861

S 21—Admissions are relevant under the Evidence Act, unless they are inadmissible by some circumstances which the Act declares to be of an invalidating nature A. I R 1932 Mad 509=62 M L J 680=35 M L W 607

S 21—An admission must be taken as a whole. 138 Ind Cas 217=33 Cr L J 570=33 P. L R 287, A I R 1933 Lahore 204

S 21 Where an accused points out the window by which they entered and committed dacoity it can be proved against as an admission. A I R 1932 Lah 488=34 P L R 405=142 Ind Cas 699

S 21—Admission against interest of party making it must be regarded as true until it is clearly proved to be untrue A I R 1933 Lah 885=34 P L R 788=144 Ind Cas 497

S. 21—Evideuce of person not party to a suit is admissible against such person and against those who claim under or from him in subsequent suit in which he is a party A I R 1933 Oudh 246=10 O W N 268

S 24—Confession made on superior officer s holding out inducement to subordinate, cannot be used. A I R 1933 Cal 644=60 C 719, see also A I R 1933 All 31=1932 A L J 1125, A I R 1933 All 31=1932 A L J 1125

S 24—Statement made by inducement of pardon but not under pressure is admissible under s 339 (2) Cr Pro Code A I R 1933 Lah 910

S. 24—Confession made under mere hope of pardon cannot be rejected when proved to be voluntary A I R 1933 Lah 368=143 Ind Cas 499

S 24—The judge is to decide whether a confession is caused by inducement, threat or promise If according to him it is inadmissible, it must be [illegible] jury A I R 1933 Cal 187=142 Ind [illegible] A I R 1932 Sind 64, 26 S L R 91= A I R 1932 Sind 64

S 24—Inducement, threat or promise by person who has no power to enquire does not make a confession to such person inadmissible 142 Ind Cas 474=14 P L T 82=12 Pat 241=A I R 1933 Pat 149 (S B)

S 24—*Tahsildar* is not a person in authority 142 Ind Cas 474=14 P. L T 82=A I R 1933 Pat 149 (S B)

S 24—Where a confession is duly recorded under s 164 the presumption is that it was freely made A I R 1932 Sind 201=26 S L R 302=141 Ind Cas 392

S 24—Extra judicial confession of guilt made by a person, before he is taken into police custody has high probative value but it must be proved strictly when it is not in writing A I R. 1932 Sind 201=141 Ind Cas 392=26 S L R 302

S 24—A retracted confession is not necessarily worthless A I R 1932 Mad 391, see also 55 M 717=138 Ind Cas 240=33 Cr L J 586=35 L W 607=A I R 1932 Mad 500=62 M L J 680 A I R 1932 Oudh 115=139 Ind Cas 736=9 O W N 96, 139 Ind Cas 756—9 O W N 321, 10 Mys L J 304, A I R 1932 Oudh 321=137 Ind Cas 665=9 O W N 327

S 24—A retracted confession must be corroborated by reliable evidence, before it is acted upon 140 Ind Cas 194=33 P L R 691=A I R 1932 Lah 557, A I R 1932 All 228=54 A 350=1932 A L J 162=33 Cr L J 201, 56 B 542=140 Ind Cas 740=34 Bom L R 1240=A I R 1932 Bom 553

S 24—Value of retracted confession depends upon circumstances of its making 7 Luck 511=A I R 1932 Oudh 317=139 Ind Cas 751

S 24—Value of extra judicial confession made to another convict in jail is very little A I R 1932 Oudh 324=9 O W N 170=137 Ind Cas 170

S 24—The manager of a company is a person in authority—A I R 1932 Sind 64=26 S L R 191=138 Ind Cas 618 So also a Zemindar connected with investigation A I R 1932 Sind 55=138 Ind Cas 614=33 Cr L J 641

S 24—The question whether the word used were intended to convey to the accused an inducement etc must depend on the surrounding circumstances in which the words were used The burden is on the posecution to prove that the confession was not improperly induced A I R 1933 Sind 406

S 24—No doubt the provisions of s 164 are imperative and mandatory but the court can admit the statement by calling oral evidence to prove that the statement had in fact been duly made unless the error has injured the accused as to his defence on the merits A I R 1934 All 81 = 1933 A L J 1551 (F B)

S 24—Confession by accused by Magistrate not improperly induced can be proved though made under hope of pardon and even though not recorded as required by s 164 of the Cr Pro Code A I R 1933 Lah 987

S 25—Political *Mohurir Oglt* is a Police officer—A I R 1933 Pesh 38

S 25—Excise officer invested with police powers is not a police officer 140 Ind Cas 283 = 13 Pat L T 627 = A I R 1932 Pat 293 (S B) 1932 M W N 453 vide article in A I R 1932 pages 47—55 (Journal)

S 25—Statement of accused made at police station is inadmissible A I R 1933 Lah 167 = 34 P L R 259 = 1933 Cr C 312

S 25—The term police officer should be read in a more popular and comprehensive sense It includes police officers of Indian States 140 Ind Cas 283 = 13 Pat L T 627 = A I R 1932 Pat 29 (S B)

S 25—Writing taken down by police officers during investigation for comparison is not confession 56 B 304 = 38 Ind Cas 708 = 34 Bom L R 598 A I R 1932 Bom 406

S 25—Confession to a crowd of people is not inadmissible merely because a police man was one of the crowd A I R 1934 All 132

S 25—Confession to chaukidar is admissible A I R 1934 All 132

S 25—Statement containing admission should be considered as a whole. A I R 1933 Rang 326

S 25—Report by accused at police station that he had killed deceased is inadmissible A I R 1933 Lah 899

S 25—Confession made to police not used as such may be used to show that accused gave different versions to court and police A I R 1938 Cal 308 56 C L J 73 = 143 Ind Cas 220 = 34 Cr L J 530

S 26—St [illegible] free will does not [illegible] excluded under S 26

S 26—Where the Magistrate has not made a record of confession under S 164 *Cr Pro* Code but only made a written memorandum he can prove the confession by his oral evidence *and may* refer the memorandum to refresh his memory A I R 1933 Lah 7 6 see also A I R 1933 Lah 956 A I R 1933 Lah 513

S 26—*The expression* police custody does not necessarily means formal arrest It also includes some form of police surveillance and restriction on the movements of the persons concerned by the police A I R 1932 Lah 609

S 26—Section 164 of the *Criminal Procedure* Code does not apply *to* oral confessions Such confession is admissible under s 26 of the Evidence Act A I R 1933 Oudh 4 2

S 26—Conviction cannot be *based on* reported confession when *the* reporter cannot depose the exact confession A I R *1934 All* 8

S 26—Confession made to a fellow prisoner in judicial look up is not inadmissible as to the custody is *magisterial* A *I R* 1934 Lah 75

S 26—Oral confession made to a Magistrate can be proved 142 Ind Cas 619 = A I R 1932 Lah 488

S 26—Oral confession made to a Magistrate soon after arrest when the police could scarcely have any opportunity to bring pressure upon the accused is admissible A I R 1933 Lah 998

S 26—Confession to chaukidar after arrest is irrelevant A I R 1934 Oudh 194

S 26 —Confession of accused to Magistrate not deputed by police is admissible A I R 1932 Lah 261

S 26 — Custody of a Police officer does not mean that the accused should be under actual arrest The test is whether he is or is not at liberty to move from particular place where he was when he made confession A I R 1932 Sind 149=26 S L R 1, see also A I R 1932 Sind 201=26 S L R 302=141 Ind Cas 392 In order to bar proof of confession two things must be proved namely limitation should be imposed upon the liberty of confessor and it must be imposed upon by police A I R 1932 Sind 201=26 S L R 302

S 26 —A village chaukidar is a police officer A I R 1933 Oudh 192=10 O W N 348=1933 Cr C 379

S 26 —Where police officer takes magistrate with him while the former is conducting investigation the evidence by such magistrate as to what happened is not admissible A I R 1933 All 394

S 26 —Magistrate of an Indian States is a magistrate under s 26—A I R 1933 All 285=1933 Cr C 484

S 26 Before retracted confession is acted upon it is necessary to make sure that corroborative evidence supports confession—57 C L J 13

S 26 —Where accused is deceived into belief that the Magistrate before whom he is making confession is police officer the confession is not irrelevant 26 S L R 302=A I R 1932 Sind 201= 41 Ind Cas 392=1932 Cr C 810 Test of police custody A I R 1932 Sind 149=26 S L R I

S 26 —Oral confessions made to the Magistrate can be proved under s 26 A I R 1932 Lah 488

S 26 —A confession made to Honorary Magistrate is admissible 32 P L R 217=138 Ind Cas 497=A I R 1932 Lah 261=33 Cr L J 632

S 27 —Where accused under detention as suspect makes a statement leading to discovery of murdered body the statement is admissible A I R 1933 Lah 516 Such statement is admissible even though made in presence of police 143 Ind Cas 46=34 Cr L J 481=1932 M W N 801=A I R 1933 Mad 233=64 M L J 88

S 27 —Statements made by accused to *daroga* showing place in jungle where occurrence took place are not admissible in evidence being in the nature of confession made to Police Officer while in custody Section 27 does not apply and does not render statements admissible A I R 1933 Cal 146

S 27 —Person accusing himself of offence and submitting to police custody under s 46 (1) Cr Pro Code is in police custody when he makes statement to police within s 27—142 Ind Cas 474=14 P L T 82=12 Pat 241=A I R 1933 Pat 149 S B)

S 27—Statement that *hatchet* produced was one by which murder was committed should not be allowed in evidence A I R 1933 Oudh 404

S 27—Section 27 is a special provision whereas s 162 Cr Pro Code is general and does not in any way affect the operation of the former when the conditions mentioned therein are fulfilled A I R 1932 Mad 391=1933 M W N 305 (F B)

S 27—S 27 is not a mere proviso to s 26 It cuts down the operation of ss 24 and 25 as well 59 C 1040=138 Ind Cas 116=36 C W N 378 =A I R 1932 Cal 297 see also A I R 1932 Bom 286=34 Bom L R 303=56 B 172 137 Ind Cas 174

S 27—Where statements are made by several person to the same effect leading to the discovery of some fact only the statement made by the first individual and only so much of it as related distinctly to the fact discovered can be admitted 36 C W N 373=59 C 1040=138 Ind Cas 116=A I R 1932 Cal 297 1932 M W N 113

S 27—The General rule that statements made by accused persons to the police in the course of an investigation cannot be proved does not affect

special exception to that rule remaining in force by force of s 27—55 M 903 = A I R 1932 Mad 391 — 62 M L J 742 F B)

S 27—Where the accused makes a statement that he and another accused hid the ornaments belonging to the murdered person in a particular place that *statement* can be admitted under s 27 *1932* M W N 801

S 27 —Where police officer interviewed person charged *with offence* of being in possession of cocaine and walked with him to place pointed out by him where cocaine was discovered the admission was held inadmissible A I R 1933 Cal 148 = 1933 Cr C 225

S 27—Only statement leading directly on the recovery of property are admissible A I R 1934 Nag 71

S 27 —Statements not directly bearing upon *discovery are not* admissible A I R 1933 Nag 252

S 28 —Confession on inducement is inadmissible A I R 1933 All 31 = 1932 A L J 1125 34 Cr L J 482

S 29 —A *confession if proved to* have been made voluntarily is not inadmissible merely because the accused *was not warned* by the Magistrate that he was not bound to make such confession The provisions of s 164 Cr Pro Code are in this respect in conflict with those of s 29 of the Evidence Act but on a question of the admissibility of a particular piece of evidence it is *the Evidence Act that prevails* 55 M 711 = 137 Ind Cas 863 = 62 M L J 559 = A I R 1932 Mad 431 see *also A I R 1933* Sind *166 = 1933* Cr C 530

S 29 —S 164 deals with persons accused and not with witnesses as also does s 29 139 Ind Cas 725 = 33 Cr L J 814 = 36 M L W 798 = 56 M 63 = 64 M L J 153 = A I R 1932 Mad 748

S 30 —Confession of co accused *implicating himself* and accused tried jointly with him may be considered if proved *142 Ind* Cas 87 = A I R 1933 Rang 57 = 142 Ind Cas 87 = 11 Rang 4

S 30 —Approvers having ample opportunity to consult each other before *becoming approvers should not be cons* dered as corroborating each other A I R 1933 Lah 946

S 30 —The confession of a co accused stands even on a *lower footing than* that of the evidence of an accomplice as it is not a statement on oath and cannot therefore be accepted without material corroboration connecting the *accused with the case* A I R 1933 Lah 956

S 30 —The statement of a co accused can be *considered* when judging the case against any person Such evidence however has *very little value* and though it may come as a link in the chain it cannot form the basis of a conviction *A I R 1934* Pes *11*

S 30 —Voluntary retracted *confession is* admissible against co accused A I R 1934 Rang 30

Ss 30 114(b) and 133 —Evidence of accomplice may be corroborated by confessions of co-accused as against other accused where truth of confession is guaranteed *A I R 1932 Oudh 355*

S 30 —Where the evidence of the approver *is eliminated* as against one of the accused whose name has been falsely substituted by the *approver the* whole fabric must fall to the ground and it should not be accepted even against the other accused *though to some extent it is* corroborated by independent *testimony* A I R 1933 Lah 871

S 30 —No conviction can be based on uncorroborated *testimony of* approver even if he has no enmity against accused A I R 1933 Lah 838 = 34 P L R 660 see also A I R 1933 Nag 249 16 N L J 129

S 30 —A retracted confession *is admissible against* a co accused but it is practically of no value unless there be independent *corroboration 136 Ind Cas* 27 = 33 L I R 602 = A I R 1932 Lah 293 A I R 1932 Oudh 321 = 137 Ind Cas 665 = 33 Cr L J 502 36 C W N 874 = 140 Ind Cas 379 = A I R 1933 Cal 6

S 30—A confession cannot be accepted in part 33 P L R 511 = A I R 1932 Lah 438

S 30—Section 30 is applicable only to statements made before and proved at the trial and not to statements made by some of the co accused in the course of the trial under s 342 of the Cr Pro Code 9 O W N 1135 = 141 Ind Cas 19 = 34 Cr L J 124

S 30—Statement of accused made at police station is inadmissible and cannot be used as evidence as against co accused 34 P L R 259 = A I R 1933 Lah 167 = 1933 Cr C 312

S 32—Before admission of statements under s 32 evidence must be given that the makers of the statements are dead or are not available A I R 1933 Rang 212

S 32(1)—Corroboration of dying declaration is not necessary as a rule of law But declaration not made in expectation of immediate death and not made in presence of accused requires corroboration as a rule of procedure A I R 1933 Bom 479

S 32(1)—Simply because declaration is false in some part it should not be disregarded as a whole A I R 1933 Bom 479 Dying declaration is relevant under this section even though maker does not expect to die A I R 1933 Bom 479

S 32(1)—The statement of a person mortally wounded in admissible under this section 140 Ind Cas 892 = 1933 Cr C 93 = A I R 1933 Oudh 53

S 32 (1)—Transactions resulting in death does not mean any fact or series of facts which have no direct and organic relation to death Statements made by deceased long before actual incident of murder are inadmissible under s 32(1) 143 Ind Cas 17 = 34 Cr L J 505 = A I R 1933 Nag 136

S 32(1)—Evidence of prosecution witnesses as to oral dying declaration of deceased should be discarded, where the deceased received several mortal injuries and there is no definite medical evidence that he would have been able to speak A I R 1933 Oudh 333 = 10 O W N 557

S 32(1)—Corroboration of dying declaration is not necessary as a rule of law But declaration not made in expectation of immediate death and not made in presence of accused requires corroboration as a rule of procedure A I R 1933 Bom 479

S 32(2)—Report submitted by a process peon who is dead regarding service of notice is admissible under s 32(2) and s 35—A I R 1933 Pat 658

S 32(2)—The Zemindari papers can be used as independent evidence provided they are brought within s 32(2) of the Evidence Act by showing that the persons who prepared them are dead or cannot be found etc but the weight to be attached to them must depend on circumstances 11 Pat 701 = A I R 1933 Pat 6

S 32(2)—The entries in a diary of a police officer who is subsequently murdered is admissible in evidence 140 Ind Cas 578 = 1932 A L J 301 = A I R 1932 All 442

S 32(4—Evidence as to family custom based on information derived from deceased is admissible if it is expression of independent opinion based on hearsay A I R 1933 Oudh 246 = 10 O W N 268

S 32(5)—Where the statements regarding fact of adoption of the party in the present suit were made in previous suits in which the question of adoption was directly in issue such statements should not be admitted in evidence in the present suit under sub section 5 section 32 as they were not made before the question of dispute was raised A I R 1932 Mad 198

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ledge and
A I R

S 32(5) — The statement of a witness on a question of relationship can be admissible either under s 32(5) or s 50 A I R 1934 All 117

S 32(5) — The statement of a deceased Mahomedan that the mother of his children was married to him is evidence of marriage for proving legitimacy A I R 1933 All 329 = 1933 A L J 483

[illegible] astrologer on information by person [illegible] ate of birth of particular person and [illegible] is admissible under s 32(5) though not [illegible] n relates to existence of relationship within s 3 (5) 30 [illegible] N 030 = 50 [illegible] L J 253 = 142 Ind Cas 36 = A I R, 1933 Cal 51

S 32 5) — Section 32(5) does not apply because statements were made after question in dispute was raised 35 Bom L R 118 = A I R 1933 Bom 126

S 33 — The expression representative in interest is not for all purposes synonynous with the expression persons claiming under in s 11 of the C P Code A I R 1932 Mad 198 = 62 M L J 116 = 1932 M W N 31 = 55 M 40 = 139 Ind Cas 684

S 33 — Where a witness is dead but the accused had opportunity to cross examination his evidence is admissible in *de novo* trial 139 Ind Cas 203 = A I R 1932 Mad 559 = 1932 M W N 857

S 33 — A deposition on which there was no opportunity at all to cross-examine, is not admissible under s 33 A I R 1934 Mad 100 = 39 M L W 34

S 33 — The first proviso to section 33 of the Evidence Act deliberately inverts the requirements of the English law and means that where the two proceedings are not between the same parties in order that the proviso may be complied with the party to the first proceeding must have been a representative in interest of the party to the second proceeding and not *vice versa* 38 C W N 1 P C

S 33 — Evidence of witness before Coroner in equiry into death is not admissible under s 33 where the witness dies prior to the enquiry before Magistrate A I R 1933 Bom 479, see also A I R 1933 Bom 126

S 34 — The mere filing of accounts and exhibiting them does not prove the various items in the accounts without some more evidence The accounts may corroborate the oral evidence and there must be the evidence of some person who knows the transaction personally and he swears to them A I R 1933 Mad 756

S 34 — A entry in an account book is an admission by the maker thereof in his own favour and it is accepted as evidence only if it strictly complies with the requirements of being kept regularly in the ordinary course of business The account books in which balances are not struck for six days running is not therefore a document which would inspire confidence in a Court of justice 33 P L R 745 = A I R 1932 Lah 417, see also A I R 1932 Sind 186

S 34 — Entries in old account books over 3 years by themselves are not sufficient to charge a person with a liability though there is presumption that they were written by person by whom they are proported to have been written 142 Ind Cas 869 = A I R 1932 All 500 = 1933 A L J 413

S 34 — Where a suit is based on entries on an account book the entries themselves should be proved 34 P L R 46 = A I R 1933 Lah. 384, see also A I R 1933 Lah 212

S 34 — Where persons preparing Zemindari papers are dead or could not be found, the Zemindari papers can be used as independent evidence 141 Ind Cas 157 = 11 Pat 701 = A I R 1933 Pat 6

S 34 — Account books of respectable firms should not be stigmatised as fabricated without coming to finding that books produced are fabricated and without giving reasons. 142 Ind. Cas. 463 = 14 P L T 61 = A I R 1933 at. 145

S 35—Entry in order sheet that notice has been served is presumed to be correct though it is conclusive evidence of *factum* of service 1933 Pat 658

S 35—Reports of Tasildar and Extra Assistant Commissioner in inquiry into *naufi* of property are relevant A I R 1934 Lah 39

S 35—Entries on the books and forms maintained under rules of Education Department are relevant as evidence of conduct of parties proving and disproving a fact of adoption A I R 1934 Nag 1

S 35—School certificate as to the age of a boy, duly prepared according to authority are admitted in evidence A I R 1934 Nag 44=16 N L J 232, see also 28 N L R 127=140 Ind Cas 66=A I R 1932 Nag 117

S 35—Entries in public documents of relevant facts are admissible irrespective of the fact whether public officer recording them knows them or not A I R 1933 Sind 317 But entry in the death register as to age is not conclusive proof of age *Ibid*

S 35—*Hatchita* of Chaukidar containing date of birth is admissible though written by Dafadar at request of Chaukidar A I R 1933 Pat 473

in Record of Rights being irrelevant are

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survey map has presumptive value against a landlord of a neighbouring estate The Gangetic survey map cannot have the same value as evidence of title as the Revenue Survey map A I R 1933 Pat 671.

S 36—Rennel's map though correct with reference to the course of rivers cannot be preferred in a matter regarding the direction of villages to the investigations of a commissioner appointed for the purpose 56 C L J 369=143 Ind Cas 179=A I R 1933 Cal 222

S 35—Where there is discrepancy between Birth Register and Guardianship certificate regarding date of birth the age should be determined by reference to birth register 142 Ind Cas 794—1932 A L J 1012=54 A 1019=A I R 1933 All 100

S 35 Where deposition is recorded in ordinary way that record is proper evidence of statement and not abstract from judgment Oral admission acted on and recorded by Court in its judgment which constituted only official record of it, such record is admissible in evidence—142 Ind Cas 548=A I R 1933 Mad 184

S 35—Wajibularz entry in respect of custom if duly attested by settlement officials and signed by zamindars of village to which it relates must be admitted under s 85 A I R 1933 Oudh 246=10 O W N 268

S 35—Entries in marriage Register kept under the Christian Marriage Act is admissible in evidence 141 Ind Cas 284—26 S L R 423=A I R 1933 Sind 27

S 41—Order in lunacy is binding on parties thereto or those claiming under them A I R 1933 Mad 624, 1935 M W N 514

S 41—A judgment in a suit for restitution of conjugal right is not a judgment in *rem* and a third party is not bound by it A I R 1933 Rang 250

S 41—Statement in judgment not *inter partes* is not admissible A I R 1932 Lah 50

S 41—A Judgment not *inter partes* or in *rem* is admissible only to show its date and legal consequences A I R 1932 Cal 292=59 C 136=137 Ind Cas 363

S 41—It is doubtful whether judgment refusing probate of will is judgment in *rem* 141 Ind Cas 287=56 Mad 346=A I R 1933 Mad 14

S 42—Judgment declaring person to be owner of certain properties as auction purchaser though not *inter partes* is admissible as assertion of title 143 Ind Cas 179=56 C L J 369=A I R 1930 Cal 222

S 42—Previous judicial decisions making mention of status of pre emptor are admissible in evidence under s 13 and 42=A I R 1933 Lah 57=140 Ind Cas 566=33 P L R 1054

S 42—Judgment determining similar questions are relevent though not conclusive A I R 1932 Bom 398 = 34 Bom L R 802

S 42—Previous judgments cannot be used as evidence to decide points which are at issue in different case except in cases under ss 40 and 42 A I R 1932 Pat 690

S 43—Decrees not *inter partes* are not evidence save under ss 13 and 43 They are mere evidence of transaction A I R 1933 Cal 21 = 140 Ind Cas 365 = 36 C W N 806 see also 37 M L W 623 = A I R 1933 Mad 429, 58 C 1187 = 58 I A 125 56 C L J 369 1932 M W N 362

S 44—The plea that a decree passed by a Native State Court was made without jurisdiction is open to the objector under s 44 and can be raised at any stage of the proceeding unless there is a bar or *res judicata* or any rule of equitable estoppel against him A I R 1931 All 689

S 45—Opinion as regards the date of the stamp whether admissible 11 Pat 782 = A I R 1932 Pat 352

S 45—A Magistrate should not refuse to record the evidence of hand writing expert where the question of identity of handwriting is in issue as the evidence of an expert in the matter of handwriting has been made admissible and relevent 139 Ind Cas 508 = A I R 1932 Lah 481 = 33 P L R 811

S 45—Opinion of expert that document is type written on same machine as another is not admissible A I R 1933 All 690 A I R 1933 All 498

S 45—Where one expert is contradicted by another their evidence has little value A I R 1933 Lah 865

S 45—Opinion of expert as to signature in language which expert cannot read or write is not of much value except by way of corroboration of other evidence A I R 1933 Pat 559

S 45—Expert evidence is not conclusive and a man cannot be convicted for forgery merely on the evidence of a handwriting expert A I R 1932 Lah 490 = 33 P L R 697 = 108 Ind Cs 368

S 45—Letter No 276 Home Judicial of the Punjab Government does not have the effect that the expert should never be called It merely says that expert should not be called unnecessarily A I R 1932 Lah 202 = 33 P L R 76 = 137 Ind Cas [illegible]4

S 45—Where no opportunity was given to parties to examine expert his bare report is not admissible 141 Ind Cas 767 = A I R 1933 Pat 159

S 45—Deposition of experts as to results of their opinion is not expert evidence A I R 1933 P C 26 = 64 M L J 193 = 14[illegible] Ind Cas 81[illegible] = 1933 A L J 393

S 45—Where Court finds signature true on comparisn under s 73 expert evidence can be dispensed with A I R 1932 Bom 588 = 34 Bom L R 1371 = 141 Ind Cas 747

S 45—Expert witness is generally prejudiced in favour of the side calling him A I R 1933 Lah 561

S 48—Ir [illegible] according to usage uncontradicte[illegible] usage is sufficient A I R 193[illegible] [illegible] = 13 Lah 800

S 49—T[illegible] s 32 49 and 60 depends on character of deposing witnesses and on the consideration as to whether they are expressing their own opinion A I R 1933 Sind 213

S 50—Evidence of witnesses that certain man and woman were regarded as man and wife by members of community does not come under s 50 Such evidence is not opinion expressed by conduct with special means of knowledge as to existence of such relationship 1932 A L J 208 = A I R 1933 All 130

S 50—For conviction under sections 497 and 498 marriage must be strictly proved A I R 1934 Sind 10

S 51 —A chemical Examiner must give in his report his opinion and the ground on which his opinion is based Mere opinion is not sufficient A I R 1932 Nag 158=34 Cr L J 154=141 Ind Cas 448

S 54—A police officer is competent to give evidence about reputation of a person residing in his circle or about whom he had occasions to make observations or inquires A I. R 1933 All 674

S 54 Evidence of previous convictions is admissible not as evidence of character but to prove habit and association A I R 1933 Oudh 355

S 54—Under s 54 if evidence is otherwise relevant it is not rendered inadmissible merely because it shows bad character or the commission of offences other than the offence with which the accused is charged 59 C 1361=139 Ind Cas 873=55 C L J' 439=A I R, 1932 Cal 474

S 55 —General and not particular evidence of character of complainant is admissible and relevant for awarding damages A I R 1932 Nag 158=141 Ind Cas 448=34 Cr L J 154

S 57 —The Court should take judicial notice of public holidays 14 Lah 240=A I R 1933 Lah 558

S 57—The Court can take judicial notice of the fact that 'the present political movement' is in fact a movement prejudicial to puclic safety or peace 36 C W N 1158

S 58 —Where the execution of an insufficiently stamped hand note is admitted by the defendant in his written statement, the plaintiff is entitled to maintain the suit 63 M L J 303=A I R 1932 Mad 693=1932 M W N 793

S 60 —Test as to value of evidence admissible under ss 32 49 and 60 depends on the character of deposing witnesses of deceased person and on the consideration as to whether they were expressing their own opinion A I R 1933 Sind 213 Section 162 of Cr Pro Code is an application of the rule against hearsay evidence contained in s 60 A I R 1933 Pat 589

S 65 —Copies of letters of conspirators to co conspirators which were intercepted and reported, are admissible though addressees are not called to produce originals A I R 1933 All 498

S 65 —Party not producing document in his possession should not be allowed to prove contents by secondary evidence A I R 1933 Lah 378=37 M L W 672=69 M L J 676

S 65 —Where document was tendered in evidence and exhibited but not found on record the party can produce copy or secondary evidence of contents A I R 1933 Lah 782

S 65 —Secondary evidence should not be allowed unless circumstances are sufficient justification under Evidence Act for reception of secondary in lieu of primary evidence A I R 1933 Pat 468, A I R 1933 All 690=1933 A L J 799, A I R 1933 Lah 945

S 65 —where secondary evidence has been admitted by trial court without objection the appellate court cannot reject such evidence A I R 1933 Lah 601=144 Ind Cas 45

S 65—An income tax return is not a public document or a public record of a private document within s 74 and so section 65 does not apply A I R 1933 Bom 291=56 B 324=34 Bom L R 236

S 65 —Where the record of a document has been burnt in the Govt Record room a certified copy of such document is admissible 11 Pat 569=138 Ind Cas 419=A I R 1932 Pat 157

S 68 —If any of the defendants to a suit denies that any of the alleged executants executed the deed the plaintiff must produce one of the attesting witnesses to prove the document A I R 193? All. 520=193? A L J 207=140 Ind Cas 115

S 68 —Where execution is not specifically denied document is admissible without proof of execution by summoning attesting witness A I R 1933 Lah 378, A I R 1933 Mad 432=37 M L W 677=1933 M W N 141.

S 68 – Although by virtue of the proviso, the attesting witness need not be called still the party is not relieved from necessity of proving mortgage in form prescribed under T P Act s 59 141 Ind Cas 700 = A I R 1933 Rang 6 = 11 Rang 26

S 68 —Person identifying executant before registration authorities, signing as such and identifying witness, whether is a attesting witness A I R 1934 Nag 1

S 68 —Scribe witnessing execution and appending his signature is attesting witness A I R 1933 Sind 257

S 68 —Where mortgage is sued upon as simply money bond, proof of attestation is unnecessary A I R 1933 Sind 257

S 68 —Person attesting document is not estopped from taking contrary position unless he knew contents of document when signing it. A I R. 1933 Lah 703

S 68 —Proviso to s 68 is retrospective in operation A I. R 1933 Mad 432 = 37 M L W 677 = 1933 M W N 141, 1933 Mad 612

S 69 —Where the plaintiff has taken early steps to secure the attendance of the attesting witness and is not responsible for the last summons being ineffective an adjournment should be granted for examining the attesting witness and if the witness has died during the pendency of the appeal whether under the ammendment of s 68 or under s 69 it is open to the plaintiff to prove the document by other means A I R 1933 Mad 612

S. 74 —Letter forwarding proceedings of public meeting is not public document 55 C L J 558 = 14, Ind Cas 367 = A I R 1933 Cal 812

S 74 —An income tax return is not a public document or a public record of a private document within the meaning of s 74—56 B 324 = 147 Ind Cas 381 = 34 Bom L R 236 – A I R 1932 Bom 291

S 74 —Certified copies of confessions by accused persons would be admissible to prove the act of the Magistrate recording the confession A I R 1934 All 81 = 1933 A L J 551

S 77 —Proof of entry in public document should be proved either by producing the document or by certified copy Proof of ownership of a car can be made by producing register It is irregular for court to accept proof of ownership by mere statement of person without person being called 36 C W. N 1147 – A I R 1933 Cal 78 = 141 Ind Cas 248

S 77.—Deposition of witnesses must be proved properly unless they are certified copies A I R 1933 Rang 212

S 80 —Deposition can be proved only under s 80 of the Evidence Act, when these are taken according to law 142 Ind Cas 653 = 34 Cr L J 430 = A I R 1933 Cal 190

S 80.—Where there are no irregularities regarding the recording of the confession and the statement was taken in accordance with law, then under s 80 there would be a further presumption that the circumstances under which it was stated to have been taken were true A I R 1934 All 81 = 1933 A L J 551, see also 10 Mys L J 385

S 83.—Entries in survey map and *khewat* carry presumption of correctness A I R 1933 Pat 555

S 83—Rennel s map indicates correctly course of rivers, but not direction of villages A I R 1933 Cal 222 = 143 Ind Cas 179 = 56 C L J. 339

S 88 —Where original of a telegram is not proved to be in the handwriting

s 81 But section 88 is no bar to

est of evidence and can be admissible

s 9 —A I R 1933 Pat 96 = 142 Ind.

Cas [illegible] = 13 [illegible] 802

S 89 —Where a party produces an unstamped copy of an instrument by way of secondary evidence the court may in the absence of contrary evidence presume that the orignal was stamped 1932 M W N. 432

S 90 —The presumption arising under s 90 as to the due execution and attestation of a document 30 years old is equally applicable to the copies as to the original when the copy is proved to be a true copy of the original A I R 1934 Nag 67, see also A I R 1933 Mad 860

S 90 —Repeated assertion of title in ancient documents being mere recitals are no evidence of what is there recited though actual possession in conformity therewith would constitute *prima facie* title 56 C L J 369

S 90 —The presumption under this section extends to genuineness and not to holding that document was executed by person possessed of requisite authority A I R 193 Oudh 22/=9 O W N 379=138 Ind Cas 513, but see A I R 1933 All 99=1932 A L J 1010

S 90 —In the case of execution of a deed by a *parda nashin* lady, proof that document was explained and understood by her must be given, it being a matter to which presumption under s 90 does not attach A I R 1933 Oudh 170=10 O W N 147

S 90 —In the case of a will the presumption as to execution under s 90 arises but presumption does not cover question of disposing mind A I R 1923 Lah 58

S 90 —Where a document is admitted by trial court under s 90 the appellate court should be slow to interfere with such discretion unless its exercise is perverse 142 Ind Cas 13=34 P L R 365=A I R 1933 Lah 347 see also A I R 1933 All 443

S 90 —Courts should be very careful about raising presumption under s 90 in favour of old deeds of *Sankalpanatra* produced after many years after first settlement in suit where under proprietary rights are set up on their basis 138 Ind Cas 513=8 Luck 18=A I R 1932 Oudh 227=9 O W N 379

S 91 —Sections 91 and 92 only applies where the document on the face of it contains or appears to contain all the terms of the contract 56 B 180=137 Ind Cas 478=34 Bom L R 26=A I R 1932 Bom 151

S 91 —Where the debt and the execution of the promisory note are contemporaneous the debt can be proved only by the note 139 Ind Cas 361= =A I R 1932 Mad 687=36 I W 432 1932 M W N 1260-140 Ind Cas 193 I R 1932 All 610=140 Ind Cas 117 140 Ind Cas 193=1932 M W N 120-A I R 1933 Mad 71 A I R 1933 Mad 117=140 Ind Cas 833=64 M L J 79 A I R 1933 All 109=141 Ind Cas 177 but see 29 N L R 131=A I R 1933 Nag 57, A I R 1933 Pat 584 141 Ind Cas 163=13 P L T 506=A I R 1932 Pat 325 9 O W N 585=A I R 1932 Oudh 235 (F B)=139 Ind Cas 298

S 91 —An unregistered sale deed cannot be received as evidence of any transaction affecting the property A I R 1933 Lah 276-33 P L R 227 = 37 Ind Cas 41

S 91 Oral evidence to prove intention of executor is not admissible especially where *wakif* though alive several years after never sought its rectification 1933 A L J 21=A I R 1933 All 186

S 91 —Unregistered document relating to partition is admissible to prove mere separation in status but not to prove that particular item has ceased to be joint 141 Ind Cas 487=34 P L R 194=A I R 1933 Lah 574 see also 143 Ind Cas 634=A I R 1933 Lah 194 A I R 1933 Rang 249

S 91 —Where document creating lease is not admissible for want of registration oral evidence as to terms is not admissible A I R 1933 Cal 612, see also A I R 1933 Bom 381 But where the partition deed is not registered possession can be proved by oral evidence A I R 1933 Nag 270, A I R 1933 Rang 249

S 92 —Written contract cannot be varied by local custom. A I R 1933 Cal 772

S 92 —One of the executants of a promissory note cannot be allowed to let in evidence to the effect that he signed the promissory note only as a

surety A I R 1933 Lah 965, see also A I R 1934 Bom 39=35 Bom L R 1197, A I R 1932 Nag 62=138 Ind Cas 879=28 N L R 325

S 92—Where the contract between the parties has been embodied in a mortgage deed, letters between the parties within several months before the completion of the mortgage are in admissible in evidence to contradict, vary or add to the terms They only constitute evidence of negotiation between the parties A I R 1933 Lah 1024

S 92—Where pronote is executed for no cash consideration, real consideration can be proved A I R R 1933 All 576

S 92—Oral agreement to pay decree by instalments in court can be proved if certified within 90 days A. I R 1933 Lah 806

S 92 (4) Agreement that registered sale shall be null and void until vendee executes agreement of repurchase cannot be proved A I R 1933 Rang 310

S 92—Oral contract, giving preferential right to pre empt leased property if it was brought to sale can be proved 138 Ind Cas 774=1933 A L J 381=63 M L J 403=36 M L W 450=34 Bom L R 1609=A I R 1932 P C 231 (P C)

S. 92—Where the whole mortgage money is payable on demand according to terms of mortgage eed contemporaneous oral agreement that amount ible and can not be proved A I id Cas 114

oral evidence to prove recession 933 Lah 278

S 92—Where on the face of a deed it is a mortgage mortgagee cannot was otherwise than mrotgage 141 Ind 933 Lah 104 A I R 1932 Mad 218

tgagee for release of certain share from mortgage cannot be proved to vary terms of registered deed A I R 1933 Nag 89=29 N L R 107=142 Ind Cas 242=15 N L J 159

S 92—This section has no application where letter containing some terms of the proposed lease and a lease embodying all terms is agreed to be executed later A I R 1933 Lah 61=142 Ind Cas 754=33 P L R 323=14 Lah 137

S 92— icipal concealing fact that he is him in his name were on principa 85=A I R 1933 Sind 34

S 92—Oral agreement to vary terms of document can be set up when writing is not required by law 142 Ind Cas 41=34 P L. R 266=A I R 1933 Lah 453

S 92—Although evidence to vary or modify the terms of an agreement in writing is not admissible oral evidence is admissible to prove that an agreement in writing was in fact no agreement at all but was only a sham or nominal transaction, not intended to be operative 63 M L J 707=36 L W, 817

S 92—The absence of mention of an agreement to pay interest in a balance struck in the creditor s book does not debar him from proving an agreement to pay interest independently and by oral evidence A I R 1932 Lah 652

S. 92—A distinct oral agreement between co mortgagors made subsequent to he execution of the mortgage deed should, in order to be admissible under th ction be reduced to writing A I R 1933 Mad 218=1932 M W N 168

92.—Where an oral agreement is made by two partners to dissolve the ership-earlier than originally agreed to in their registered agreement, the greement and any payment made in accordance there with is not made missible 136 Ind Cas 874=A I R 1932 Nag 42=14 N. L J 1,

S. 93.—A bequest in favour of a son of L or G is void for uncertainty as extraneous evidence is not admissible to show which particular son of L or G was intended to be benefited by the testator A I R 1933 Pat 647

S 94—Where mortgage deed is clear and unambiguous and actually applies to existing facts parol evidence is inadmissible A I R 1934 All 100

S. 95.—Where language of document is meaningless with reference to existing facts extrinsic evidence is admissible to prove its true meaning 141 Ind Cas 298 = A I R 1933 Oudh 80 = 9 O W N 1024

S. 101.—Those who allege fraud must prove it A I R 1933 Pat 306, A I R 1932 All 625

S 101.—Where circular is issued by a public servant containing certain statement a person who challenges that statement must prove it A I R 1934 Mad 27

S. 103.—Persons claiming to succeed on ground of relationship should prove such relationship and absence of nearer heirs A I R 1934 All 117

S 105—Where death results from the injuries caused by the accused, the burden of proving the circumstances which entitled him to kill the deceased so as to bring his case under any of the exceptions in the Penal Code is on him A I R 1933 Lah 1055

S 108—The rule of presumption of Mahomedan law as regards missing person has been abrogated by the Evidence Act A I R 1934 Oudh 41

S 112.—The parties to marriage were in touch with each other, were residing for a short period in reasonable proximity the wife being in the house of a relation of the husband There was nothing to suggest that she was unfaithful or that the parties were on terms of personal hostility Held that the child could have been begotten during the period and his legitimacy was undeniable A I R 1934 P C 49 The word access means no more than opportunity of intercourse *Ibid* The burden of showing that parties to marriage has no access to each other at any time when child could have been begotten is on the person challenging legitimacy of the child *Ibid*

S 114 ill (a)—It is not possible to lay down any maximum period which will apply to all cases of possession of stolen property 1932 M W N 862

S 114 ill (a)—Where revolver stolen in October found with accused in May and the accused is unable to account for its possession a presumption would arise under s 114 ill (a) because revolvers are not easily obtainable in market overt 1933 A L J 523 = A I R 1933 All 461 = 14 L R A Cr 63

S 114 ill (a)—Court may draw presumption if accused is not able to account for his possession but the onus of proving ingredients of offence under s 411 I P Code is on the prosecution and does not shift to the accused A I R 1933 All 893

S 114 ill (a)—Possession and production of part of stolen property six days after commission of the offence give rise to the inference that the accused dishonestly received stolen property knowing it to be stolen and not that he was actually concerned in burglary 1933 M W N 325 = 193 M Cr C 143 But possession must be definitely established in order to justify presumption of guilt 141 Ind Cas 537 = 34 Cr L J 163 = A I R 1932 Sind 180

S 114 (b)—No conviction can be based on the uncorroborated testimony of an approver even if he has no enmity against the accused A I R, 1933 Lah 838, A I R 1933 Pat 500, A I R 1934 Lah 21, 1934 Lah 23 = 34 P L R 866 A I R 1934 Cal 114, A I R 1934 Pes 11, A I R 1934 Oudh 90, A I R 1933 Oudh 465 = 1933 Cr C 597 But corroboration need not be by direct evidence nor should corroboration be sufficient by itself to prove guilt A I R 1933 P 500 To justify conviction on approver s evidence it is sufficient if corroboration is merely circumstential evidence of accused s connection with crime 140 Ind Cas 19 = 14 Lah 11 = 34 P L R 285 = A I R 1932 Lah 623 Approver s evidence must be corroborated by

reliable and independent evidence 34 P L R 2 Corroboration by another accomplice is not material corroboration 142 Ind Cas 809=13 P L T 802 =A I R 1933 Pat 96 Evidence of accomplice must be regarded with suspicion A I R 1933 Rang 116 It is not necessary that the evidence corroborating the story of an approver or an accomplice should be evidence which directly connects the accused with the offence, but there must be some evidence which tends to show that the story of the approver or accomplice is true in so far as it relates to the accused A I R 1933 Bom 487 Approver s ... different occasions should ... complices are not necessarily ... tences in which accomplices make their statement must always be regarded No general rule on the subject can be laid down 142 Ind Cas 809=13 P L T 802=A I R 1933 Pat 96 Evidence of approver can be corroborated by confession of co accused jointly tried implicating both himself and accused But the court must scrutinise such corroboration with care 342 Ind Cas 87=34 Cr L J 286=11 Rang 4=A I R 1933 Rang 57, see also A I R 1933 Oudh 355 Confession of co accused and testimony of accomplice without other evidence is not sufficient to justify conviction of other accused A I R 1933 Oudh 355 Retracted confession has no value against other accused unless fully corroborated A I R 1933 Rang 320, see also A I R 1933 Rang 73=143 Ind Cas 142=34 Cr L J 558

S 114 ill (e)—Secretary to Government signing petition is presumed to be acting within authority until contrary is shown 37 C W N 276=A I R 1933 Cal 118 Evidence accepted by a Court is presumed to be regular and the burden is upon the party who asserts the contrary to prove it otherwise 10 Mys L J 151

S 114 ill (f)—Where lawyer sends letter purporting to be instructed by client the presumption is that the letter is written under instruction A I R 1933 Rang 147 Where registered letter is returned by Post office as refused the presumption as to due delivery or service depends upon particular circumstances of each case A I R 1933 Rang 76

S 114 ill (g)—Where the accused does not attempt to get certain witnesses examined it may fairly be presumed that the evidence of such witness will not be helpful to the accused A I R 1933 Sind 412 Where a party suppresses a document or evidence the opposite party is entitled to make presumption in his favour A I R 1933 Mad 451=37 M L W 672=64 M L J 676, A I R 1933 All 474 But to draw an inference under this section the Court must be satisfied that the evidence is in existence 142 Ind Cas 220=37 M L W 521=64 M L J 413=37 C W N 657=A I R 1933 P C 87= 7 C L J 222 But in a criminal case the prosecution is under no obligation to call all relevant evidence and presumption under s 114 illus (g) need not be raised simply because prosecution does not call certain witness A I R 1933 Cal 620 The only witness whom the prosecution need call are those who know the facts and are able and willing to give truthful evidence which is relevant to the charge 58 C 1335=135 Ind Cas 443=A I R 1932 Cal 118

S 114 ill (i)—The strength of the presumption which might be raised when the document creating obligation is produced by the obligor varies in different circumstances A I R 1933 Nag 379

S 114 ill (k)—Where mortgagor produces the mortgaged deed with stamp cancelled presumption is that the mortgage has been paid up in full A I R 1933 Rang 61

S 115—There can be no estoppel unless other party has changed position on fait ... f representation A I R 1933 Mad 471, see also 56 Bom 501= A I R ... 32 Bom 386=140 Ind Cas 171

S 115—There can be no estoppel when true state of affairs is known 143 Ind ... s 542=14 P L T 189=A I R 1933 Pat 210

S. 115.—Attestation after hearing contents estops attestor A I R 1934 Pat 93

S. 115.—Estoppel is nothing more than rule of evidence The law of *India and England is the same as regards estoppel* A I R 1933 Pat 708

S 115—An admission on a point of law is not an admission of a thing so as to *make the admission a matter of estoppel within* section 115 A I R 1932 Pat 267=140 Ind Cas 687

S 115—It is estoppel alone which can prevent the true owner from disputing the acts of his *benamidar* 58 C 1371=135 Ind Cas 433=A I R 1932 Cal 167

S 115—There can be no estoppel when a person acts in a different capacity 36 C W. N 972

S 115—An infant is not estopped from setting up the plea of his infancy where he has fraudulently represented that he is of age and thereby induced another to enter into a contract with him A I R 1932 All 710=139 Ind Cas 718

application when person acts in ll 641

shed that a tenant who has been deny his landlord s title however defective it may be so long as he has not openly restored possession by surrender to his landlord 33 P L R 799=139 Ind Cas 46, I R Lah 623 55 M 601=138 Ind Cas 31=A I R 1932 Mad 292=62 M L J 313

if she understands questions put 36 C W N 1152=A I R

class of witness for when of a tender age they often mistake dreams for reality, repeat glibly as their own *knowledge what they have heard from others* and are greatly influenced by fear of punishment, by hope of reward and desire of notoriety When considering the evidence of child witness these observations should not be lost

)end upon its particular facts and circums Ind Cas 479

should not be rejected simply because as 129=A I R 1933 Oudh 340 Evidence of respectable and reliable witness should not be disregarded merely because he is related to party calling him A I R 1933 Rang 162

S 118—Accused though competent to testify is incompetent witness *because oath canot be administered to him* 141 *Ind Cas* 89—10 *Rang* 511=A I R 1932 Rang 190 (F B)

S 122—Prohibition against admission of communication between husband and wife extends to all communication of whatever character This prohibition can in no circumstances be waived or relaxed 33 Bom L R 174=A I R 1933 Bom 153

SS 123, 124—Under the above sections subject matter of police diaries is privileged 142 Ind Cas 854=34 Cr L J 464=A I R 1933 Lah 498

S 126 Prov. 2.—Definite charge of fraud and some evidence to support it is *necessary to compel pleader* to answer question which he is privileged not to answer A I R 1933 Rang 61

S 126—Doctor called to give evidence is not protected and he is not entitled to with hold evidence 1933 A L J 14=A I R 1933 All 55

S. 132—A witness is not protected unless *he has objected to answering* questions A I R 1933 Oudh 370

S 133—Corroborative evidence must be taken in case of evidence of *accomplice* A I R 1933 *Lah* 294, A I R 1933 Nag 249, A I R 1933 Pat 500 But corroborating evidence need not directly connect accused

with offence A I R 1933 Bom 482 So also corroboration need not be by direct evidence nor should corroboration be sufficient by itself to prove guilt A I R 1933 Pat 500, A I R 1933 Lah 294

S 133 —The evidence of one accomplice cannot be corroborative of the evidence of another accomplice A I R 1933 Nag 372, A I R 1933 Oudh 355

S 133 —Evidence of accomplice may be corroborated by confession of co accused as against other accused where the truth of the confession is guaranteed A I R 1933 Oudh 355

S 133 —Retracted confession of co accused and motive and suspicion are not enough for conviction for murder 34 P L R 417 = 142 Ind Cas 620 = 34 Cr L J 372

S 137 —Unfinished testimony if substantially complete should be submitted to the jury and should not be rejected A I R 1933 Lah 561

S 145 —Statement made to headman of a village can be used only under ss 145 and 157 A I R 1933 Rang 119

S 145 —The statements under s 164 Cr Pro Code cannot be put to the jury in their entirety under s 145 or under any other provision of law if there is no evidence susceptible of corroboration recorded under s 288, Cr Pro Code A I R 1934 Cal 124 The provisions contained in s 145 relates to previous statements in writing but does not militate in any way against such previous statements being used by way of corroboration of stetements put in under s 288 Cr Pro Code which are substantive evidence in the case before the court of Session especially when the accused are not prejudiced *Ibid* The object of s 162 Cr Pro Code is plainly to exclude altogether the hearsay evidence of police officer except for the purpose of contradicting a witness in the manner provided by s 145 and if the exception thus made is to be applied it must be applied in the manner provided in the section A I R 1933 Pat 589 A document which is used to contradict a witness must be put to the witness Simply because the witness does not go to the witness box the court is not entitled to break the law and admit such document A I R 1934 Pat 55

S 146 —The Judge should control cross examination A I R 1933 Lah 667

S 154 —The circumstances in which a witness may be cross examined by the party calling him are not laid down in s 154 of the Evidence Act which leaves the matter entirely to the discretion of the Court and there is no legal objection to such permission being freely granted A I R 1933 Pat 488 A I R 1933 Nag 384 Discretion exercised under s 154 will not be reversed by Appellate Court A I R 1933 Rang 57 = 142 Ind Cas 87 = 34 Cr L J 286

S 154 —This section does not lay down that a witness must be declared [illegible] A I R 1933 Nag 384 [illegible] eclared hostile his evidence cannot [illegible] 3 Pat 517 Value of his testimony [illegible] *Ibid* Either side can rely upon [illegible] idered as a whole *Ibid* [illegible] of modifying s 155 Evidence Act [illegible] A I R 1933 Pat 567

S 157 —Recital of boundary in document between strangers to suit relating to adjoining land is not admissible under s 157 if executant is called and deposes as to boundary or under s 32 if he is dead A I R 1933 Pat 636

S 158 —List of stolen things given to supplement first information report is admissible and can be referred to under s 158 and proved under s 158 A I R 1933 Lah 987

S 159 —Documents can be referred to for refreshing memory A I R 1933 Pat 306 A I R 1933 Lah 716

S 164 —In prosecution for offence under s 408 Penal Code accused not producing document after notice can use it to cross examine complainant 36 C W N 1126 = A I R 1933 Cal 65 = 60 C 341

S 165 —Question whether particular evidence is admissible or not should be decided before it is actually given A I R 1932 Sind 201 = 26 S L R 302 = 141 Ind Cas 392

S 167 —Retrial by appellate court can be ordered if evidence is not sufficient to pronounce judgment 35 Bom L R 174 = A I R 1933 Bom 153 = 1933 Cr C 465, see also A I R 1933 Cal 136 = 142 Ind Cas 274 = 34 Cr L J 294

S 167 —T[illegible] [illegible]f the adm[illegible]ble [illegible]dence is not a ground to [illegible] evidence upon which [illegible] [s]ee also 141 Ind Cas 392 = 26 S L R 302 = A I R 1932 Sind 201



ADDENDA

Latest Amendments and Case-laws reported upto January 1936

N B—*The references within the parenthesis are to the page nos of the book*

Amendment—In section 1, after the words "Army Act' the words and figures, "the Naval Discipline Act or that Act as modified by the Indian Navy (Discipline) Act, 1934" shall be inserted—*vide*, the Amending Act, 1934 (XXXV of 1934)

Case laws

Preamble (p 11) Where terms of section is clear, English law should not be applied *Emperor* v *Ramanuja*, A I R 1935 Mad 528=1934 M W N 1479

S 3 (p 38) The definition of fact in s 3 does not restrict fact to something which can be exhibited as a material object *Emperor* v *Ramanuja*, A I R 1935 Mad 528=1934 M W N 1479

Ss 3, 5, 65 (p 43) A document which is not relevant to the issue, even if admitted without objection by the opposite party must be discarded by the appellate Court *Badnel Islam* v *Ali Begum*, A I R 1935 Lah 251

S. 6. (p 119) Evidence of witnesses that complainant informed about theft long after incident is not admissible *Brojabala Dhar* v *Nityamoyee Biswas*, A I R 1934 Cal 17=57 C L J 447=150 Ind Cas 209

S. 8 (p 140) Statement of accused after arrest in course of investigation giving false name is inadmissible under s 162 Cr Pro Code and cannot be admitted under s 8 *Krishna Iyer In re*, A I R 1935 Mad 479=1935 M W N 82

S 8 (p 40) *Statements accompanying or immediately preceding production* of articles are evidence of conduct under s 8 of the Evidence Act as much as the Act of production itself In adducing evidence as to the production of articles, evidence as to absence or existence of contemporary statements should also be adduced *Emperor* v *Rafiqueuddin* 39 C W N 368

Ss 8, 27 (p 140) Where joint acts of several persons are sought to be proved, in order to ask the Court to draw an inference from such conduct, evidence should be led with some degree of particularity so that it may be possible for the Court to draw the necessary inference from the conduct of each of the persons concerned in the act The principle applies not only to evidence relevant under s 27 but also to that under s 8 of the Act *Rafique uddin* v *Emperor*, A I R (935 Cal 184 (F B)

Ss 9, 11 13 42, 43 (p 161) Judgment in previous suit is admissible in evidence under ss 9 11 13, 42 and 43 *Mirbahuddin* v *Vidyasagar*, A I R 1935 Lah 64=36 P L R 106

S 10 (p 180) Where a person is charged under s 420 and 120 B for committing fraud on the Insurance Company by inducing the said company to accept the proposal for insurance on the life of one M by securing a false [illegible] the confessional statement of the doctor that [illegible] though

s 10 of the Act seeing that oth[illegible]
grounds for believing that there [illegible]
conspirator *Kunjalal Ghose* v *Emperor* A I R [illegible]
N 1015

S 10 (p 180) Document written by deceased describing conversation with third person who referred to accused as conspirator is admissible under s 10 *Emperor* v *Surja Kumar Sen*, 35 Cr L J 334 = 147 Ind Cas 32 = A I R 1934 Cal 221 (S B)

S 10 (p 186) For meaning of anything said—*Vide* A I R 1933 All 690 = 1933 A L J 799

S 11 (p 195) In determining the question as to whether recital as regards boundaries in document between strangers are admissible s 11 has no application *Soney Lall* v *Darb deo Varain*, A I R. 1935 Pat 167 = 16 P L T 199 (F B)

S 11 (p 200) Where statement of deceased is not admissible under s 32 s 11 cannot make it evidence *Latafat* v *Omkar* A I R 1935 Oudh 41 = 152 Ind Cas 1042 = 1934 O L R 922 = 11 O W N 1589

Ss 11, 32. (p 200) Statement not falling under s 32 is inadmissible even under s 11 *Naima Khatun* v *Basant Singh*, A I R 1934 All 406 (F B) = 1934 P L J 318

S 11 (p 200) A *chitta* prepared by the landlord recording his land to be in possession of certain persons as tenants would be admissible in evidence against a third person if there is further account introduction or verification *Abdul Khaleque* v *Susil Chandra Chaudhuri* 39 C W N 330

S 13 (p 222) A judgment not *inter partes* mentioning that certain rights in respect of property have been claimed and recognized by the authorities concerned is admissible in a subsequent case *Matasaddi* v *Latnmi*, A I R 1935 Lah 179

Ss 13, 43 (p 229) Judgment not *inter partes* is admitted for limited purposes under s 43, read with ss 11 and 13 *Hemchandra* v *Purna Chandra* A I R 1934 Cal 788 = 59 C L J 320 = A I R 1934 Cal 653

S 13. (p 240) Where the Collector had given his decision in the course of a prior proceeding on an incidental issue also but such issue arises in a subsequent suit his decision cannot make it *res judicata* in the subsequent suit But that decision is a piece of evidence under s 13 Evidence Act, to which some weight must be given in the determination of the status of the two estates in relation to each other *Sonaboti* v *Krityananda*, A I R 1935 Pat 306 = 14 Pat 70

S 13 (p 242) Decision in custom case is not judgment *in rem* It may only be instance of custom under s 13 *Janat Bibi* v *Ghulam Hussain* A I R 1934 Lah 861 = 36 P L R 256

S 13 (p 243) A recital of boundaries in a deed executed by strangers is not admissible under this section But it may be used as a corroborative evidence under s 157 if the executant is called as a witness *Rimnandan* v *Laley Tilakdhari* A I R 1934 Pat 636 = 145 Ind Cas 944

SS 13, 11 (p 250) Recitals in deed are not admissible for proving how lands are dealt with by landlord *Thakur Kurmi* v *Lalji*, 150 Ind Cas A I R = 1934 Pat 81

S 13 (p 2 0) Where the defendant purchased by a *kobola* in which the lands in suit were described as *niskar*, *Held* that the *kobola* was not admissible in evidence for the purpose of proving *niskar* *Kanta Mohan* v *Basudeb Ghose*, 39 C W N 311, but see 12 Pat 285 = A I R 1933 Pat 285

SS 13 35, 32(5) (p 250) Where certified copies of decree and of two pedigrees with it are produced the Court may presume that the two pedigrees were filed in suit Both pedigrees should be admitted as pedigrees filed by the respective parties to the suit and not as evidence of relationship

under s 32(5). The statements in the decree that the pedigrees are filed in evidence under s. 35 as an entry in a public record, or under s 13, as evidence of the course of proceedings in a suit *Collector of Gorakhpur* v *Ram Sundar*, 56 A 468=40 L W. 217=38 C W. N. 1101 16 P L T 531=60 C L J. 67=36 Bom L. R 867=1934 M W. N. 751=11 O. W. N. 889=1934 A. L J. 779=67 M. L J 274 (P. C)

S 14 (p 277) To prove habit and association, evidence of previous conviction is admissible *Bene Madho* v. *Emperor*, A. I R. 1933 Oudh 355 =10 O W. N. 688=146 Ind Cas 1064.

S 14 (p 282). Views held by the accused show his conduct and as such relevant under this section. *Manabendra* v. *Emperor*, A. I. R 1933 All. 498=1933 Cr C 833.

S 16, illus (b) and s 114, illus (f). (p. 300) A registered letter which is proved to have been correctly addressed and posted and which did not come back, must be presumed to have reached the addressee, although the latter's signature on the acknowledgment receipt may not be proved. *Rajani Sutradhara* v. *Baikuntha Chandra*, 39 C W. N 1041.

S 17. (p 313) Where in a document executed by a woman there was an admission and the fact that she made the statement was relevant in a suit in which the document was proved *Held* that the admission should also be held to be proved even though the woman was not examined A I R 1935 Lah. 628

S 18. (p 320) Admission is the best evidence of the party making it. *Nanilal* v *Nutbehari*, 38 C. W N 861

SS 18, 21. (p. 322) In case of admission by a party, admission must be relied as whole and not by pieces *Durshan Singh* v *Baldeo Singh*, A I R 1934 Oudh 370

S 18. (p 325) Under s 18 a statement made by a servant is admissible in evidence against his master both as regards his position, if it is in dispute, as to whether he is a servant and as regards his liability as such Occupying the position of a servant does not involve as one essential ingredient acting in the course of his employment The driver of a lorry is a servant of the owner of the lorry *M E Moses* v *Shaikh Bakridhore*, 39 C W. N 736

S 18 (p 333) Statement of opinion by counsel is not admission by party and so not binding on him *Kanti Prasad* v *Chait Narain*, A I R. 1934 All. 531

S. 18 (p 335) There is no rule of evidence under which the statement of one person can be regarded as the admission of another person merely on the allegation that the two are in collusion *Motiram* v *Sripal*, A I R 1934 All 684=151 Ind Cas 261

S. 18 (p 385) Admission by one partner binds another *Thomas Bear* v *Rulia Ram*, A I R 1934 Lah 625=148 Ind Cas 763

S 18. (p 385) Ordinarily an admission is admissible against the party making it or his privies To this principle there are exceptions, namely, of admissions made by joint contractors and joint owners But admissions made by such persons must be limited within legitimate bounds, which are two in number, namely, that the admission must relate to the subject matter of the suit and that it must be made by the declarant in his character of a person jointly interested with the party against whom evidence is tendered *Kanta Mohan* v *Makhan Satra*, 39 C. W. N 277, see also *Thomas* v *Rulia*, A I R. 1934 Lah 625

S 18 (p 353) Where a person offers to accept a smaller sum as a matter of compromise that offer is not an admission as to the proper amount due to him *Chandrika Prosad* v *Bombay Baroda Ry* A I R 1935 P C 59 = 1935 O W N 178 (P C)

S 21 (p 360) Confession is provable against accused unless prohibited by law *Sidheswar Nath* v *Emperor* A I R 1934 All 351 = 1934 A L J 178 = 152 Ind Cas 174

S 21 (p 361) The onus to prove the alleged joint ownership of the plot was initially on the plaintiff, but the proof of an admission shifts the onus because what a party himself admits to be true may reasonably be presumed to be so *Abady* v *Mumtazuddin* A I R 1934 Lah 662 = 35 P L R 578 = A L R 1934 Lah 853

S 21 (p 361) Admission made in prior suit can be used in subsequent suit, even when the admitting party in the prior suit is not a party in the subsequent suit. *Amarnath* v *Ralla Ram*, 35 P L R 463 = A I R 1934 Lah 527 = 149 Ind Cas 217

S 21 (p 361) An admission is no doubt a very good piece of evidence and under ordinary circumstances it would be taken as binding upon a party unless the party who makes the admission can explain it away *e g*, the document was executed by a *pardanashin* lady *Bholanath* v *Mritunjoy* 59 C L J 532 = A I R 1934 Cal 851 see also *Sidheswar* v *Emperor* A I R 1934 All 351 = 1934 A L J 178 = 152 Ind Cas 174

S 21 (p 361) Statement in admission must be taken as a whole *Sundara Rajah* v *Gopala Thevan*, 150 Ind Cas 132 = 39 L W 34 = A I R 1934 Mad 100, see also *Fakhir Khan* v *Ismail Khan* 14 Lah 218 = 34 P L R 149 = A I R 1933 Lah 179 *Darson Singh* v *Baldeo Singh*, 11 O W N 579 = A I R 1934 Oudh 370

S 21 (p 368) Admission not allowed to be explained cannot be used against maker *Latafat* v *Onkar* A I R 1935 Oudh 41 = 152 Ind Cas 1042 = 1934 O L R 922 = 11 O W N 1589

SS 21, 13 (p 369) Document containing admission by third party can be allowed in evidence not as admission but as proof of transaction mentioned *Jasoda* v *Punit* A I R 1934 Pat 48 = 146 Ind Cas 937

S 21 (p 369) A statement in a judgment that a witness admitted certain things is not admissible to prove the admission unless it is proved that primary evidence is not available *Medavaruppa* v *Medavaruppa* A I R 1935 Mad 268 = 40 M L W 810

S 24 (p 393) When a confession is used against a person the whole confession must be introduced *Mahomed* v *Emperor* A I R 1934 Lah 620 = 35 P L R 659 see also *Pathani* v *Emperor* A I R 1934 Lah 673 = 152 Ind Cas 1077

S 24 (p 393) Where part of confession is found to be false the entire confession need not be rejected *Emperor* v *Shankar* A I R 1934 Oudh 222 = 11 O W N 626 = 35 Cr L J 894

S 24 (p 395) Clear consistent and convincing extra judicial confession should be believed *Ramappa* v *Government of Mysore* 12 Mys L J 73

S 24 (p 409) Plea of guilty under s 271 (2) Cr Pro Code is not confession as dealt with in s 24 *Srikanti Das* v *Emperor* A I R 1934 Pat 256 = 35 Cr L J 1217

S 24 (p 409) For rejecting confession lesser degree of probability is required because the word used is appear and not proved *Ajyeb Shana* v. *Emperor*, 61 C 399 = 38 C W N 659 = 35 Cr L J 1479 = A I R 1934 Cal 636 = 152 Ind Cas 44

S 24 (p 40?) Where the main foundation for the conviction is the confession alleged to have been made by the accused, there are three things which the prosecution must establish (a) that a confession was made, (b) that evidence of it can be given, (c) that it is true *Bhojo* v *Emperor*, A I R 1934 Sind 172 = 1934 Cr C 1274 = 152 Ind Cas 1032

S 24 (p 409) A voluntary confession if uncorroborated by circumstances is admissible in evidence *Bhuvar* v *Emperor*, 9 O. W N. 1191

S 24 (p 417) Mere belief of accused that person to whom confession is made is person in authority is not sufficient Such person must have authority to interfere *Mukhis* are not persons in authority *Bhojo* v *Emperor*, A I R 1934 Sind 172 = 1934 Cr C 1274 = 152 Ind Cas 1032

S 24 (p 417) Honorary Magistrate who is also *Zaildar* is a person in authority *Hesmat* v *Emperor*, A I R Lah 417 = 1934 Cr C 643 = 15 Lah 417 = 1934 Cr C 643

S 24 (p 427) Unqualified expression "you had better tell the truth" amounts to inducement *Hasmat* v *Emperor*, A I R 1934 Lah 417 = 1934 Cr C 643 = 152 Lah Ind Cas 998 = 15 Lah 856 = 37 P L R. 25

S 24 (p 436) It is rule of practice and not of law that retracted confession requires corroboration *Bhojo* v *Emperor*, A I R 1934 Sind 172 = 152 Ind Cas 1032, see also *Chinnaga* v *Government* of *Mysore* 11 Mys L 407, *Imamuddin* v *Emperor* 150 Ind Cas 862 = 35 Cr L J 1154 = 11 O W N 950 = A I R 1934 Oudh 388, *Jahangir* v *Emperor*, 35 Cr L J 180 = 150 Ind Cas 10 6, *Bhikar* v *Emperor* 35 Cr L J 1113 = 150 Ind Cas 810 = 11 O W N 851 = A I R 1934 Oudh 405, *Aishan Bibi* v *Emperor* 15 Lah 310 = 152 Ind Cas 206 = A I R 1934 Lah 150 = 1934 Cr C 330, *Marten* v *Emperor*, 35 Cr L J 1453 = A I R 1934 Lah 89 = 1934 Cr C 172, *Nahnun* v *Emperor*, 151 Ind Cas 716 = 35 Cr. L J 1190 = 36 P L R. 2 A I R 1934 Lah 715, *Sheoratan* v *Emperor*, 35 Cr L J 1290 = 151 Ind Cas 298 = 11 O W N. 1012 = A I R 1934 Oudh 418

S 25 (p 441) Statements which are not of incriminating nature is not confession *Mustafa* v *Emperor*, 35 P L R 359, see also *Rudrappa* v *Government* of *Mysore* 11 Mys L J 438, *Misri* v *Emperor*, A I R 1934 Sind 100 = 35 Cr L J 1332

S 25 (p 442) A chaukidar is not a police man A I. R 1934 All 132 = 35 Cr L J 448 = 1934 A L J 143

S 25 (p 442) Village headman is not police officer *Ramcharan* v *Emperor*, A I R 1935 All 549 = 1935 A L J 478 = 36 Cr L J 636

S 25. (p 443) Excise officer is police officer within meaning of s 25 *Amin Shariff* v *Emperor*, A I R 1934 Cal 580 = 61 C 607 = 150 Ind Cas 561 = 35 Cr L J 1071 = 59 C L J 555 = 38 C W N 930 = 1934 Cr C 841 (F. B), see also *Keratali* v *Emperor* A I R 1934 Cal 616 = 61 C 967 = 150 Ind Cas 980 = 38 C W N 1005, *Ram Karin* v *Emperor*, A I R 1935 Nag 13

S 25. (p 443) Sub divisional Magistrate is not police officer *Srikant Das* v *Emperor* 150 Ind Cas 991 = 35 Cr L J 1217 = A I R 1934 Pat 256

S 25 (p 444) An admission of the accused to the Excise Sub-inspector is inadmissible under s 25 *Rijmal* v *Emperor*, A I R 1934 Nag 136 = 1934 Cr C 568 = 150 Ind Cas 1144 = 35 Cr L J 1233

S 25 (p 445) First information by accused to police officer admitting guilt is inadmissible being confession *Harnam* v *Emperor* A I R. 1935 Bom 26 = 36 Bom L R 1117

Ss 25, 26, (p 445) Evidence of police officer and complainant as to pointing out of various places by accused is evidence of his confession and as such not admissible under ss 25, 26 *Turab* v *Emperor* A I R 1935 Oudh 1 = 11 O W N 1385 = 152 Ind Cas 473 = 1934 O L R 875

S 25 (p 446) Where confession was made to private individual in presence of *chaukidar*, but where *chaukidar* does not take part in bringing about confession, confession is admissible *Emperor* v *Shankar*, 149 Ind Cas 69 = 35 Cr L J 894 = 11 O W N 636 = A I R 1934 Oudh 222

S 26 (p 448) A chaukidar is a police officer *Jangli* v *Emperor*, 148 Ind Cas 475 = 35 Cr L J 664 = 11 O W N 119 = A I R 1934 Oudh 19

S 26 (p 448) Confession to a fellow prisoner in lock up in the presence of guard of the lock up is not inadmissible A I R 1934 Lah 75 = 1934 Cr C 142 35 Cr L J 1432 = 15 Ind Cas 894 see also *Barnabas* v *Emperor* 152 Ind Cas 275 – 15 Pat L T 111 = A I R 1934 Pat 586

S 26 (p 448) Confession to Magistrate himself while in police custody satisfies requirements of s 26 *Sidheswar Nath* v *Emperor*, A I R, 1934 All 351 = 1934 A L J 178 152 Ind Cas 174

S 26 (p 448) Bare possibility of inducement having been offered is not sufficient for holding confession is irrelevant *Hashmat* v *Emperor*, 15 Lah 856 = 37 P L R 25 = A I R 1934 Lah 417

S 26 (p 448) Magistrate in Native State is included in s 26 *Mahomed Bux* v *Emperor* A I R 1934 Sind 103 = 1934 Cr C 82 = 151 Ind Cas 311 = 35 Cr L J 1328

S 26 (p 448) Statement containing denial by accused of dishonest intention is not confession *Ramsakh a* v *Emperor* A I R 1934 Pat 651 = 1 P L T 586

S 26 (p 448) Mere presence of Magistrate will not make confession voluntary *Krishna Iyer In re* A I. R 1935 Mad 479 – 1935 M W N 82

S 26 (p 448) Formalities of law should be strictly followed in recording confession *Ram Sakhia* v *Emperor* A I R 1934 Pat 651 = 15 P L T 586

S 29 (p 449) Statements made by the accused to a Magistrate when produced by the police for purpose of remand are admissible *Nga Po Dwe* v *Emperor*, A I R 1935 Rang 78 = 1934 Cr C 491 = 148 Ind Cas 1002 = 35 Cr L J 823.

S 27 (p 454) Section 27 is a proviso to both the sections 25 and 26 which immediately precede it *Emperor* v *Ramanuja* A I R 1935 Mad 528 = 1934 M W N 1479

S 27 (p 456) The word fact as used in s 27 only includes physical fact *Emperor* v *Ramanuja* A I R 1935 Mad 528 = 1934 M W N 1479

S 27 (p 461) Section 162 does not apply to the statement of an accused person Such a statement would however be inadmissible under s 27, if it is of a nature of a confession and no material fact is discovered in consequence of the information received *Mohammad* v *Emperor*, A I R 1934 Lah 695 = 35 P L R 738

S 27 (p 461) Where a person is in police custody, such of his statements as lead to the discovery of articles are admissible *Aishan* v *Emperor* A I R 1934 Lah 150

S 27 (p 458) If a fact has been previously discovered by the police s 27 would not apply *Chiragdai* v *Emperor* A I R 1934 Lah 786 = 36 P L R 40, see also *Har Narain* v *Emperor* A I R 1934 Lah 313 = 35 P L R 203 = 1934 Cr C 545 = 36 Cr L J 189

S 27 (p 468) Section 27 does not operate to make admissible in evidence a confession which would be otherwise irrelevant under s 24 Section 27 would make admissible only that part of the confession in consequence of which a fact deposed was discovered *Hashmat* v *Emperor*, 15 Lah 856

S 27 (p 458) Statement of accused that leads to discovery of anything by police is only admissible *Ghandalal* v *Emperor*, A I R 1934 Sind 159 = 28 S L R 41 = 1934 Cr C 126

S 27 (p 468) Only statements bearing directly on the recovery of property are admissible Where therefore A stated that he handed on the property to B and B stated that he handed on to C and C to D and D to E, and recovery was made from E, the statements of A, B, C, D, have direct bearing on the recovery of the property, although they may have had an indirect bearing in giving the police a fresh starting point for investigation and they cannot be admitted *Maganlal* v *Emperor*, A I R 1934 Nag 71 = 30 N L R 269 = 35 Cr L. J 1097 = 150 Ind Cas 623 = 1934 Cr C 276

S 27 (p 468) Court should direct statement and admit only such portion as directly led to discovery *Emperor* v *Salve*, A I R 1934 Bom 233 = 36 Bom L R 384

S 27 (p 468) It is not necessary that the information given by a person in the police custody shall be a confession before it can be proved under the provision of this section Any information which relates distinctly to the fact deposed to as discovered in consequence of the information received may be passed *Emperor* v *Ramanuji*, A I R 1934 M W N 1479 = A I R 1935 Mad 528

S 29 (p 474) The provisions of s 164 Cr Pro Code do not affect the provisions of s 29, Evidence Act, and therefore a confession cannot be excluded from evidence as irrelevant merely because all the provisions of s 164 were not carefully complied with *Khitab* v *Emperor*, A I R 1934 Oudh 404 = 10 O W N 937 = 146 Ind Cas 905

S 30 (p 481) Before any statement made by one of the accused person tried jointly with the others can be taken into consideration against such others it must fulfil two conditions (a) it must be a confession of guilt affecting himself equally with the others, and (b) it must be proved against those persons who are jointly tried with him This section introduces a departure from the ordinary rule relating to the admissibility of evidence and must be strictly construed *Nawab* v *Emperor*, A I R 1935 Lah 35

S 30 (p 482) A confession by each of the co accused throwing entire burden on the other is inadmissible as against the latter *Nawab* v *Emperor* A I R 1935 Lah 35

S 30. (p 483) No doubt under s 30 Evidence Act the confession of an accused person may be taken into consideration as against other co accused but this is not tantamount to saying that such confession is to take the place of proof *Kasimuddin* v *Emperor* 39 C W N 27 = A I R 1934 Cal 853 = 1934 Cr C 1368

S 30. (p 483) This section applies to proceedings under Cr Procedure Code s 110 *Richpal* v *Emperor* 152 Ind Cas 881 = 1934 A L J 1170 = 1934 Cr C 1246 = A I R 1934 All 927

S 30. (p 483) It is unsafe to rely upon confessions extracted under circumstances not free from doubt *Bhagwan Din* v. *Emperor*, A I R 1934 Oudh 151

S 30. (p. 485) Offence in s 30 includes its abetment and attempt *Richpal* v *Emperor*, 152 Ind Cas 881 = 1934 A L J 1170 = A I R 1934 All 927.

S 30 (p 488) If the statement of a person who is being tried jointly with the accused is a statement deprecating his own guilt, and seeks to clear himself at the expense of the accused, the statement cannot be taken into consideration under s 30 Evidence Act, or any other provision of the law as against the accused *Jogendra Nath* v *Emperor*, A I R 1934 Cal 724 = 152 Ind Cas 924 = A L R 1934 Cal 411

S 30 (p 488) The word 'proved' means proved before the prosecution case comes to an end either proved in the course of the prosecution case or proved in some proceedings previous to the trial *Nawab* v *Emperor*, A I R 1935 Lah 35

S 30 (p 496) Retracted confession and co accused *vide Jahangir Lal* v *Emperor* 150 Ind Cas 1056 = 35 Cr L J 180, A I R 1934 Pat 586 = 15 P L T 711 = A I R 1934 Pat 586, *Kuladip* v *Emperor*, A I R 1934 Lah 718, *Sheoratan* v *Emperor*, A I R Oudh 418 = 35 Cr L J 1290, 11 O W N 1012 = 35 Cr L J 1290, A I R 1934 Pesh 1 = 35 Cr L J 739

S 32 (p 518) The expression 'written statement by person who is dead' means statement actually written or dictated by deceased *Nga Mya* v *Emperor*, A I R 1936 Rang 42

S 32 (1) (p 540) Statements made by a person who is dead must be proved whether they are written statements or verbal statements If they are verbal statements, the persons who heard the deceased make the verbal statements must be examined on oath as witness *Nga Mya Di* v *Emperor*, A I R 1936 Rang 42

S 32 (1) (p 540) Statement by person who is dead as to cause of death is admissible though he was not aware of his impending death when he made the statement *Inayat* v *Emperor*, A I R 1935 Lah 54, see also A I R 1934 Lah 805 = 36 P L R 24

S 32 (1) (p 540) It is not safe to base conviction on dying declaration alone A I R 1934 Oudh 405 = 11 O W N 851 = 35 Cr L J 1113

S 32 (1) (p 540) In a trial for robbery statement of a person before death regarding the circumstances of robbery is relevant under s 32 (1), even though death was caused remotely by the wounds received at robbery *Nga Ba Min* v *Emperor*, A I R 1935 Rang 418

S 32 (1) (p 540) A magistrate should be very careful in recording dying declaration He should see that the declarant does not get any hint or help from outside *Nem Singh* v *Emperor* A I R 1934 All 908 = 152 Ind Cas 41 = 1934 Cr C 1167

S 32 (2) S 34 (p 552) To prove books of accounts writer of the account book if alive should be called *Gajendra* v *Shankar*, 11 O W N 1323 = 152 Ind Cas 4 8

S 32 (2) and s 34 (p 552) Books of account, if no balance have been struck in them may be inadmissible under s 34 but they are however admissible under s 32 (2) as entries or memoranda made by persons who are dead, in books kept in the ordinary course of business *Babuaji* v *Ratanlal* A I R 1934 Nag 106 = 30 N L R 192

S 32 (2) (p 552) Statements of boundaries of title between third parties are not admissible under s 32 (2) as this cannot be deemed to be statements made by persons in ordinary course of business *Soney Lal* v *Darbdeo Narain*, A I R 1935 Pat 167 = 16 P L I 199 (F B)

S 32 (3) p 553) A statement in a sale deed by the executant that he was liable for a particular amount is admissible under s 32 (3) as a statement made against the pecuniary or proprietary interest *Babhnaji* v *Ratanlal*, A I R 1934 Nag 106 = 30 N L R 192 = 140 Ind Cas 1033

S 32. (3) (p 553). A statement in order to be admissible under s 32 (3) must be a statement of a relevant fact and must be against the proprietary interests of the person making it *Soney Lall* v *Darbdeo Narain*, A I R 1935 Pat 167 = 16 P L T 199 (F B)

S 32 (3) (p 561) Statement which makes a person liable to criminal prosecution is admissible *Gerold* v *Olga*, 150 Ind Cas 445 = A I R 1934 All 618 (F. B); but see *Kunjalal* v *Emperor*, 38 C W N 1015

S 32 (3) (p 571) Statements of boundaries in documents of title between third parties are not admissible under s 32 (3). Such a statement cannot be said to be necessarily and *prima facie* against the proprietary interest of person making it It will be admissible only if it is shown that (1) at the time it was made it was contrary to interest of maker and (2) at the time it is sought to be used it is a statement of relevant fact *Soney Lall* v. *Darbdeo*, A I. R 1935 Pat 167 = 16 P L R 199 (F. B)

S. 32 (3) and (7) (p 573) Where there is recital in deed that land in deed is bounded by property over which another person exercises proprietary rights, recital is no evidence against third party *Hari Ahir* v *Sanglat Chada*, A I R 1934 Pat 617 = 152 Ind Cas 829

S 32 (p 597) Entries in books of priests are admissible but should be accepted with care. *Acharaj Ram* v *Ganesh Das*, A I R 934 Pesh 78

S 32 (p 597) Statement as to age of adopted son by adoptive mother is admissible under s 32 (5) *Naina* v *Basant* A I R 1934 All 406 (F. B) = 1934 A L J 318

Ss 32 (5) and 50 (p 600) Statement of witness as to relationship between two persons can be admissible only under s 32 (5) or s 50 *Chunna Kumar* v. *Mukhat Beharilal*, A I. R 1934 All 117.

S 32 (5) (p 600) Party producing a witness for proving pedigree, should elicit from his requirement under s 32 (5). *Chunna Kumar* v *Makhat Behari Lal*, A I R 934 All. 117

S 32 (5) (p 600). Where the relationship is created by adoption is of such importance and specifically included in the act, evidence of incidents bearing more or less directly on the fact or otherwise of an adoption and its validity would be allowed subject of course to careful scrutiny as to value *Haridas* v *Manmatha Nath*, A I R 1936 Cal 1

S 32 (5) (p 600) Where pedigree was filed for purpose of preparation of *Khewat*, and document was more than 30 years old and signatories are all dead, pedigree is admissible *Mahadeo* v *Suraj Bali*, 148 Ind Cas 1041 = A I R 1934 Oudh 210

S 32 (5) (p. 600). Pedigree table relied on in previous suit is not admissible under s 32 *Jagmahar Singh* v *Sidhu Ram*, A I R 1934 Lah 283 = 36 P L R 503 = 15 Lah 688 = 149 Ind Cas 943

S 32 (6) (p 601) Hearsay evidence is to be restricted to proof of pedigree and not to proof of birth, death, etc *Naima* v *Basant*, A I R 1934 All 406 (F B) = 1934 A L J 318

S 33 (p 616) Section 33 makes evidence given by a witness in "a judicial proceeding" admissible in evidence in a subsequent judicial proceeding, where the question in controversy in both proceedings is identical and where the witness is dead or cannot be found or is incapable of giving evidence *Sri Krishna* v. *Ahmadi Bibi*, A I R 1935 All 187 = 1935 P L J 235

S 33 (p 616) Where in a case under ss 366 and 458, Penal Code, the horoscope of the accused was produced to show that the girl was below 16 years of age as the person, preparing the horoscope was examined in the committing Court and he admitted that the horoscope was prepared by him but he did not

appear in the Sessions Court though summoned, and it was alleged that he did not get the summons. *Held* that it was not open to the prosecution to invoke s 33, Evidence Act, and the Sessions Judge was right in refusing to admit evidence given in the lower Court *Superintent* v *Forhad*, A. I. R 1934 Cal 766

S 33 (p 616) An inquiry before the Coroner, although it may be a judicial proceeding, is not a proceeding between the prosecutor and the accused. The proceedings before the Coroner are merely an inquiry into the circumstances leading to the death of the person whose death is under inquiry, and it is impossible to say that the Crown is a party to those proceedings, even if it can be said that the accused is a party on the ground that he was during those proceedings a suspect. Hence the evidence given by a witness before a Coroner is not admissible under s 33 if such witness dies prior to inquiry before Magistrate *Emperor* v *Mahomed Yusuf*, A I R 1933 Bom 479

S 33 (p 622) The statement made by a perrson before a committing Magistrate can be transferred to the record of the Sessions Judge only if the person is examined as a witness before the Sessions Judge If such a person is not examined before the Sessions Judge as a witness his statement can not be transferred under s 288, Cr Pro Code The proper section applicable is section 33 Evidence Act, but in such a case it is necessary for the Sessions Judge to hold that the witness was incapable of giving evidence within the meaning of that section *Emperor* v *Nathu Singh* A I R 1934 Lah 212 = 35 P L R 75 = 35 Cr L J 349 - 149 Ind Cas 234

S 33 p 623) A witness who had been brought from Calcutta and examined on two occasions once before framing of the charge and again after framing of the charge was cross examined and re examined in great detaill so that there could be no doubt that all that could be got out of this witness had been got out of him The complainant was not a man of means to bring such witness from Calcutta, for the *de novo* trial must have been a very heavy drain on his purse Moreover there would be delay in securing attendance of such a witness *Held* that the difficulty and expense involved in calling this witness were sufficient to make such evidence admissible under s 33 *Frnandis* v *Emperor*, A I R 1935 Rang 484

S 33 (p 626) The person who is called by Proviso (1) "a representative in interest' of another is a person who was a party to the first proceedings Whatever may have been the intention of those who framed the section, the first proviso exactly inverts the requirements of the English law, which requires that the parties to the second proceedings, should legally represent the parties to the first proceeding, or be their privies in estate The first proviso requires that the party to the first proceeding should have represented in interest the party to the second proceeding in relation to the question in issue in the first proceeding to which 'the facts which the evidence states' were relevant It covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist, *viz*, (1) the interest of the relevant party to the second proceeding in the subject matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical There may be other cases covered by the first proviso; but if both the above conditions are fulfilled, the relevant party to the first proceeding in fact represent in the first proceeding the relevant party to the second proceeding in regard to his interest in relation to the particular question in issue in the first proceeding, and may grammatically and truthfully be described as a representative in interest of the party to the second proceeding What the first proviso aims at securing is that the evidence shall not be admitted unless the person who tested, or had the opportunity of testing, the

evidence by cross examination either is himself or represented the interests of, the party to the latter proceeding against whom the evidence is tendered *i e* that he was (in the latter case), in effect, fighting that person s battle as well as his own Where a party to the second proceedings were not himself a party to the first proceeding the admissibility of the evidence in favour of such a party must be tested by its admissibility if tendered against him If not admissible against him it cannot be admissible in his favour *Krishnayya* v *Venkata*, A I R 1933 P C 202 = 60 I A 336 = 1933 P L J 1039 = 38 L W 409 = 1933 M W N 191 = 38 C W N 1 = 35 Bom L R 1076 = 58 C L J 305 = 65 M L J 479

S 33 (p 629) The accused has a right to cross examine a prosecution witness before the charge is framed against him and if he has failed to do so not only had he opportunity but he had the right of cross examining the witness and the action of the Court in treating the evidence of any such witness under s 33 is justified when it is found impossible to produce him for further cross examination under the provisions of s 256 Cr Pro Code *Gurudin* v *Emperor*, A I R 1935 Nag 8

S 33 (p 629) Actual cross examination by adverse party is not necessary, it is enough if there was opportunity to cross examine *Gouri Dutta* v *Dowring* A I R 1934 Pat 413 = 151 Ind Cas 683

S 34 (p 638) Entries in account books by the agent of a party are irrelevant against the party under this section *Nanilal* v *Nutbehari Das*, 38 C W N 861

S 34 (p 638) A day book which has been entered after four months from the happening of an event and the rough notes of which are available is not a document which can be held to have been kept in the regular course of business These remarks apply *a fortiori* to ledger which is prepared from such a day book *Arjan Singh* v *Sirjan Singh* A I R 1935 Pesh 44 see also *Nanilal Dis* v *Nutbehari Das*, 38 C W N 861 *Nanak Chand* v *Parameshri Das* 35 P L R 539

S 35 (p 65) Guardianship certificate does not fall under this section *Naina* v *Basant* A I R 1934 All 406 (F B) 1934 A L J 318

S 35 (p 651) Entry as to age in school register based on statement by father since deceased is admissible under ss 35 and 32 (5) *Latafat* v *Onkar Mal* A I R 1935 Oudh 41 = 152 Ind Cas 1042 = 11 O W N 1589, see also *Las Baba* v *Government of Mysore* 12 Mys L J 133 = 39 Mys H C R 406 *Liladhar* v *Mabibi* A I R 1934 Nag 44 = 16 N L J 232 = 149 Ind Cas 660

S 35 (p 651) Municipal register is admissible under section *Ju* *Bhagwan* v *Guttoo*, 11 O W N 410 = A I R 1934 Oudh 67

S 35 (p 6) The words an entry
the opinions of public officer based on or
made before them in the course of enqui
Code *Ghanayi* v *Mehleb* A I 1934 Lah 890

S 35 (p 651) The very wording of s 3 conveys the idea of a duty imposed upon the matter of the entry by law or his official position to record the information he possesses or has gathered in an official document of the nature described therein It further imports that the entry will be of a permanent nature *Ghulam* v *Sunandar* A I R 1936 Lah 37

S 35 (p 651) Entries as to age in vaccination and school register *vide* *Superintendent* v *Forhad* A I R 1934 Cal 766

S 35 (653) The *Khasra Girda vars* are public documents and admissible under s 35 *Mohammad Din* v *Fateh Din* A I R 1934 Lah 698 = 35 P L R 725 = 153 Ind Cas 209 = 1934 Cr C 1010

S 35 (p 653) The documents consisting of mere opinions expressed in secretarial correspondance which passed between various officers of the Government who had held no personal enquiries in the matter are admissible in evidence *Ghulam Mohammad* v *Samundar Khan*, A I R 1936 Lah 37

S 35 (p 654) A certificate of birth of a person is evidence and conclusive evidence of his age unless disproved by the evidence of the witness of the party denying correctness of it *Nanhak* v *Baijnath*, A I R 1935 Pat 474 = 16 P L T 629

S 35 (p 654) Public servant need not be compelled by legislative enactment to discharge duty of preparing or keeping document *Phakkar* v *Progji*, A I R 1935 Oudh 268 = 1935 O W N 321 = 154 Ind Cas 575 = 1935 O L R 176

S 35 (p 657) The entries in the *riwajiam* owe their weight to the principle originally laid down in English law which received statutory recognition in s 35 Evidence Act The principle is that statements made by a public officer should be receivable in evidence because it is his duty to satisfy himself of the truth of the statements made If the officer himself is not satisfied of the truth of the statements made such statements have less weight than they otherwise would *Sukh Devi* v *Faquir Singh*, A I R 1935 Lah 434

S 35 (p 658) *Butwara* record is not conclusive evidence It is weak evidence of title *Charan* v *Ramani*, 60 C 302 = 38 C W N 268 = A I R 1934 Cal 488

S 35 (p 658) As regards admission *vide Narasayya* v *Veerayya*, 40 L W 810

S 35 (p 660) The *Khara Girdadavaris* are public documents *Mahamed* v *Fateh*, 151 Ind Cas 786 = 35 P L R 405 = A I R 1934 Lah 698.

S 35 (p 660) An entry in the first information report is admissible under s 35 of the Act *Babu* v *Government* of *Mysore*, 11 Mys L J 475 = 39 Mys H C R 75

S 35 (p 660) The *Khasra parmash* is not a record of title but a mere record of survey and carries with it no presumption of correctness so far as the question of ownership is concerned *Kartar Singh* v *Mehr Nishan*, A I R 1934 Lah 885

S 35 (p 660) As regards value of entries in survey record *Kumar Kamakhya* v *Abhim Singh*, 13 Pat 589 = 39 C W N 41 = 150 Ind Cas 807 = 11 O W N 1025 = 1934 A L J 793 = 1934 M W N 870 = 15 Pat L T 555 = 40 L W 342 = 60 C L J 153 = A I R 1934 P C 182 = 64 M L J 450 (P C)

S 36 (p 666) *Thak maps* are good evidence of the state of things at the date of the Permanent Settlement in the absence of evidence to the contrary *Kumar Raj* v *Barbani coal*, A I R 1935 Cal 366 = 62 C 316 = 60 C 477

S 40 (p 682) *Vide Hridayanath* v *Probodh chandra*, A I R 1933 Cal 923 = 37 C W N 1148 = 60 C 1171 = 57 C L J 549, *Ramparekha* v *Ram Jhari*, A I R 1933 Pat 690

S 41 (p 690) A judgment in heirship proceeding is not a judgment *in rem* in a matrimonial Court which would be binding under s 41 Evidence Act *Bajaza* v *Parvatleva*, 144 Ind Cas 442 = 35 Bom L R 118 = A I R 1933 Bom 126

S 41 (p 693) A decree under s 42 Specific Relief Act but not in exercise of matrimonial jurisdiction is not a judgment *in rem* *Khambata* v *Khambata*, 6 Bom L R 1021

S 41 (p 694) A judgment in Insolvency proceeding is a judgment *in rem* *Bansiram* v *Firm Ananda Ram*, A I R 1935 Pat 273,

S 41 (p 695) An order in lunacy proceeding, *vide Subba Naicker* v *Solaippa*, 56 M 904 = 1933 M W N 514 = A I R 1933 Mad 624 = 65 M L J 279

S 42 (p 699) A judgment relating to *wakf* property is a judgment of a public nature *Misbahuddin* v *Vidyasagar*, 36 P L R 106

S 42 (p 700) Judgment in which existence of usage has been judicially recognised is admissible but is not conclusive proof *Ragunath* v *Rampertab*, A I R 1935 Sind 38

S 43 (p 704) Previous judgment in main suit becomes relevant in objection proceedings in execution of decree *Vednatu* v *Mahomed*, A I. R. 1934 Rang 212 = 154 Ind Cas 123

SS 43, 11, 13 (p 704) Previous judgment not *inter partes* though does not operate as *res judicata* is admissible in evidence for limited purpose but not for discussing basis of its decision *Hemchandra* v *Purnachandra*, 59 C L J 320 = A I R 1934 Cal. 788 = A L R 1934 Cal 653

S 44 (p 705) S 44 has no application to proceedings under s 73 C P Code It is only decrees under ss 40, 41, and 42, Evidence Act, which are referred to in s 44, Evidence Act, and such decrees have no application in execution proceedings *Biswambhor* v *Aparna*, A I R 1935 Cal 290 = 39 C W N 490

S 44 (p 705) *Vide Keshavlal* v *Amarchand*, A I R 1933 Bom 398 = 35 Bom L R 630 = 57 B 456

S 44 (p 705). S 44 has no application to proceedings under s 73 C P Code It is only decrees under ss 40, 41, 42, Evidence Act, which are referred to in s 44, Evidence Act, and such decrees have no application in execution proceedings *Biswambar* v *Aparna*, A I R 1935 Cal 290 = 39 C W N 490

S 44 (p 742) Orders issued by Courts without authority is not binding on another Court *Keshablal* v *Amarchand*, A I R 1933 Bom 398 = 35 Bom L R 630 = 57 B 456

S 45 (p 734) A Court is not to surrender his own opinion to that of experts who are called before it, but with such help as the experts can afford the Court must form his own opinion on the subject in hand *In the matter of an Advocate*, A I R 1935 Rang 178

S 45 (p 735) Report of expert by itself is not evidence Expert should be produced in Court and his evidence should be tested by cross examination *Bhoore Singh* v *Karan Singh*, A I R 1935 All 142 = 1935 A W R 76

S 45 (p 735) In case of expert opinion basis of expert s opinion should be put before court *Tilli* v *Alfred*, 1934 A L J 1129 = A I R 1934 All 27

S 45 (p 742) As regards value of evidence of interpreters of Hindu law, *Vide* *Sabitri* v *F A Savi*, 12 Pat 359 = 14 Pat L T Sub I = A I R 1933 Pat 306

S 45 (p. 743). Doctor s opinion as regards age is not entitled to more weight than that of any other person *Nasrullah* v *Emperor*, A I R 1934 Oudh 32 = O W N 1274

S 45 (p 746) Judge should not take upon himself the duties of hand writing expert or form opinion about genuineness in privacy of his chamber. *Barkat Ali* v *Kirtar Singh* A I R 1935 Lah 555 = 156 Ind Cas 253. Objection in revision is not competent *Karam Din* v *Ata*, A I R 1934 Lah 230

S 45 (p 753) The evidence of handwriting expert has often found to to be faulty bu so far as finger prints are concerned it has never so far been found that two finger prints can be identical in all respects Hence where the execution of an entry is proved by evidence of thumb impression experts, the burden of proving want of consideration is on the executant *Ganga Sahai* v *Molar*, A I R 1935 Lah 147

S 45 (p 753) Evidence of expert that one document has been typed on same machine as another is not admissible, Court must come to its own conclusion on such point *Bacha Babu* v *Emperor* A I R 1935 All 162, see also *Jhabwala* v *Emperor*, 1933 A L J 799=34 Cr L J 957=A I R 1933 All 690, *Manibendra* v *Emperor*, A I R 1933 All 498

S 45. (p 754) Where a marriage is attacked on the grounds of non-observance of ceremonies, the Court is not bound to accept the opinion of a religious expert however high his position may be placed in church *Titli* v. *Alfred*, 56 A 428=1934 A L J 1129=A I R 1934 All 273

S 45 (p 756) The Imperial Geologist is a highly responsible officer and a duly qualified scientist who would never venture to give any definite opinion on a question unless he has the fullest scientific data in support of his conclusion His opinion therefore is entitled to great weight. *Ghirrao* v *Emperor*, A I R 1933 Oudh 265=34 Cr L J 1009=145 Ind Cas 470

S 47 (p 762) Where the only witness was examined to prove a particular letter to be in the handwriting of the accused stated "I have no writing of H with me I have no correspondence with him From a single letter I would not be able to identify the handwriting of any person I was not particularly friendly with H *Held* that the evidence was hardly sufficient under s 47 to prove that the letter was in the hand writing of H *Hemraj Lodhi* v *Ramcharan Lodhi* A I R 1934 Nag 204=1934 Cr C 898

S 47 (p 762) Where the fact to be proved is a signature and a witness merely says that the signature is of the person concerned there is no proper evidence of the facts required to be proved under section 47 *Surendra Krishna* v *Mirza Mahamad*, 40 C W N 226 (P C)

S 4 (p 762) A finding of the lower Court to the effect that a person unable to read and write certain characters could prove the handwriting of another person in those characters because he had the occasion to see the latter write, cannot be questioned in second appeal because, though such a thing is rare, is not impossible *Ram Chandra* v *Jaith Mall*, A I R 1934 All 990=4 A W R 676

S 47 (p 769) Statement by another in writing with regard to partnership cannot be proved different person. *In the Matter, of B*, A I R 1935 All 1023=1935 A W R 1229

S. 48 (p 773) A living witness may state his opinion on the existence of a family custom and may state as grounds thereof information derived from deceased person, but it must be the expression of independent opinion based on hearsay and not repetition of hearsay The weight of the evidence would depend on the position and character of the witness, and of the persons on whose statements he has formed his opinion However, evidence, oral or documentary as to statements of a deceased person as to the custom in a family is not admissible if it appears that such statement were made after a controversy as to the custom had arisen *Amina Khatun* v *Khalilurrahman* A I R 1933 Oudh 246=8 Luck 445=10 O W N 268.

S 48 (p 773) Value and sufficiency of expert evidence cannot be questioned on second appeal *Jafar Beg* v. *Ujagar Lal* A I R 1935 All 501

S 50 (p 778) Statement of witness as to relationship between two persons can be admissible only under s 32 (5) or s 50 *Chunna* v. *Mukat*, 151 Ind Cas. 338 = A I R 1934 All 117

S 51 (p 784) No doubt the Excise Sub Inspector is an expert in his ow ... ut the Court should under s ... based *Ram Karan Singh* vi ...

S 51. (p 784) It is not enough for the chemical examiner merely to state his opinion He must state the grounds on which he arrives at that opinion As the chemical examiner merely tenders a report and he does not appear and give evidence, it is extremely desirable that his report should be full and complete and take the place of evidence which he would give if he were called to Court as a witness *Gajram* v *Emperor* A I R 1934 All 394 = 144 Ind Cas 357 = 34 Cr L J 754 = 1933 Cr C 664

S 54. (p 802) Evidence of previous conviction cannot be admitted during trial It cannot also be referred to by Judge while addressing jury *Bhura Singh* v *Emperor*, A I R 1935 Sind 115

S 58 (p 8 o) Inspite of waiver of proof by an admission under s 58 Evidence Act, a note or other instrument insufficiently stamped cannot be acted upon or decree given upon it *Alipati* v. *Yasiraddi*, A. I R 1933 Mad 17 = 64 L J 79 = 37 L W 157 = 1933 M W N 663

S 58 (p 840) While s 58, can be invoked when the documentary evi dence about the admitted facts is shut out by p ovisions made in purely revenue laws, *it cannot be invoked to overrule the provisions of non revenue enactments*, nor can it be used to bind the party who has made an admission of the genuineness of a document, when such admission is accompanied by a legal plea that the contract and the other facts mentioned in that document could not be *relied upon by the opposite party owing to the provisions of the statutory* laws relating to registration or attestation *Bashehar Nath* v *Mian Feroz Sha*, A I R 1935 Pesh 12

S 60 (p 868) Hearsay evidence is excluded *Annamuthu* v *Emperor*, 1933 M W N 1424

Ss 60 48 (p 869) Person who holds an opinion should be cited as a witness *Amini* v, *Khalil*, A I. R 1933 Oudh 246

S 60 (p 869) The value of evidence depends upon the character of the person who deposes *Mulchand* v *Demgir* A I R 1933 Sind, 213

S. 60 (p 869) The fact that a person is a habitual offender may in view ... neral repute or otherwise ... *the rule against receipt* ... idence Act *Raghubar* v *Emperor* A I R 1934 All 735

S 65. (p 887) Where secondary evidence of the contents of a deed are led *without objection by the other party objection cannot* be *raised in second* appeal *Umeruddin* v *Ghulam Mohammad* A I R 193 Lah 628

Ss 65, 66 (p 894) The only purpose of a notice under section 65 and 66 of the Evidence Act is to give the party an opportunity by producing the original to secure if he pleases the best evidence of the *contents* and under section 66 the Court has absolute power when it thinks fit to dispense with a notice under these sections *Surendra Krishna* v *Mirza Mohammad* 40 C W N 216 = A I R 1936 P C 15, see also *Jhabvala* v *Emperor* A I R 1933 All 690.

S 65 (p 899) Where a Will has not been seen *for a long period of time*, a statement by a person in whose custody it is alleged to have been given, that

it is not with him and never was, is sufficient evidence of loss to satisfy s 65 *Kunwar Basant* v *Kunwar Brij Raj*, 39 C W N 1057

Ss 65, 90 (p 902) Where mortgage was admitted in *wajib u larz* more than 30 years old and signed by another for mortgage s 90 applies and mortgage can be proved by certified copy *Bhairon Prosad* v *Abalak*, 148 Ind Cas 1972 = A I R 1934 All 529

S 66 (p 915) The identity of the machine on which two have been type written would not by itself show that the writer of the two is one and the same person But such a conclusion may be drawn from additional evidence *e g* internal evidence afforded by the document, or external circumstances, or the continuity of the correspondence passing between the sender and the addressee *Jhabwala* v *Emperor* 145 Ind Cas 481 = 34 Cr L J 967 = 1933 A L J 799 = A I R 1933 All 690

S 67 (p 914) Thumb marks are not exempt from provisions of s 67 *Ramamanamma* v *Basarayya*, A I R 1935 Mad 558 = 40 M L W 277 = 1934 M W N 443 = 151 Ind Cas 990

S 67 (p 914) S 67 is not restricted to proof of handwriting of executant alone *Ponnuswami* v *Kalyan Sundara*, A I R 1935 Mad 365 = 57 M 662 = 66 M L J 712 = 149 Ind Cas 257 = 39 M L W 571 = 1934 M W N 38

S 67 (p 915) The meaning of the term "sign" is different from one as defined in s 3 of the General Clauses Act *Shazadi* v *Beni*, A I R 1934 All 390

S 68 (p 921) If signature of attesting witness is proved, everything on face of document is proved *Ponnuswami* v *Kalyan Sundaram* A I R 1935 Mad 365 = 57 M 662 = 66 M L J 712 = 149 Ind Cas 257 = 1934 M W N 384

S 68 (p 932) In a case where attestation according to law is specifically denied but the signing of the document required to be attested is not so denied it is necessary to call atleast one attesting witness to prove execution under s 70 of the Evidence Act *Ebrahan Mandal* v *Akshoy Konor*, 40 C W N 151, see also *Azizun nisa* v *Siraj Husain*, 1934 A L J 817 = 152 Ind Cas 146 = A I R 1934 All 507

S 68 (p 932) Where execution of mortgage was not specifically denied, marginal witness need not be called *Jhillar* v *Rajnarain*, A I R 1935 All 781 = 156 Ind Cas 45, see also *Gobinda* v *Chanan Singh*, A I R 1933 Lah 378; *Desai* v *Sheo Deo* 17 R D 70

S 68 (p 932) Proviso does not dispense with proof of mortgage *Kartar* v *Didar*, A I R 1934 Lah 282 = 149 Ind Cas 1109

S 69 (p 935) Where witness says that the executant signed his name in the mortgage deed in my presence and in the presence of the attesting witnesses and also identifies their signatures but did not say that the attesting witnesses signed in his presence, the requirements of section 69 have been fulfilled *Bhairon Singh* v *Ganga Narayan*, A I R 1935 All 527

S 73 (p 947) There is considerable doubt as to whether s 73 refers to an accused person at all *Kishore* v *Emperor*, A I R 1935 Cal 308 = 39 C W N 936

S 73 (p 947) A magistrate making an enquiry before commitment has no power under s 73 to ask another magistrate to direct an accused person to make a specimen signature for comparison with other writings *Kishor* v *Emperor*, A I R 1935 Cal 308 = 39 C W N 985

S 73 (p 949) Standard writing must be proved to be in alleged writer's handwriting Comparison is hazardous proof When made by stranger to subject

and without guidance from experts or arguments of Counsel *Lafat* v *Onkar*, A I R 1936 Oudh 41 = 152 Ind Cas 1042 = 1934 O L R 922 = 11 O W N 1589

S 74 (p 953) Education officers of a Government are public officers *Las Babu* v *Government* of *Mysore*, 12 Mys L J 133

S 74 (p 955) Certified copies of deposition are admissible *Karapaji* v *Mayandi* A I R 1933 Rang 212

S 74 (p 957) A certified copy of the pedigree given in the *Khewat* of village is admissible in evidence *Sheo Shankar* v *Mt Ram Dei* A I R 1935 Oudh 231 = 1935 O W N 162 = 1935 O L R 119

S 74 (p 957) Certified copies of confession are admissible *Mahamed* v *Emperor*, 1933 A L J 1551 (F B)

S 80 (p 968) Certified copies of confession are admissible to prove act of Magistrate recording it *Mohammad Ali* v *Emperor* A I R 1934 All 81 (F B) = 1933 A L J 1551 (F B)

S 80 (p 969) Dying declaration before Magistrate recorded by him is inadmissible in evidence without calling Magistrate as a witness *Suraj Bali* v *Emperor* A I R 1934 All 340

S 83 (p 978) Entry in cadastral survey map has presumptive value against landlord of neighbouring estate *Radha Kishun* v *Shyam Das* A I R 1933 Pat 671

S 87 (p 983) Maps prepared by Revenue authorities after due inquiry are presumed to be correct *Tarak Das* v *Secy of State* A I R 1935 P C 125

S 90 (p 988) In the case of documents purporting or proved to be 30 years old and produced from proper custody s 90 allows the Court to presume that the signature and every other part of such documents which purport to be in the handwriting of any particular person is in that person's handwriting and in the case of a document executed or attested that it was duly executed and attested by the persons by whom it purports to be executed and attested, under the General Clauses Act (10 of 1897) the word sign includes mark with reference to a person who is unable to write his name S 90 makes no provision for any presumption in regard to seals nor can a seal be regarded as a signature under the definition contained in the General Clauses Act *Special Manager* v *Tribeni Prosad* A I R 1935 Oudh 289 = 1935 O W N 387 = 1935 O L R 217 = 154 Ind Cas 965, see also *Nilima* v *Johorlal* 38 C W N 753

S 90 (p 988) When a sale has been made nearly 30 years before the suit is brought and all the parties to the transaction have died it is impossible to expect full and detailed evidence of all the circumstances that gave rise to the transaction and presumptions are permissible to fill in the details which have obliterated by time *Bibhutiji* v *Ratanlal* A I R 1934 Nag 106 – 30 N L R 192

S 90 (p 989) Under s 90 of the Evidence Act the period of 30 years is to be reckoned not from the date upon which the deed is filed in Court but from the date on which it having been tendered in evidence its genuineness or otherwise becomes the subject of proof *Surendra Krishna* v *Mirza Mahammad* 40 C W N 226

S 90 (p 989) Recitals in a deed of alienation thirty years old by a limited owner stating legal necessity can be relied on in the absence of any evidence either for or against such necessity *Krishna Ayyar* v *Mattu Lakshmi Ammal* A I R 1931 Mad 169 = 65 M L J 342 = 39 M L W 701 = 150 Ind Cas 1137

S 90 (p 989) Period of 30 years is to be reckoned from date on which document is tendered in evidence and not date of filing it *Surendra* v *Mirza Mahammed* A I R 1936 P C 15

S 90 (p 991) Under s 90, what the Court may presume is that the signature and every other part of such document which purports to be in the handwriting is in that person's handwriting In the case of imaginary persons like *Imams* there can be no question of signature and handwriting and an attempt to apply to such documents as *Imamiletters* is never futile *Mansoor li* v *Taiyabali* A I R 1935 Nag 150

S 90 (p 991) Where document was written by licensed stamp vendor 55 years ago and comes from proper custody, benefit of s 90 can be claimed A I R 1934 Lah 685 = 35 P L R 661 - 153 Ind Cas 23

S 90 (p 993) Section 90 requires the production to the Court of the particular document in regard to which the Court may make the statutory presumption Production of a copy is not sufficient to justify the presumption of execution of the original If the document produced is a copy admitted under s. 65 as secondary evidence and it is produced from proper custody and is over thirty years old then the signature authenticating the copy may be presumed to be genuine *Basanti Sinh* v *Brij Raj*, 39 C W N 1057

S 90 (p 993) The presumption under s 90 in regard to documents thirty years old arises in the case of copies as well as of originals *G r Har saroof* v *Bhagwandin* A I R 1935 Oudh 96 11 O W N 1435 = 1934 O L R. 890 = 152 Ind Cas 861

S 90 (p 998) Presumption as to due and execution and attestation arises even to copies when copy is true copy of the original *Shri Gopi Nath* v *M u Chitra*, A I R 1934 Nag 67 = 30 N L R 155

S 90 (p 994) The words "duly executed and attested" signify execution and attestation as prescribed by law *Rajeshar* v *Har Kissin*, A I R 1933 Oudh 170 = 10 O W N 147

S 90 (p 996) Ordinarily an appellate Court would be slow to interfere with the discretion exercised by the lower Court in the matter of raising presumption under s 90 but the discretion allowed by the section is a judicial discre[illegible] l principles and after due regard to [illegible] *Minager* v *Tribeni Prosad* A I [illegible] 1935 O L R 217 = 154 Ind Cas 965, see also *Gir Har Saroof* v *Bhagwandin* A I R 1935 Oudh 96 = 11 O W N 1435 = 1934 O L R 890 = 152 Ind Cas 861 *Radha Kishun* v *Basdeo* A I R 1935 Oudh 482 156 Ind Cas 990 = 1935 O W N 842 = 1935 O L R 454

S 91 (p 1002) Section 91 lays down that the terms of contract or of an agreement or of the disposition of property may not be established by oral evidence when they have been reduced to the form of a document but it does not say that no other evidence may be given of facts set forth in the recitals in a document *Bhirgu* v *Gaya Prasad*, A I R Oudh 57

S 91 (p 1002) Where the relationship of the parties was determined by the terms of the lease and these are embodied in the said document oral evidence to prove these terms was barred by s 91 *Mohammad* v *Saroda* A I R 1934 Lah 743 = 148 Ind Cas 558

S 91 (p 1002) Production of oral evidence to prove terms of written contract is barred *S han* v *Raghu* A I R 1934 Lah 606 = 153 Ind Cas 1076, but see *Aimna* v *Lakhmi*, A I R 1934 Lah 705

S 91 (p 1002) Document not admissible to prove terms can not be used to show that it contains all terms of contract *Datto Shivram* v *Baba Saheb*, A I R 1934 Bom 149 = 36 Bom L R 859 = 58 B 419

S. 91 (p 1002) The term "in proof of such matter" must carry with it the term "in disproof of it" because if evidence were to be admitted on one side, it would have to be admitted on the other *Rambohar* v *Chatur Ghun Rai*, A I R 1935 All 58

S 91 (p 1002) Where a contract is signed by one person evidence to show that another is also a party to it or is bound by it is admissible *Muni swami* v *Thandu varaja*, A I R 1935 Mad 5 = 1935 M W N 1084

SS 91, 92 (p 1002) Oral evidence to prove separate contemporaneous agreement that amount mentioned will not be paid is not admissible *Mohammad Taki* v *Jang Singh*, A I R 1935 All 529 = 1935 A L J 560 (F B)

SS 91, 92 (p 1002) The acknowledgment of receipt of the whole or part of the sale consideration in a deed of sale is not a term of the deed of sale and oral evidence may be given to show that the amount acknowledged or any part of it was not received *Taki* v *Jang Singh*, 1935 A L J 560 = A I. R 1935 All 529 (F B), see also *Hukum* v *Shambhu*, 1935 A L J 54 = A I R 1935 All 346 But the amount of sale consideration is a term of deed of sale, when the terms of a deed of sale have been proved according to s 91 of the Act, no evidence of any oral agreement or statement shall be admitted as between the parties to the deed of sale or their representatives for the purpose of contradicting, varying, adding to, or subtracting from the amount of sale consideration *Moham Taki* v *Jang Singh*, A I R 1935 All 29 (F B)

S 91 (p 1002) Although a document is inadmissible for the purpose of proving a claim, it may be admissible for a collateral purpose, that is, a purpose foreign and not subordinate to the purpose, for which document was executed *Tribhuban Ojha* v *Ramchandra*, A I R 1935 Pat 375 14 Pat 233 = 16 P L T 475

SS 91, 92 (p 1003) Where one party tenders oral evidence to prove that the amount acknowledged or any part of it was not received, this does not give the other party a right to produce evidence of any oral agreement or statement that the amount of sale consideration was less than what is entered in the deed of sale *Mohammad Taki* v *Jang Singh* A I R 1935 All 529 (F B) = 1935 A L J 560 (F B)

S 91 (p 1004) If there is a document evidencing the contract between the parties then that and that alone is the repository of the terms of the contract between the parties and all else reduced to silence *U Sin* v *U Tun* A I R 1935 Rang 473

S 91 (p 006) Evidence of the contents of a document inadmissible for want of registration cannot be given *Nantulli* v *Safia*, A I R 1935 Bom 208 37 Bom L R 82, but see *Sidamma* v *Chennabarappa*, 12 Mys L J 236

S 91 (p 1006) Even where the loan is not antecedent to or independent of the bill but is contemporaneous with it, the lender when the note turns out to be invalid can fall upon the original contract express or implied arising from the loan The effect of s 91 is merely to provide that the contract embodied in the bill shall be proved by the bill itself, but that does not mean or imply that the bill has either destroyed or superseded the original right, for to hold that it does, would amount to holding that the rule of evidence overrides a well settled principle of substantive law, viz, that a negotiable instrument operates only as a conditional discharge The bill can be treated only as a contract but not having the effect of superseding the original right *Chinnaji* v *Srinivasa*, A I R 1935 Mad 206 = 67 M L J. 912, see also *Ganesh Prosad* v *Bechu Singh*, 147 Ind Cas 443 = A I R 1934 All 271, *Ma Ung Chit* v *Roshan*, A I R 1934 Rang 389 = 12 Rang

500 = 512 (Ind Cas 1038 but see *Mirza Murad* v *Shipley* A I R 1934 All 837 = 151 Ind Cas 123, *Gulari* v *Fasihunnissa*, 1934 A L J 1185, *Chockalingam* v *Palaniappa* 67 M L J 595

S 91 (p 1006) Where deed is clear and unambiguous oral evidence is not admissible *Sujjatnand* v *Gobind* A I R 1934 All 100, see also *Allah* v *Punjab Bank* A I R 1934 Lah 181 35 P L R 200

SS 91, 92 (p 1011) Mortgagor can prove by parol evidence that money sought to have been borrowed has not actually been borrowed *Mohammad Jaki* v *Jang Singh* A I R 1935 All 529 = 1935 A L J 560 (F B)

S 92 (p 1011) Courts are empowered to go behind the apparent terms of a registered document and to hold that what purports to be a mortgage with possession can by the subsequent conduct and intention of the parties be shown to be in fact not a mortgage with possession but contract merely by hypothecating land by way of collateral security *Gopichand* v *Mahammad Umar* A I R 1935 Pesh 176

S 92 (p 1022) For admissibility of oral agreement to vary etc, terms of written contract law must be ascertained only from the section *Mahesh Chandra* v *Ananda Chandra* 61 C 344 = A I R 1934 Cal 564

S 92 (p 1023) The Court in considering whether oral evidence can be given or not has to look to the Evidence Act and the equitable consideration which has influenced the English Courts in like cases have no application in this country *Khunaji* v *Damaji* 148 Ind Cas 269 = 35 Bom L R 1197 = A I R 1934 Bom 39

S 92 (p 1024) It is doubtful whether evidence is admissible in the case of consent decree to explain the ambiguity *K P Ganapatty* v *K P Subramaniya* A I R 1933 Mad 516 144 Ind Cas 95

S 92 (p 1024) A decree is an adjudication by a Court of the rights of the parties litigating before it it is not an act of the parties but an act of the Court and derives its binding force and validity from the authority of the Court and not from any agreement or contract between the parties Hence a decree or its terms cannot be varied or modified except by the Court *it is a matter of* procedure and not rules of evidence The parties can not by their agreement alone vary or modify the terms of the decree whether the *agreement be oral* or written Section 92 therefore has no application to decrees *Adippa Papamma* v *Dasbha Venkaya* A I R 1935 Mad 860 1935 M W N 685 = 42 M L W 365

S 92 (p 1024) Where the judgment debtor pleads that the decree-holder has accepted a smaller sum that was due to him under the decree in full satisfaction of it s 92 Evidence Act does not bar him from proving such adjustment under order 21 rule 2 C P Code by oral evidence *Kamakshi* v *Thangamathu*, A I R 1936 Mad 424 = 1935 M W N 335

S 92 (p 1024) Oral evidence to prove an agreement to take less than what is due under a promissory note is not admissible *Ma Ou Baw* v V E P R *Chattyare* A I R 1935 Rang 188

S 92 (p 1024) Oral evidence as to real nature of consideration is admissible *Gangaram* v *Malik Nur* A I R 1935 Sind 48 = 28 S L R 266 = 153 Ind Cas 635

S 92 (p 1024) Section 92 is no bar to consider question as to what extent consideration is absent under s 44 Negotiable Instruments Act *Bala Subramani* v *Venkatarama*, A I R 1935 Mad 253 = 67 M L J 650 = 40 M L J 706

S 92 (p 1028) Persons not party to a sale deed can let in oral evidence to establish that it was not executed with knowledge and consent of another as mentioned in sale deed *Maung Hyame* v *Maung Aung*, A I R 1935 Rang 122

S 92 (p 1028) Agreement not to execute the decree against a particular judgment debtor does not vary its terms The agreement pleaded is not one to which all the parties to the decree are parties but only some of them and s 92 does not apply *Adippi Papamma* v *Dibbha Venkiya*, A I R 1935 Mad 860 = 1935 M W N 685 = 42 L W 365

S 92 (p 1029) Section 92 excludes admission of any oral agreement or statement between the parties to the agreement *Basiant* v *Abasalli*, 150 Ind Cas 635 = 36 Bom L R 158 = A I R 1934 Bom 145

S 92 (p 1031) Executant of p omissory note cannot prove that as be tween promisee and him, he is only surety *Venkata* v *Karnadan*, A I R 1935 Mad 643 = 1935 M W N 525 = 42 M L W 24 156 Ind Cas 827, see also *Khunji* v *Damaji*, A I R 1934 Bom 39 = 35 Bom L R 1197 = 148 Ind Cas 260

S 92 (4) (p 1031) Contract to release between mortgagee and stranger need not be in writing and registered It can be oral *Manuswami* v *Gobindaraja*, A I R 1935 Mad 113 = 40 M L W 942 = 153 Ind Cas 668

S 92 (p 1033) Rate of interest and time and mode of repayment of principal are essential p rts of mortgage deed Verbal agreement making change in these terms must be excluded *Maung Bi* v *Nimsram*, A I R 1934 Rang 316 = 13 Rang 22 = 154 Rang 189

S 92 (p 1034) Where mortgage is alleged to be modified by subsequent verbal arrangement, such subsequent verbal agreement cannot be proved *Kamta Singh* v *Chaturbhuj*, A I R 1935 P C 98 = 11 O W N 481 = 13 Pat 310 = 15 P L T 169 = 61 I A 185 = 18 C W N 575 36 Bom L R 541 = 1914 A L J 462 = 1934 O L R 371 (P C)

S 92 (p 1035) Oral evidence is not admissible to prove intention of the executant of a document under s 92 *Ma Shin* v *Ma Thin Kyi*, A I R 1934 Rang 129 = 150 Ind Cas 966

S. 92 (p 041) Where a *sanad* regarding a property is based upon a letter of the Legal Remembrancer, the intention of the *sanad* can be interpreted from the letter, where only an extract of the *sanad* is available and not the *sanad* *Basvant* v *Abisalli*, 150 Ind Cas 635 36 Bom L R 158 = A I R 1934 Bom 145

S 92 (p 1041) Oral evidence is competent to show the real consideration at the basis of the promise made by the obligor to pay the amount mentioned in the deed *Gangaram* v *Maluk*, 28 S L R 266

S 92 (p 1041) Oral statements intended to vary the terms of a warrant required by law to be in writing are not admissible *Emperor* v *Subramania* A I R 1935 Mad 648 = 1934 M W N 1170 = 68 M L J 421 = 41 M L W 679 155 Ind Cas 496

S 92 (3) (p 1041) Though s 120 Negotiable Instruments Act precludes the maker of a promissory note from denying the validity of the note, where money is not advanced as a single loan unconditionally upon the promissory note but is advanced after the note had been executed and on certain conditions previously agreed upon the promisor is entitled to prove circumstances in repudiation of his liability *Bichan Singh* v *Dhiran Arti Bank* 143 Ind Cas 348 = 34 P L R 470 = A I R 1933 Lah 456

S 92 (p 1041) Oral evidence can be given to show what the oral consi

deration was for th· *Kabuliyat*. *Kumar Raj* v *Barbani Coal*, A I R 1935 Cal 368 = 62 C 346 = 60 C L J 477

S 92 (p 1041) Where a renewed promissory note has been executed in consideration of a prior promissory note, the executant can show by oral evidence that a part of the debts of the prior promissory note was paid Section 92 does not bar the admissibility of such evidence *Bola Subramania* v. *Venkatarama*, 40 L W 706 = 1934 M W N 1382 = 67 M L J 650

S 92 (p 1041) A mortgagee with deposit of title deeds was acting as an agent of his mortgagor in arranging a loan for the mortgagor At the same time he was also acting as agent of the mortgagee . but as agent of the mortgagor he sent a letter to the mortgagor containing the scope of the security and the terms *Held* that the document was not the bargain between the parties to the mortgage subsequently effected but only one sent by agent of the mortgagor , that it did not require registration and that extraneous evidence was admissible to prove the scope of the security *Villa* v *Petty*, A I R 1934 Rang 51 = 148 Ind Cas 721

S 92 (p 1041) Where a tenant of an occupancy holding executed a lease by means of a *patti* which was registered under s 45 H *Held* the landlord was not precluded by s 92 Evidence Act, from giving evidence to show that the real transaction was not a lease but a sale, the landlord not being a party to the deed *Troilokya* v *Jajneswar*, A I R 1934 Cal. 821 = 38 C W N 1004 = 152 Ind Cas 933

S 92 (p 1041) The recital in a bond or in a pronote that consideration has passed amounts only to an admission, and it is open to the party whose admission it is to prove that his own admission is in fact incorrect but the burden of proof lies on him *Ganga Dewar* v *Tilok Dhari*, A I R 1934 All 496 = 148 Ind Cas 1124

S 92 (p 1041) Evidence to prove that there was no consideration for a promissory note is not debarred by this section *Ram Jash* v *Markanda*, 4 A W. R 964 = A I R 1934 All 1068

S (p 1050) Where compound interest payable under deed, oral agreement that stipulation will not be enforced cannot be proved *Mahesh Chandra* v, *Aanada Chandra*, 61 C 344 = A I R 1934 Cal 564

S 92 (p 1050) Where after execution of mortgage of *sir* land equity of redemption was also sold evidence of a separate agreement to give up *ex* proprietary right cannot be given *Partap* v *Bechan* 14 L R 425 (Rev) = 17 R D 800

S, 92 (p 1050) Where promissory note fails for non cancellation of stamp, the plaintiff cannot fall back upon the original loan *Ma Shwe* v *Deva Hhaw*, A. I R 1933 Rang 161 = 145 Ind Cas 378

S 92 (p 1050) Where the document purports to be a possessory mortgage, evidence to show that the mortgage was in reality a simple mortgage according to the intention of the parties is inadmissable under s 92 *K S Mian Feroz Sha* v *Sobhat Khan*, 60 I A 273 = 65 M L J 150 (P C) = 14 L W. 466 = A I R 1933 P C 178 = 37 C W N 993 = 35 Bom L R 877 = 1933 A L J 1193 = 143 Ind Cas 659 (P C) = 1933 M W N 755

S 92, proviso 1 (p 1051) There is a distinction between the case where the plea is taken that an agreement the terms of which had been embodied in a written instrument was not intended to be acted upon *ab initio* and the case when the plea is that the terms had been varied by a contemporaneous or [illegible] oral evidence or indirect [illegible] the parties is admissible [illegible] to prove such intention. In

the latter, no such evidence is admissible *Satyendra Nath* v *Pramananda*, 39 C W N 888

S 92 Proviso (1) (p 1504) Executant of a bond can adduce evidence that no consideration passed *Ganga* v *Tilak* A I R 1934 All 496, see also *Ramjas* v *Markunda*, A I R 1934 All 1068

S 92 (p 1068) Oral evidence that the real consideration for a promissory note was not payment of money as recited in the note but something different, namely, the construction of a sluice is admissible under s 92, proviso 3 *Nima gudda* v *Adusumilli*, A I R 1935 Mad 310 = 41 M L W 298

S. 92 (p 1070) The consideration for a lease is the rent to be paid and the payment of the *atakasam* a kind of premium or renewal fee paid by the tenant to the landlord, is clearly in the nature of a condition precedent, evidence as to which is permitted by proviso 3 s 92, Evidence Act *Paniyib Kalliani* v *Valvar Tarwad*, A I R 1935 Mad 190

S 92 (p 1070) Where the mortgagor intends to sell his property to the mortgagee there is nothing in law to prevent the parties from coming to a settlement, for the purpose of determining the amount of sale consideration, as to what is the amount of money which could be due to the mortgagee under the deed of mortgage accounts are taken on aforesaid basis *Hari Krishna* v *Nazir Hasan*, A I R 1934 Oudh 115 11 O W N 254 = 151 Ind Cas 531

S 92 (4) (p 1071) Where the claimant under the option of repur chase affirms the original transaction as a sale and merely seeks to enforce a ... s not to be treated as a mortgage by ... ey does not require registra ... ient no objection can arise under s 92, clause 4 Evidence Act as it does not seek to use it as to affect the provisions of the original deed *Chinak kal* v *Chinnathambi*, 152 Ind Cas 634 = A I R 1934 Mad 702 = 66 M L J 635 - 40 L W 646 = 1934 M W N 1122

S 92, Prov (4) (p 1071) A document purporting to be a sale deed was presented for registration The executant denied that he had executed a sale deed, and stated that he had merely agreed to execute a mort age deed After some discussion the parties agreed that the transaction should be entered as a mortgage and made statements to the Sub Registrar, who recorded the terms of the mortgage agreed to by the parties and registered the document as a mort gage deed *Held* that proviso (4) to s 92 did not prevent the successor in interest of the executant from proving that the transaction entered into between the parties was really a mortgage and not a ale, as he was not producing any evidence to prove any subsequent oral agreement to rescind or modify a contract which had been registered *Ganga* v *Pnoga* A I R 1933 Lah 318 = 145 Ind Cas 697

S 92 (4) (p 1071) Mortgage created jointly is inadmiss ble, hence any agreem nt between a co mortgagor and mortgagee in derogation of original contract is variation and therefore is inadmissible in evidence *Ma Tin* v *Alagappa Chellyar*, A I R. 1915 Rang 197

S 92 (4) (p 1071) Where executant orally agreed to pay in form of transfer of land instead of money agreement cannot be proved under s 92 (4) *Nachiappa Chettiyar* v *Theivanai*, A I R 1914 Rang 228 - 151 Ind Cas 398

S 92 (p 1083) This section does not preclude oral evidence to disprove that a note about presentation of petition is wrong *Jiwan* v *Umar Din*, A I R 1934 Lah 452 = 148 Ind Cas 209 = 15 Lah 694 = 36 P L R 525

S 93 (p 1092) Where meaning of terms of agreement is capable of being made certain having regard to conduct of parties, s 93 is no bar to the produc-

tion of extrinsic evidence to show their meaning *Gadula Ram* v *Musala* A I R 1935 Mad 276 = 1933 M W N 114 = 40 M L W 914

S. 93. (p 1092) Where the language of a document is plain and there is no ambiguity in it, it is not permissible to produce other evidence to show that there was different intention on the part of the transferor *Dhanpatti* v *Badri Singh* A I R 1935 All 729 = 156 Ind Cas 53

S 93 (p 1092) In case of patent ambiquity in consent decree, evidence should not be allowed to construe it *Jahuri Lal* v *Kanhai Lal*, A I R. 1935 Pat 123

S 94 (p 1098) Where deed is clear and unambigusus and applies to existing facts, oral evidence is not admissible *Sajaatmind* v *Gobind*, A I. R 1934 All 100 147 Ind Cas 633, see also *Ram Rakhi* v *Gauri Sankar*, 36 P. L R 611

S 95 (p 1103) Where there is doubt about construction of security bond it must be considered in light of order directing security to be given *Mohendra nath* v *Satish chandra* 61 C 890 = 150 Ind Cas 985 – A I R 1934 Cal 569

S 96 (p 1107) Extrinsic evidence to explain acknowledgment may be given *Nipalu Ram* v *Radhuram*, A I R 1934 Lah 835

S 97 (p 1107) Where language applies partly to one set of facts and partly to another but whole not applying to either extrinsic evidence to show which of two applies is admissible *Banaphal* v *Noor Mohammad*, A I R 1935 All 662 = 1935 A L J 664 = 155 Ind Cas 634

S 97 (p 1107) Where in mortgage decree, boundaries and area of property given are totally wrong oral evidence is admissible to explain intention of decree *Allah Baksh* v *Punjab and Sindh Bank*, A I R 1934 Lah 181 – 35 P L R 20 – 147 Ind Cas 23

S 101 (p 1124) Wrong view of burden of proof can be interfered in second appeal *Pandurang* v *Tukaram* 152 Ind Cas 441 = A I R 1934 Nag 253

S 101 (p 1125) The burden of proving allegations in the plaint is on the plaintiff *Anand* v *Deputy*, 143 Ind Cas 568 = O W N 412 = A I R 1933 Oudh 242

S 101 (p 1125) Where in a prosecution for false entries the defence raised was that the entries were made under the direction or authority of the member of the complainant s firm it is the duty of the prosecution to call some of the partners or at least one responsible person as a witness and to give positive denial of the allegation which the accused put forward *Indra Kumara* v *Emperor*, A I R 1934 Cal 500 59 C L J 83 = 152 Ind Cas 226 = 36 Cr L J 74

S 101 (p 1125) The general rule of evidence is that, if in order to make out a title, it is necessary to prove a negative the party who avers it, must prove the title *Hemchandra* v *Matilal*, A I R 1934 Cal 68 = 58 C L J 85 = 37 C W N 1174 = 60 C 1253 = 149 Ind Cas 177

S 101 (p 1125) Where circular has been issued by public servant containing certain statement person challenging that statement must prove it *Bijili* v *Mahomed* A I R 1934 Mad 21 = 39 M W N 466 = 146 Ind Cas 572

S 101 (p 1125) Where all available evidence has been brought on record question of onus is not impor ant *Chunilal* v *Radha Devi* A I R 1934 Pesh 134 – 153 Ind Cas 71, see also *Mati Ram* v *Official Receiver*, A I R 1934 Lah 936, *Nipalchand* v *Narain Das*, A I R 1934 Lah 949, *Ramjilal* v *Debi Sihai* A I R 1934 Lah 542 = 33 P L R 462 = 152 Ind Cas 240, *Maung Po* v *Rechttiar*, 145 Ind Cas 413 – A I R

1933 Rang 211 ; *Debendra* v *Nigendra*, 60 C 1158 = 37 C W N 1001 *Bhanji* v *Gobind*, 29 N L R 298 = A I R 1934 Nag 379, *Pandurang* v *Tukaram* A I R 1934 Nag 253

S 102 (p 1125) Where a transferor brings a suit to show that transfer was not meant to be operative as such onus is on him to prove it *Amrit* v *Gurcharin*, A I R 1934 All 226 = 147 Ind Cas 59

S 103 (p 1126) Person claiming to succeed on ground of relationship should prove such relationship and absence of nearest heir *Chunna* v *Lala Markat* A I R 1934 All 117, see also *Mahabir* v *Radha*, 10 O W N 424 = A I R 1933 Oudh 231

S 104 (p 1131) Onus of proving error of lower Court in appeal is on the appellant *Abdul* v *Nasir*, A I R 1933 Oudh 142 = 10 O W N 201

S 114 (p 1132) The onus of proof that property has been purchased *benami* is in the person who alleges that *Ma Khatun* v *Ma Bi Bi*, A I R 1933 Rang 393

S 104 (p 1140) Burden of proving fraud is on the person who alleges fraud *Sabitri* v *Savi*, 12 Pat 359 = 145 Ind Cas 1 = 14 Pat L T (sup) 1 = A I R 1933 Pat 306 But when fraud has been established, it is on the opposite party to prove that the party alleging fraud had knowledge of those circumstances which constitute fraud *Ramiraddin* v *Naimaddi*, 143 Ind Cas 284 = 56 C L J 570 = A I R 1933 Cal 339

S 104 (p 1144) In a dispute as regards tenancy, initial onus is on tenant *Rikhdeo* v *Gangi Prosad* 146 Ind Cas 1002 = A I R 1933 All 825

S 104 (p 1145) The defendant who claims that the suit is barred by limitation must prove that *Padhum* v *Tribeni*, A I R 1934 Pat 44

104 (p 1145) One questioning marriage, must prove that it was not per formed with requisite ceremonies, etc 56 A 428 = A I R 1934 All 273

S 104 (p 1146) In a suit for possession the person claiming possession must prove his title *Aruna chalam* v *Ko Tu*, 146 Ind Cas 445 = A I R 1933 Rang 174

S 104 (p 1149) In a Will case, the onus is on the propounder that the Will was duly executed *Jotindra* v *Rajlakshi* A I R 1933 Cal 449 = 57 C L J 8

S 105 (p 1152) The accused must prove that his case comes within any exception *Nga Bashin* v *Emperor* 144 Ind Cas 420 = 14 Cr L J 783 = A I R 1933 Rang 142, see also *Maung Sein Ba* v *Maung Kawe*, A I R 1934 Rang 90 = 12 Rang 55 = 150 Ind Cas 667

S 106 (p 1157) A fact which is within the special knowledge of a person must be proved by that person *Mahabir* v *Rohim*, 64 M L J 413 (P C) = A I R 1933 P C 67 = 35 Bom L R 500 17 C W N 637 (P C), see also *Dhanirajagiri* v *Pirtha Sirathy* 38 L W 714 = 1933 M W N 1182 = A I R 1933 Mad 825

S 108 (p 1170) There is no presumption as to the time of death *Ram Kali* v *Nirun Sing*, A I R 1934 Oudh 298 = 11 O W N 793 = 149 Ind Cas 632

S 108 [illegible] of death but not of time of death [illegible] v *Sheo Gobind* A I R [illegible] 52[illegible]

S 108 (p 1173) Where two brothers died in same catastrophe and who died first is not known no presumption exists as to the time of death or the sur vivorship of either *Nikshi* v *Jirali*, A I R 1934 Oudh 101 = 11 O W N 267 = 9 Luck 461

S 109 (p 1176) Where there is not only a decree but that the plaintiff has collected rent due under it this is sufficient to bring about the relationship under s 109 and to throw the onus of proving that tenancy terminated is on the defendants *Medazarupa* v *Medivarupa* A I R 1935 Mad 268=40 M L W. 810

S 109 (p 1076) Where the re the burden of proving that they had ship is clearly on the person wh A I R 1935 Lah 49

S 110 (p 1179) Section 110 applies even in cases where Government is a party and s 41 (1) of Berar Land Revenue Code is not meant to lay down a rule regarding the burden of proof at variance with the provisions of s 110 Evidence Act *Govind Rupchand* v *Secy of State* A I. R 1935 Nag 163= 155 Ind Cas 264.

S 110 (p 1179) Where certain property is found to be held by a person who occupies the office of Mohant of a *Math* there is no presumption that the property belongs to the *Math* *Ganesh Gir Guru* v *Fatehchand* A I R 1935 Nag 114

S 110 (p 1179) Where the defendants who are in possession of a well have from time to time asserted their claim to the property as owners the mere user of the well by the public is not sufficient to rebut the presumption of ownership or to raise a further presumption that the defendants are trustees of the said property *Hemraj* v *Allahdinn* A I R 1935 Sind 133

S 110 (p 1179) Long possession creates presumption of ownership *Champat* v *Toti Ram*, A I R 1934 Lah. 324=150 Ind Cas 17=16 P L R 64

S 111 (p 1183) Where a gift is executed to a person standing in a fiduciary relationship to the donor the donee is bound to establish good faith of the transaction For this the donee may prove that the donor had independent advice or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever by showing existence of other circumstances sufficient to prove good faith *Binoy Krishna* v *Panchanon*, A I R 1935 Cal 671

S 111 (p 1183) The words active confidence in s 111 indicate that the relationship between the parties must be such that the one is bound to protect the interest of other, in order that the law may be really protective the word should receive a wider interpretation *Benoy Krishna* v *Panchanon* A I R 1935 Cal 671, see also *Lekh Raj* v Mt *Mehtab* A I R 1933 Lah 861

S 111 (p 1183) Where the fact of undue influence was not seriously disputed burden lay upon him who denies to show that no undue influence was used and the transaction was made in good faith *Azizunnissa* v *Siraj Husan*, A I R 1934 All 507=1934 A L J 817

S 111 (p 1187) Section 111 applies to case of a Will and burden of proving good faith of the transaction lies on propounder *Nandalal* v *Dasarathi* A I R 1936 Cal 15=61 C L J 304

S 112 (p 1193) The presumption of law that a child born of a married woman in wedlock was begotten by the h [illegible] band nor a wife is permitted child to give evidence of no have been conceived—as enur prevails equally in India as in England The above principle is not limited to legitimacy proceedings but applies [illegible] ed in consequence of adultery and it in no [illegible] 12 of the Evidence Act The fact of non [illegible] other than that of the husband *Joseph Ant* [illegible] 1047

S 112 (p 1193) Where a person is admittedly born after his mother's marriage to a certain person the onus of establishing non access and physical incapacity to procreate on the part of the husband lies heavily on those who allege such person to be an illigitimate son *Bhagwan Baksh* v *Mahesh Baksh*, A I R 1935 (P C) 199 = 1935 O W N 1261 (P C)

S 112 (p 1193) Even though connection between a man and a woman is adulterous at its inception by the existence of a marriage between the woman and another man, when the latter divorces the woman and the two continue to live together and are treated as husband and wife and a child is born during such period, presumption of legitimacy can be raised *Gurdial Singh* v *Bhagat Singh*, A I R 1934 Lah 517 = 35 P L R 532 = 153 Ind Cas 241

S 112 (p 1193) In a divorce suit filed by the husband on the ground of adultery the miscarriage took place long after filing of petition, and the evidence of non access was offered by the husband *Held* that the evidence of the husband of non access was admissible against his wife *Gerald* v *Olga*, A I R 1934 All 618.

S 112 (p 1193) Section 112 merely requires proof to the satisfaction of the Court that the p[illegible] had no [illegible]ccess to each other, not that there was no [illegible] that there was no access is a pure finding of f[illegible] *Varayan*, A I R 1934 Nag 124 = 150 Ind Cas 306

S 112 (p 1193) Presumption that child in lawful wedlock is legitimate child of its mother's husband is rebuttable But if access or intercourse by husband is proved, presumption becomes irrebuttable *Sivakami* v *Koolyandi*, A I R 1934 Mad 318 = 66 M L J 283 = 149 Ind Cas 953, see also *Samuel* v *Annammal*, A I R 1934 Mad 310 = 66 M L J 279 = 149 Ind Cas 100

S 112 (p 1194) Access means sexual intercourse *Samuel* v. *Annammal*, A I R 1934 Mad 310 = 66 M L J 279 = 149 Ind. Cas 100 The word "access means "effective access and physical incapacity to procreate, if established amounts to non access within the meaning of s 112 *Bhagwan Baksh* v *Mahesh Baksh* A I R 1935 P C 199 = 1935 O W N 1261 (P C), see also *Umaruddin* v *Ghulam*, A I R 1935 Lah 628

S 112 (p 1194) The evidence of Indian witness on question of age is notoriously often very vague and unreliable and it is unsafe to base a finding of physical incapacity on the part of a husband on such evidence *Bhagwan* v *Mahesh*, A I. R. 1935 P C 19 = 1935 O W N 1261 In dealing with the question of non access under s 112 in a case of child marriage among the Hindus much depends upon the question whether the case presented on either side is reconciliable with the established customs and usages of Hindus as regards child marriage *Ibid*

S 112 (p 1195) To brand a child form in lawful wedlock with illegitimacy on the ground of physical incapacity of the husband to procreate it is necessary in the first place to prove the precise age of the husband at the date of conception and in the second place to negative the possibility of premature virility at that age owing to precocious development *Bhagwan Baksh* v *Mahesh Baksh*, A I R 1935 P C 149 = 1935 O W N 1261 (P C)

S 112 (p 1195) Ordinarily onus of proving illegitimacy lies on person who so asserts But where opposite party has failed to prove that mother of alleged illegitimate son was lawfully married to his father, onus is not on former *Ram Natn* v *Desraj Singh*, A I R 1935 Oudh 80 = 1934 O L R 983 = 1935 O W N 25 = 153 Ind Cas 349

S 112 (p 1196) Where a child establishes the possession of filiation, which is the acknowledgment of the parents and habit and repute everything

uch as legitimacy must be presumed in his favour *Kishen Singa* v *Sidhi and others* A I R 1933 Lah 520

S 114 (p 1202) The effect of the provision of s 114 is to make it perfectly clear that Courts of justice are to use their own common sense and experience in judging of the effect of particular facts and that they are to be subject to no technical rules whatever on the subject *Sarat Chandra* v *Emperor* A I R 1934 Cal 719 (S B) = 35 Cr L J 1335 = 151 Ind Cas 473

S 114 (p 1202) If an article stained with human blood is recovered from the possession of an accused or from a place pointed out by an accused then the case against him becomes very serious He has to explain that point away But if the prosecution fails to establish that there were stains of human blood on any of the articles so recovered then a Court would be wholly unjustified in drawing an inference that blood stains were of human blood *Imamuddin* v *Emperor* A I R 1934 Oudh 386 = 11 O W N 95 = 35 Cr L J 1154 = 150 Ind Cas 862 see also *Bhagwati* v *Emperor*, A I R 1934 Oudh 373 = 11 O W N 969 = 35 Cr L J 1159

S 114 (p 1202) Court is often obliged to rely more upon circumstances than on direct evidence *Mallavarupa* v *Boggavarupa* A I R 1935 Mad 769 = 1935 M W N 528 = 42 M L W 321

S 114 ill (a) (p 1203) To raise a presumption under this illustration, possession should be exclusive as well as recent *Rajalingam* v *Emperor* A I R 1934 Rang 85 = 149 Ind Cas 31 = 35 Cr L J 994 see also *Emperor* v *Zahir* 150 Ind Cas 538 = 35 Cr L J 1092 = A I R 1934 All 455 *Jai Narain* v *Emperor* A I R 1933 Oudh 117 10 O W N 47 = 34 Cr L J 649 = 143 Ind Cas 835 *Emperor* v *Sangram* 143 Ind Cas 152 = 34 Cr L J 545 = 9 O W N 1198 = A I R 1933 Oudh 85 *Hori lal* v *Emperor* 1933 A L J 1534 = A I R 1933 All 893 = 1933 Cr C 1523 *Public Prosecutor* v *Kudimbatcha* 1933 M W N 325 *Reoti* v *Emperor* 1933 A L J 523 *Joynarain* v *Emperor* A I R 1935 Cal 650

S 114 ill (a) (p 1203) S 114 ill (a) does not entitle the Court to presume the knowledge of dacoity or dacoits and a person cannot be convicted under s 412 I P Code merely on the fact of possession of recently stolen goods *Isthahar* v *Emperor*, 39 C W N 620

S 114 ill (b) (p 1208) As a broad proposition it is correct to say that inspite of s 133 of the Evidence Act the rule of the Evidence Act the rule of practice that an accused *person ought not* to be convicted on the uncorroborated testimony of an accomplice has virtually become equivalent to a rule of law But the proposition *is subject* to various qualifications and the true legal position is the following —

(1) An accused person can legally be convicted upon the uncorroborated [illegible] ed person should or should not [illegible] e prudence and good sense of the [illegible] of the case (3) *Prima facie* [illegible] evidence is unworthy of credit [illegible] ulars tending to show that the [illegible] is charged (4) In a Sessions [illegible] extremely dangerous to act upon [illegible] plice and similarly a Judge sitting alone without a jury must bear the same consideration in mind (5) It is for the Court to determine in the particular *circumstances* of each case whether the matter before it tending to corroborate the evidence of the approver (which may or may not be evidence *strictly* so called and as defined in the Evidence Act) is worthy of credence and is *sufficiently* reliable to be treated as evidence against the accused and acted upon (6) The evidence of an approver may be corroborated by the evidence of another approver, or by the confession

of a person who is being jointly tried with the accused for the same offence, implicating both himself and the accused, (7) it is the duty of the Court to scrutinize with much care such corroboration as that mentioned in (6) but whether it is to be treated as evidence against the accused or not is to be determined by the Court *Emperor* v *Nirmal Jiban Ghose*, 39 C W N 744 = A I R 1935 Cal 513 = 62 C 238, see also *Bimal Krishna* v *Emperor*, 39 C W N 761, *Venkataramanna* v *Emperor*, 1933 M W N 1129, *Beni Madho* v *Emperor*, A I R 1933 Oudh 355 = 146 Ind Cas 1064 = 10 O W. N 685 = 1933 Cr C 975, *Bacha Babu* v *Emperor* A I R 1935 All 162, *Shiva Das* v *Emperor* A I R 1934 Cal 114 = 37 C W N 348 = 147 Ind Cas 1028 = 35 Cr L J 535, *Nizamdin* v *Emperor*, A I R 1934 Pesh 134 = 153 Ind Cas 71, *Chatumal* v *Emperor*, A I R 1934 Sind 185 = 1934 Cr C 1392, *Mahadeo Prasad* v. *Emperor*, A I R 1934 Oudh 90 = 11 O W N 62 = 35 Cr L J 397 = 9 Luck 355, *Kansi Ram* v *Emperor*, 15 Lah 491 = 36 P L R 346 = A I R 1934 Lah 873, *Ali Mahammed* v *Emperor*, A I R 1934 Lah 171 = 1934 Cr C 349, *Gujar Singh* v *Emperor* A I R 1934 Lah 21 = 1934 Cr C 39, *Mahomed Panah* v *Emperor*, 150 Ind Cas 917 = A I R 1934 Sind 78, *Hari Ram* v *Emperor*, 15 Lah 673, *Hafizuddi* v *Emperor*, 38 C W N 777 = A I R 1934 Cal 678, *Mangal Singh* v *Emperor*, 150 Ind Cas 21 = 35 Cr L J 1046 = 36 P L R 121 = A I R 193 Lah 346, *Nizam Din* v *Emperor*, A I R 1934 Pesh 11 = 1934 Cr C 381 = 35 Cr L J 719, *Kartari* v *Emperor*, A I R, 1934 Lah 525 = 35 P L R 436, *Turab* v *Emperor*, A I R 1935 Oudh 1 = 11 O W N 1383 = 152 Ind Cas 473 = 1934 O L R 875, *Abdul Majid* v *Emperor*, 39 C W N 1082, *Balmukundo* v *King Emperor*, 39 C W N 1051 *Sundar Lal* v *Emperor*, A I R 1934 Oudh 315, *Turab* v *Emperor*, 11 O W N, 1363, *Ali Mohammed* v *Emperor*, A I R 1934 Lah = 1934 Cr C 349, *Mallu Masheta* v *Emperor*, 146 Ind Cas 701 = 16 N L J 186 = A I R 1933 Nag 352, *Venkata Giriappa* v *Government of Mysore*, 11 Mys L J 239, *Madhusudan* v *Emperor*, 37 C W N 934, *Dhaju Manaal* v *Emperor*, 34 Cr L J 476 = 146 Ind Cas 934 = A I R 1933 Pat 1 2, *Sudam* v *Emperor*, A I R 1933 Cal 148 = 34 Cr L J 675

S 114 (p 1208) Evidence of one accomplice can not be corroborated by evidence of another accomplice *Kamboji Venkataramanna* v *Emperor*, A I R 1934 Mad 248 = 1933 M W N 1129 = 40 M L W 237 = 67 M L J 74 see also *Mallu Masheta* v *Emperor* 146 Ind Cas 701 - 16 N L J 186 = A I R 1933 Nag 352, *Parbhu* v *Emperor* 146 Ind Cas 364 = 34 P L R 639 = A I R 1933 Lah 946, *Nasir* v *Emperor* A I R 1933 All 31 = 1932 A L J 1125 = 55 A 91 = 34 Cr L J 489

S. 114 ill (c) (p 1208) Rule laid down in s 114 (c) is affected by subsequent enactment of Negotiable Instruments Act

S 118 *Binnumal* v *Munshi Ram* A I R 1935 Lah 549 The difference between s 114 Evidence Act and s 118 Negotiable Instruments Act consists only in this that under the first, the Court has a discretion to make the presumption or not whereas under the second the Court is bound to start with the presumption *Mallavarapu* v *Bogavarappu* A I R 1935 Mad 769 Illustration (c) is confined to acceptance and endorsement of bill of exchange But s 118, Negotiable Instruments Act has wider scope *Binnumal* v *Munshi Ram* A I R 1935 Lah 599 Under s 114 a strong presumption is raised that an obligation has been discharged when the bond duly signed is in the hands of the obligor *Rangappa* v *Syed* 30 N L R 196 = A I R 1934 Nag 29 The explanation added to illustration (c) of s 114 only indicates that it is not meant to be exhaustive of its application *Mallavarapu* v *Bogavarapu*, A I R 1935 Mad 769

S 114 ill (d) (p 1209) The rule of evidence in favour of presuming the continuity of things shown to exist at a prior date There is no rule of evi

dence by which one can presume backwards *Manmatha Nath* v *Girish Chandra* A I R 1934 Cal 707 = 38 C W N 763 = 153 Ind Cas 170, see also *Hemendra* v *Jnanendra* A I R 1935 Cal 702

S 114 ill (e) (p 1212) S 114 includes but is not limited to presumption of regularity *Hiridas* v *Manmatha* A I R 1936 Cal 1

S 114 ill (e) (p 1212) Section 114 ill (e) does not presume that official act has been done But if the act is proved to have been done it is presumed to have been regularly done *S A Kumari* v *Raj Kumar* A I R 1934 Rang 207 = 151 Ind Cas 337

S 114 ill (e) (p 1212) This section raises the presumption of legality and correctness of Court s proceedings When a Judge signs a decree it is presumed that the decree is in accordance with his judgment *Raghubir Singh* v *Rani Rajeswari* 146 Ind Cas 310 = 10 O W N 884 = A I R 1933 Oudh 466 There is a presumption under this section in favour of the correctness of the record by a Judge in the judicial record B *Srinivasa Iyengar In the matter*, 12 Mys L J 311 = 39 Mys H C R 461 Where there is evidence of an attachment in the absence of direct evidence to the contrary it ought to be presumed that all necessary formalities were complied with *Mohd Akbir* v *Hadur Mian* 9 C W N 89 see also *Mohammad Akbir* v *Mian Musharaf Ali* A I R 1934 P C 217 = 11 O W N 1158 = 40 M L W 390 = 151 Ind Cas 221 = 39 C W N 89 = 67 M L J 641 = 61 I A 371 = 15 Lah 836, *Arjun* v *Emperor* A I R 1935 All 436 1935 A L J 390

S 114 (p 1212) There is a presumption in law that all official acts are regularly performed and when a document is attested by the Sub registrar as duly presented, there is an initial presumption that the document was duly presented and the person presenting it was duly authorized to do so *Mahammad* v *Fattah* A I R 1934 Lah 452 = 148 Ind Cas 209 = 15 Lah 694 = 36 P L R 525

S 114 ill (e) (p 1212) The pedigree table prepared in the course of each settlement is a part of the Record of Rights and as such there is statutory presumption of correctness attaching to it It is however impossible to lay down a rule that the presumption is stronger in favour of one rather than the other It is for the Court to decide in each case which pedigree table is to be preferred *Ditt Ram* v *Khazana Ram* A I R 1935 Lah 108

S 114 ill (e) (p 1213) The Court should not presume that the documents referred to in the order of sanction by the Governor General were the documents in question and that they were duly forwarded by the Governor General and reached complainant through the usual channel unless there be any indication on the face of the questioned documents to show that there were the annexures to the order of sanction *Sardar Diwan Singh* v *Emperor* A I R 1935 Nag 90

S 114 ill (e) (p 1213) Though official acts may be presumed to have been regularly performed such presumption cannot supply deficiency in the proof *Hooghly Chinsurah Municipality* v *Keshab Chandra Pal*, A I R 1933 Cal 347 = 143 Ind Cas 285 = 30 Cr L J 549 = 56 C L J 583 = A I R 1933 Cal 347

S 114 ill (e) p 1213) It may be presumed that official acts are regularly performed and a warrant once signed and issued remains actually in existence until such time it is known to have been destroyed *Emperor* v *Kalu* A I R 1933 Lah 159

S 114 (p 1213) The entry in a *Jamabandi* in the years following the partition to the effect that the field was joint while other fields have been recorded in the separate names of the parties raises a strong presumption that

the field was kept joint *Mitharij* v *Kedar nath*, A I R 193 Nag 130 = 29 N L R 272 = A I R 1933 Nag 130 = 144 Ind Cas 948

S 114 ill (e) (p 1212) Where an election officer issues circular to polling officer stating that it is used under direction of superior office, the presumption is that the statement is correct *Bijli Sahib Bahadur* v *Mahammad Asan*, 146 Ind Cas 572

S 114 ill (e) (p 1212) Where a document was registered under s 23 A of the Registration Act the presumption is that it was represented within time *Sudarsana Roy* v *Seetharamaya*, 1933 M W N 1148

S 114 ill (e) (p 1212) The papers of a survey which do not reach the stage of final publication are not altogether inadmissible in evidence even though the weight to be attached is a different matter The presumption of ... until final publication but the presumption ... official duties are taken to have been ... *Nund Lal*, A I R 1933 Pat 468

S 114 ill (g) (p 1215) In case of failures of party to produce account in his possession regarding certain expenses where money spent for such expenses by party is otherwise proved, the mere non production of accounts does not show that no expense has been incurred *Sajjad* v *Manammed*, A I R 1934 All 71

S 114 ill (g) (p 1215) Where a party does not produce certain material document Court is entitled to draw adverse presumption *Nimmag da* v *Adusumilli*, A I R 1935 Mad 310 = 41 M L W 298, see also *Deo Narain* v *Emperor* A I R 1934 Pat 132 = 15 P L T 647 = 35 Cr L J 693, *Baroda* v *Krishna* A I R 1934 Cal 414 = 38 C W N 33 = 151 Ind Cas 268, *Educational Book Depot* v *Dr Rabindranath Tagore*, 55 A 564 = 1933 A L J 791 = A I R 1933 All 474 but see *Mt Boota* v *Gur Prasad* 10 O W N 827 A I R 1933 Oudh 412

S 114 ill (g) (p 1215) No presumption of s 114, ill (g) arises if there is no evidence that the document could be produced *Popusi Ramayya* v *Putcha Lakshminarayana*, A I R 1934 P C 84 = 39 M L W 329 = 11 O W N 468 = 1934 A L J 402 = 61 I A 177 = 38 C W N 669 = 57 M 443 = 67 M L J 1

S 114 ill (g) (p 1215) The petitioner not giving evidence though he was the best informed person about the matter, may be taken as an indication that he could say nothing convincing to support his case *Piran Dis* v *Kartar Singh* A I R 1934 Lah 398 151 Ind Cas 32 = 36 P L R 280, see also *Piran Singh* v *Mathura Das* A I R 1934 Lah 126, *Bishan Das* v *Gurbaksh Singh* 148 Ind Cas 45 A I R 1934 Lah 63 but see *Kanhaya Lal* v *Bishan Dis* A I R 1934 Lah 59 = 149 Ind Cas 1119

S 114, ill (g) (p 1215) Omission to call material witness raises inference that evidence would have been unfavourable *U Po* v *Edward*, A I R 1934 Rang 139 150 Ind Cas 898

S 114 (p 1215) It is open to a litigant to refrain from producing any evidence, not forming part of his case, that he considers irrelevant if the other litigant is dissatisfied it is for him to apply for its production and inspection as evidence in the case if he thinks proper if this is not done the Court is not entitled at his suggestion to draw an adverse inference and the presumption will also not arise when there is sufficient explanation *Shi a Prasad* v *Prayag Kumari* A I R 1935 Cal 39 = 61 C 711

S 114 (p 1222) The effect of conflicting presumption is to leave the party to have their case decided by evidence produced *Nanilal Dis* v *Nutb hari*, 38 C W N 861

S 114 (p 1219) It is impossible to believe that evidence consisting of oral and documentary evidence of very great strength and conclusiveness and in possession of accused s near relatives would not have been produced atonce by the accused or his relations and would have been concealed till the defence stage in sessions trial *Emperor* v *Sheo Janak Pande*, A I R 1934 All 27=56 A 354=147 Ind Cas 238=35 Cr L J 364=1935 A L. J 1573 (F B)

S 115 (p 1237) Estoppel is not a cause of action It may, if established, assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or by preventing a defendant from asserting the existence of some facts the existence of which would destroy cause of action It is a rule of evidence which comes into operation if (a) a statement of the existence of a fact has been made by the defendant or an authorized agent of his to the plaintiff or some one on his behalf, (b) with the intention that the plaintiff should act upon the faith of the statement and (c) the plaintiff does act upon the faith of that statement There is no such thing as estoppel by waiver A representation which can ground an estoppel must be representation of an existing fact and not of a future intention which may or may not be enforceable in contract A statement to ground an estoppel must be clear and unambiguous *Dawson Bank* v *Nippon Menkwai*, 39 C W N 657=A I R 1935 P C 79=1935 M W N 442=155 Ind Cas 1=1935 O W N 599

S 115 (p 1249) Where a party changed his position as a result of the representation intentionally made by the ancestors of the plaintiff in order to secure certain concession and the party s conduct was influenced by those representations *Held* that the conditions requisite for an estoppel by conduct were satisfied *Special Manager* v *Tribeni Prosad* A I R 1935 Oudh 289.

S 115 (p 1250) The question of estoppel not being pure question of law it should be distinctly pleaded *Kanhailal* v *Bhaiyalal*, 16 N. L J 248, see also *Fakir* v *Ismail*, A I R 1933 Lah 179

S 115 (p 1251) No estoppel arises if truth of the matter was known to both the parties *Rajib Narain* v *Bindeshwari* 15 P L T 596 But there is no obligation on person claiming estoppel in every case to make enquiries about truth of representation *Shiam Lal* v *Matadin*, 151 Ind C s 576=11 O W. N 1097=A I R 1934 Oudh 4'o

S 115 (p 1252) To attract the applicability of estoppel in *pais* representation must be clear and unambiguous and it must be acted on by other party *Jethibai* v *Chabildas* A I R 1935 Sind 142, see also *Mohini* v *Radha*, A I R 1935 Cal 481, see also *Afzal Hussain* v *Cheddi Lal*, A I R 1935 All 79=1935 A L J 217=155 Ind Cas 791, *Radhalal* v *Kishori Lal*, A I R 1935 Lah 527 37 P L R 301 *Mohammad Musa* v *Qasim Husain*, A I R 1935 All 739 155 Ind Cas 1063, *Gauri Dei* v *Mohammad Yasin* A I R 1935 Oudh 121=11 O W N 1571-1935 O L R 9=153 Ind Cas 585, *Fakir Khan* v *Ismail Khan*, 14 Lah 218-141 Ind Cas 264=34 P L R 149=A I R 1933 Lah 179, *T Hirst* v *Syamsundar Lal*, 61 C 61=A. I R 1934 Cal 441=151 Ind Cas 334

S 115 (p 1254) As regards representation by conduct, *vide Saddha Singh* v *Mangal Singh* A I R 1933 Oudh 166-10 O W N 58=142 Ind Cas 860, *Sikhdei* v *Mathra*, 142 Ind Cas 606=34 P L R 115=A I R 1933 Lah 412, *Bhirgunath Prasad Singh* v *Annapurna Debi* A I R. 1931 Pat 644, *Ditto Shivram* v *Babisaheb*, 58 B 419=150 Ind Cas 555=36 Bom L R 359=A I R 1934 Bom 194, *Secretary of State* v *Rajaram*, 36 Bom L R 1055

S 115 (p 1262) As regards estoppel against minor, *vide Rangi Rao* v *Sait Chowgmal*, 152 Ind Cas 262=1934 M W N. 672=4 L W 261=A.

I. R 1934 Mad. 560=67 M L J 257, *Umor Din* v *Abdul Huq,* 150 Ind. Cas 968=A I R 1934 Lah. 304

S 115 (p 1266) Where it is not proved that the witness knew of the contents of the deed at the time of attestation, the mere fact of attestation does not give rise to estoppel *Hazeli Sha* ... Lah 703, see also *Fazol Husain* v *Jiwan* ... Cas 454=34 P. L. R 196=A I R 19 ... v *Ven Kinna,* 145 Ind Cas 862=1933 M W ... 637=65 M L J 282, *Bhagwat* v *Gorakh,* 150 Ind Cas 765=A I R 1934 Pat 93

S 115 (p 1267) There is no estoppel against statute *Barisal Co operative* v *Benoy bhusun,* A I R 1034 Cal 537=38 C W. N 457=151 Ind Cas 165, see also 15 P L T 661=A I R 1934 Pat 666 (F B), *Hakim Husain* v *Mustaq Husain,* 146 Ind Cas 482=A I R 1933 Oudh (F B), *Jai Sri Singh* v *Prabhu,* A I. R 1935 All 127=1935 A L J 21

S 115 (p 1258) The doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has on grounds of public policy, enacted shall be invalid *Gaura Die* v *Mohammad Yasin,* A I R 1935 Oudh 121=11 O. W N 1571=1935 O I R 5=153 Ind Cas 503

S 115 (p 1268) Where a Burmese Buddhist wife does not make any claim in husband s *payin* property but attested mortgage deed and makes pay ment of interest thereon, there is representation to creditor that she has no interest in it and she is estopped from claiming interest in such property *Ma Shin* v *N R* A I R 1935 Rang 17

S 115 (p 1276) Even *bona fide* purchaser for value is representative *Dara Sivarao* v *Kola Subharao,* A I R 1934 Mad 302-1934 M W N 316=39 M L W 431 A representative in interest is bound by the estoppel of his predecessor *Tilak Rai* v *Pargash Rai,* A I R 1935 Pat 21=152 Ind Cas 823

S 115 (p 1276) Where the plaintiff stands in the shoes of and derives his title as successor in interest from one entitled to deny the defendant s title to certain property in suit he is not estopped from denying the title to certain property in suit he is not estopped from denying the title of the defendant merely because he was signatory to a deed of partition by which the property in suit fell to the share of the defendant *Misbahuddin* v *Vidyasagor,* A, I R 1935 Lah 64=36 P L R 106

S 115 (p 1276) Judgment debtor is not estopped from urging that agreement for payment of enhanced interest subsequent to decree is not enforce able in execution *Nirendra* v *Oudh Commercial Bank,* A I R 1935 Oudh 465

S 115 (p 1276) The word 'representative' in s 115 is not to be limited to gratuitous transferee or volunteer and to a subsequent transferee for value ... toppel A derivative owner, ... estoppel is included *Dara* ... 02=148 Ind Cas 612-1934 ... id 302=66 M L J 563.

S 115 ... Mortgagor ... 576=11 O ...

S 115 (p 1291) Party admitting partition in a previous suit cannot deny it in the subsequent suit *Barodi* v *Krishna,* A I R 1934 Cal 414=38 C W N 33=151 Ind Cas 268

S 115 (p 1291) In a case for money on accounts submitted, no estoppel arises unless the acts of the plaintiff in consequence of the accounts submitted are

necessarily referable to the representation made by the defendant *T A Hurst* v *Shyam sundar lal* A I R 1934 Cal 441 = 61 C 64 = 151 Ind Cas 334

S 115 (p 1291) A person who has held office under a registered agreement for a period of years on certain terms and conditions and who has unreservedly accepted a fresh tenure of office on the same terms and conditions cannot be heard to say that he was not bound by the terms of his service *Gholam Hossain* v *Altaf Hossain* A I R 1934 Cal 328 58 C L J 333 = 61 C 80 = 149 Ind Cas 1215 = 38 C W N 214

S 115 (p 1291) Where person accepts before Settlement Officer his liability to pay rent he cannot subsequently turn round and seek declaration that some other person is liable for same *Man oor Hussain* v *Dawar Ali* A I R 1935 Oudh 409 = 1935 O W N 537 1935 O L R 290 = 155 Ind Cas 295

S 115 (p 1291) Acceptance of rent at rate specified in unregistered document requiring registration does not give rise to estoppel in suit to eject tenant *Datta Shivaram* v *Babi Saheb* A I R 1934 Bom 194 = 36 Bom L R 359 = 58 B 419

S 115 (p 1291) A mistaken interpretation made by Government officers of a grant by the Crown and their consequent mistaken acts would not be binding on the Crown and would not create an estoppel as against the Crown *Secretary of State* v *Faredoone* A I R 1934 Bom 434 = 36 Bom L R 761 = 154 Ind Cas 278

S 115 (p 1291) In case of temporary arrangement for mutual convenience no estoppel arises *Desto Din* v *Raj Narain* A I R 1934 All 75

S 115 (p 1291) Where in a previous partition suit plaintiff reserved right to sue separately for one item defendant is not estopped in a subsequent suit from challenging plaintiff's right *Gokul Prosad* v *Kunwar Bahadur* A I R 1935 Oudh 30 = 11 O W N 1359 1934 O L R 849 = 155 Ind Cas 322

S 115 (p 1291) Insurance Company is not estopped from asserting that premium is not paid because policy recites that premium has been paid *U San* v *New Zealand Insurance Co* A I R 1935 Rang 343 = 153 Ind Cas 387

S 115 (p 1291) The fact that some of the earlier grantees acquired the fresh grants being made by the Government on lands which they might have claimed for [illegible] stop subsequent grantees from claiming acc [illegible] I R 1934 P C 17 = 38 C W N 337 = 39 [illegible] 12 = 1 O W N 217 = 147 Ind Cas 657 = 19[illegible] Rang 136 = 66 M L J 239 = 61 I A 18 = 59 C L J 269

S 115 (p 1294) To estop a tenant from denying the landlord's title under s 116 it is not necessary that the tenant should have been actually put into possession by the landlord It is sufficient being already in possession if he passes a rent note to the landlord acknowledging that a new tenancy had arisen *Krishna Rao* v *Gl[illegible]* A I R 193[illegible] Bom 144 = 36 Bom L R 1074

S 115 (p 1294) The words at the beginning of the tenancy mean at the time when the tenant was let into possession The distinction between the [illegible] seeks to deny and [illegible] possession seems to [illegible] vided by s 116 that [illegible] his land [illegible] he sense [illegible] vitiate

the agreement which he has entered into with the landlord *Badruddin* v *Bhagloo Kueri*, A I R 1934 Pat 555 = 15 P L T 519, *Racholappa* v *Kouchter*, A I R 1935 Bom 41 = 36 Bom L R 1083, *Alauddin* v *Aziz*, 148 Ind Cas 684 = A I R 1934 Pat 369, *Charubala* v *German Gomes*, A I R 1934 Cal 499 = 59 C L J 66 = 152 Ind Cas 212, *Beli* v *Beli Ram* A I R 1934 Lah 445 = 154 Ind Cas 52, *Chandrika* v *Bombay Baroda & Central India Ry*, A I R 1935 P C 59 = 1935 O W N 319, *Kumar Raj* v *Barboni Coal*, A I R 1935 Cal 368 = 62 C 340 = 63 C L J 477

S 116 (p 1294) Section 116 relates also to tenancies other than those in which tenant was first let in possession *Ram zani* v *Banshidhar*, A I R 1935 Oudh 385 = 1935 O W N 449 = 1935 O L. R 230, *Bhattacharji* v *Ishtiog*, 143 Ind Cas 838 = 10 O W N 48 = A I R 1933 Oudh 129

S 116 (p. 1294) Where persons executing a lease deed are not let into possession of the property by the landlord but they were in possession long before they signed the lease, which was done under pressure, under a mistake and in ignorance of facts relating to the landlord's title, the execution of the loan does not raise any estoppel against person executing the lease *U Po Shin* v *Edward*, A I. R 1934 Rang 139 = 150 Ind Cas 898.

S 116 (p 1294) No doubt a tenant may dispute his landlord s title, if he has been evicted by title paramount, or if under threat of eviction by a party having a title paramount, he has attorned as tenants But if the tenant has attorned voluntarily, he is estopped from denying his landlord s title *Vayya prath* v *Chowa Kkaran*, A I R 1934 Mad 197 = 37 M L W 116 = 1934 M W N 38 = 66 M L J 355 = 147 Ind Cas 1218

S 116 (p 1302) Licensee or his assignee is also barred like tenants *Currimbhoy* v *Creet* 60 I A 297 = 60 C 980 = 1933 M W N 10 = 37 C W N 265 = 37 L W 253 = 35 Bom L R 223 = 57 C L J 264 = 1933 A L J 611 = A I R 1933 P C 29 = 64 M L J 103 (P C)

S 116 (p. 1303) As regards estoppel by mortgagee *vide Mahamed Sherif* v *Syed Kasim*, A I R 1933 Mad 635 = 1933 M W N 642

S 118 (p 1314) It not likely for a child of seven years to distinguish between things which he has heard and those which he has seen, and when, inconsistent statement occurs in his evidence much importance should not be attached to his legitimacy *Ram Sakhia* v *Emperor*, A I R 1934 Pat 651 = 15 P L T 586

S 123 (p 1330) *Vide Mahtab* v *Secretary of State*, A I R 1933 Lah 157

S 124 (p 1334) Report of confidential enquiry held under orders of Divisional officer for taking departmental action is privileged and inadmissible in evidence under s 124 *K* v *Mir Mahamed* A I R 1935 Sind 50 = 28 S L R 274 = 153 Ind Cas 651

S 124 (p 1334) Section 124 Evidence Act, involves two matters and *there is distinction between the two (1) whether the particular document for* whic [illegible] whether document is a [illegible] and it is for the C [illegible] ecide that the document is of the nature contemplated by the section then as to whether by its *disclosure public interest would suffer of which the public officer himself is the* sole Judge, The ground of privilege is only in regard to the second matter and not in regard to both *Srila* v *Secretary of State* A I R 1935 Mad 542

S 126 (p 1340) Things observed in course of employment are protected *Hakam* v *Emperor*, A I R 1934 Lah 269 = 1934 Cr C 507 = 152 Ind Cas 161 = 36 Cr L J 31

S 126 (p 1340) The privilege afforded to a legal adviser under s 126 is of a very limited character It protects only such communications as are made to the legal adviser in confidence, in the course and for the purpose of employment. And if the communication is not made in confidence then the communication is in no sense privileged *Bhagvani* v *Deoram*, A I R. 1933 Sind 47 = 27 S L R 72 = 34 Cr L J 562.

S 126 (p 1351) Communications between a prosecutor in a Crown case and his attorney are not privileged *Bhagwani* v *Deoram*, A I R 1933 Sind 47 = 27 S L R 72

S 132 (p 1364) The compulsion referred to in s 132 is something more than being put in the witness box and being sworn to give evidence, but such compulsion may be express or implied *Ghanshamdas* v *Naumal*, A I R 1934 Sind 114 = 1934 Cr C 955 = 28 S L R 251 = 36 Cr L J 78

S 132 (p 1364) Where a witness answers questions put by Court and thereby he is open to criminal prosecution, he must be deemed to have been compelled to answer and this entitles him to privilege of s 132 even though he has not objected *Jagannath* v *Emperor*, A I R 1934 Lah 386

S 133 (p 1372) A confession of a co accused requires to be corroborated as much as and in the same way as the sworn testimony of an accomplice, and a retracted confession is of no value at all as against the co accused *Kasimuddi* v *Emperor*, 39 C W N 27, see also *Madhu Sudan* v *Emperor*, 37 C W N 934, see also *Venkataramanna* v *Emperor*, 1933 M W N 1129, *Nasir* v *Emperor*, A I R 1933 All 31 = 1932 A L J 1125 – 55 A 91 = 143 Ind Cas 67

S 133 (p 1372) In order to sustain the conviction there must be independent corroboration of the testimony of the approver and the corroboration must be on a point material to the issue *Jiwan Singh* v *Emperor*, 34 P L R 866, see also *Arjan* v *Emperor* 34 P L R 2 *Dhaju Mandol* v *Emperor*, A I R 1933 Pat 112 = 34 Cr L J 476 = 146 Ind Cas 934, *Ramani Mohan* v *Emperor*, A I R 1933 Cal 146 = 34 Cr L J 638, *Shib das* v *Emperor*, A I R 1934 Cal 114 = 35 Cr L J 551, *Hafizuddi* v *Emperor*, A I R 1934 Cal 678 = 3 C W N 777 = 35 Cr L J 1357, 35 Cr L J 1335 = A I R 1934 Cal 719 (F B), *Mahadeo Prasad* v *Emperor* A I R 1934 Oudh 90 = 11 O W N 62 = 1934 Cr C 260 = 35 Cr L J 397 = 9 Luck 355, *Bimal Prosad* v *Emperor*, A I R 1934 Lah 583 = 35 Cr L J 752 = 148 Ind Cas 745

S 133 (p 1372) A confession of a co accused requires to be corroborated as much as and in the same way as the sworn testimony of an accomplice, and a retracted confession is of no value at all against the co accused *Kasimuddin* v *Emperor*, 39 C W N 27

S 133 (p 1372) In considering evidence of accomplice, Judge sitting without jury must treat himself as jury and apply same rule as in trials with jury *Shiba Das* v *Emperor*, A I R 1934 Cal 114 = 37 C W N 934 = 147 Ind Cas 1124

S 133 (p 1387) Evidence of accomplice can be used for purpose of corroborating evidence of approvers *Maung Thaka* v *Emperor*, A I R 1935 Rang 491; but see *Parbhu* v *Emperor*, A I R 1933 Lah 916 = 34 P L R 639 = 146 Ind Cas 364

S 135 (p 1390) Where the defence wants to cross examine the prosecution witnesses in a particular order by being allowed to postpone the cross examination of the complainant on the ground that the cross examination of the complainant before some other witnesses will embarrass and prejudice the defence case, the mere fact that the complainant, a sickly man

is present in Court and may not come on some other day due to his bad health is not sufficient to justify the Court in refusing to accede to the request of the defence; but the Court should exercise the discretion in favour of the defence *Moosa Haji* v *Emperor*, A I R 1933 Cal 189 = 37 C W. N 286 = 142 Ind Cas 479 = 34 Cr L J 347

S 155 (p 1390) Where the witnesses are not summoned at the instance of the accused for cross examination, but are summoned for examination in a *de novo* trial, the order in which the witnesses are to be examined in chief rests at the discretion of the prosecution *Sheikh Ibrahim* v *Emperor*, A I R 1934 Nag 209 = 1934 Cr C 980 = 152 Ind Cas 236

S 135 (p 1391) The presence of a witness during the examination of the previous witness may well be turned an abuse of the process of the Court and therefore under s 151 the Court has inherent power to prevent that abuse and the Court can order that such witness should not be heard as a witness *Lalmani* v *Bejai Ram*, A I R 1934 All 840 = 1934 A L J 750 = 152 Ind Cas 30

S 145 (p 1430) The provisions contained in s 145, Evidence Act relates to cross examination as to previous statements in writing but does not militate in any way against such previous statement being used by way of corroboration of statement put in under s 288, Cr Pro Code which are substantive evidence *Manir Ali* v *Emperor*, A I R 1934 Cal 124 = 37 C W N 1066 = 58 C L J 66.

S 145 (p 1430) The previous statement must be put in strictly in accordance with the provisions of s 145 *Abdul Gafoor* v *Kalicharin* A I R 1934 Rang 273 = 152 Ind Cas 425

S 145 (p 1430) A previous statement made by a party cannot be made legal evidence in the case and used against him as one admission by merely filing an attested copy of that statement without putting it to the party concerned *Secy of State* v *Akbar Shah* A I R 1934 Lah 753

S 145 (p 1430) Admission by party in previous proceeding must be put to them before it is used against him in subsequent case *Daulat* v *Bishan*, A I R 1 34 Lah 750

S 145 (p 1430) If questions are put and extracts included from depositions during the trial of a case it must be obvious that evidence has been admitted by the Judge and that it must form part of his record whether technically speaking it has been properly tendered or not. *Malla Khan* v *Emperor* L I R 1934 Cal 169 = 37 C W N 1061.

S 145 (p 1430) A document which is used to contradict a witness must be put to the witness Simply because the witness does not go into the witness box, the Court is not entitled to break the law and admit such document *Gajadhar Tewari* v *Nand Lal*, A I R 1934 Pat 55 = 150 Ind Cas 841 = A A R 1934 Pat 215

S 145 (p 1430) No doubt a witness can be contradicted by his previous statement recorded in writing under s 145, but before this is done it must be shown that the statements were voluntary *Nayeb Shahana* v *Emperor*, A I R 1934 Cal 636 = 61 C 399 = 38 C W N 659 = 152 Ind Cas 44 = 35 Cr L J 1479

Ss 145 146 (p 1432) Document for contradicting need not come from legitimate custody *Emperor* v *Raja Ram*, A I R 1934 Nag 85 = 16 N L. J 193 = 145 Ind Cas 83 = 1934 Cr C 151

S 145 (p 1432) Section 162 Cr Pro Code in its present form allows a Court no discretion to refuse an accused person copies of statements of witnesses recorded by the police in the course of an investigation whether such statements are recorded in a police diary or otherwise, unless proviso (2) to the

section applies. This is the case whether the statements are in extenso or in the form of a compressed memoranda and whether they are recorded in the third person or in the first person provided they are such statements as can be utilized to contradict a witness with his statement in Court in the manner provided by s 145 Evidence Act *Emperor* v *Hari and others*, A I R 1935 Sind 145 but see *Michael* v *Emperor*, 1933 M W N 1270, *Pakkiri* v *Emperor* 1933 M W N 919

S 145 (p 1432) Where under s 162 Cr Pro Code, a statement in a public diary is to be used to contradict a witness the procedure under s 145, Evidence Act is to be observed strictly *Raghuraj* v *Emperor*, A I R 1934 All 956, see also *Ponnusami Chetti In re*, 56 M 475 143 Ind Cas 424=34 Cr L J 582=1933 M W N 90=A I R 1933 Mad 372=64 M L J. 519, *Ram Bharosey* v *Emperor*, 14 L R 184 Cr

S 154 (p 1452) From the mere fact that a witness before the Sessions Court makes statement relating to a part of the prosecution case different from what he made before the Magistrate does not necessarily make him hostile *Nayeb Shahana* v *Emperor* A I R 1934 Cal 636=38 C W N. 659=61 C 399=152 Ind Cas 44=35 Cr L J 1479

S 154 (p 1452) Where it does not appear that the witness unexpectedly turned out hostile, it is not a proper exercise of discretion under s 154 for the Judge to allow him to be cross examined especially when the object of such cross examination is to introduce his retracted confession in evidence *Nayeb Shahana* v *Emperor*, A I R 1934 Cal 636 38 C W N 659=61 C 399–152 Ind Cas 44=35 Cr L J 1479

S 154 (p 1450) Although s 154 gives the Court an unfettered discretion to allow cross examination of a witness by the party calling him it ought not to exercise its discretion unless during the examination in Chief of the witness something happens which makes it necessary for the facts to be got from the witness by means of cross examination That section does not entitle any party, for instance to say 'I propose to call my opponent and cross examine him' and the Court to allow such cross examination without anything more Some thing more than the mere position in which the witness stands to the party calling him is required before the Court can exercise its discretion Therefore, it is necessary before the procedure of s 154 can be adopted either for the per mission of the Court to be obtained or for it to be given by the Court without its being sought Such permission should not be tacit but should be signified if not in words by some other action of the Court indicating permission *Ammathayarammal* v *Official Assignee* A I R 1933 M 137=64 M L J 208=37 L W 233=144 Ind Cas 629=56 M 7

S 154 (p 1450) Before the party calling the witness can cross examine him, it it is not necessary that the witness should first of all be declared to be hostile and questions to cross examine can be allowed by the Court to be asked even though the witness does not show himself to be hostile *Ammathaya rammal* v *Official Assignee*, A I R 1933 Mad 137=56 M 7=37 L W 233=A I R 1933 Mad 137=64 M L J 208

S 154 (p 1456) When the Court has exercised its discretion under s 154 it ought not to be interfered with by the appellate Court *Ammathayaram mal* v *Official Assignee* A I R 1933 Mad 137=56 M 7=37 L W 233=A I R 1933 Mad 137=64 M L J 208

S 155 (p 1463) Where a previous statement by a witness is used to contradict him he should be given opportunity to explain it *Amrit* v *Gurcha ran* A I R 1934 All 226=147 Ind Cas 591

Ss 155 157 (p 1470) Evidence of test identification is admissible under Ss 155 and 157 and otherwise also *Krishna chandra* v *Emperor*, A I R 1935 Cal 311=39 C W. N 488

S 157 (p 1773) A former statement admitted under s 157 can only be
[illegible] But it can not be used as sub-
[illegible] Munda v *Emperor*, A I R
[illegible] *Emperor*, A I R 1933 Rang
[illegible] Cr C 644, *Ram Das* v *Maya*

S 157 (p 1473) The first information can be used as corroborative evidence only of the person making the report *Mt Misri* v *Emperor*, A I R 1934 Sind 100

S 157 (p 1473) Where a person has been examined as a witness, a statement said to have been made by him to another is not admissible when no question is put to the witness as to whether the particular statement had been made to such other person *Mt Misri* v *Emperor*, A. I R 1934 Sind 100

S 158 (p 1474) Under s 158, prior statements of deceased persons are admissible both for contradiction and corroboration *Sundarsana* v *Sutharamamma*, 1933 M W N 1148.

S 159 (p 1475) Horoscope may be used for refreshing the memory as regards the age of the person whose horoscope it is *Las Baba* v *Government of Mysore*, 12 Mys L J 133

Ss 159 161 (p 1475) Panchnamas may be used to refresh memories *Baloch Pirwali* v. *Emperor*, 144 Ind Cas 772 = 34 Cr L J 848 = A I R 1933 Sind 220

S 162 (p 1487) Even confidential document should be produced before Court and the Court is to decide how far the privilege claimed is reasonable and justified *Karigowda* v *Government of Mysore*, 11 Mys L J 171

S 165 (p 1493) Under s 165 the Court can not order the production by a party of any document or thing no mattter how irrelevant, into Court, unless the object is to obtain indicative evidence which may lead to discovery of relevant evidence of any fact in any matter then before Court *Krishna Ayyar* v *Balakrishna*, A I R 1934 Mad 199 = 39 M L W 179 = 60 M L. J 498 = 57 M 635 = 148 Ind Cas 79

S 167 (p 1500) Section 167 of the Act provides that if a Court finds that a certain piece of evidence has been wrongly admitted, the decision need not be reversed on the ground even in second appeal provided that the Court holds there is sufficient evidence on the record to justify the finding *Soney Lal* v *Derbdeo*, 16 P L T 199 (F B)

S 167 (p 1500) Section 167 does not apply to second appeal on the civil side or cases tried by a jury on the criminal side, and not to first appeals where the facts are a matter of decision of the appellate Court *Bhabendra chandra* v *Ajodhya chandra*, A I R 1934 Pat 605

S 167 (p 1500) If there is sufficient evidence upon which a case could be completely decided the appellate Court is precluded from remanding the cases for hearing under s 167 The question is not whether the Judge would or would not believe the evidence other than the inadmissible evidence but whether it was possible for him to come to such conclusion as he did in the absence of that inadmissible evidence *Hari Ahir* v *Sri Sangat Chatchi* 152 Ind Cas 829 = A I R 1934 Pat 617

S 167 (p 1500) The acceptance of inadmissible evidence is not a ground to set aside a judgment or grant a new trial if there is other evidence upon which the finding could be arrived at And the High Court even in second appeal see whether there is such other evidence justifying the decision and if there is such evidence it cannot order a new trial *Gajadhar* v *Nand Lal*, A I R 1934 Pat 55 = 150 Ind. Cas 841 = A I R. 1934 Pat 55

Amendments to the Indian Evidence Act, 1872

The Government of India (Adaptation of Indian Laws) Order, 1937.

AT THE COURT AT BUCKINGHAM PALACE.

THE 18TH DAY OF MARCH, 1937.

Present.

The King's Most Excellent Majesty in Council

WHEREAS by section two hundred and ninety three of the Government of India Act, 1935, (hereinafter in the recitals to this Order referred to as 'the Act') His Majesty is empowered by Order in Council to provide that as from such date as may be specified in the Order any law in force in British India or in any part of British India shall, until repealed or amended by a competent legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of the Act

And whereas a draft of this Order has been laid before Parliament in accordance with the provisions of sub-section (1) of section three hundred and nine of the Act and an Address has been presented to His Majesty by both Houses of Parliament praying that an Order may be made in the terms of this Order ·

Now, therefore, His Majesty, in the exercise of the said powers and of all other powers enabling him in that behalf, is pleased by and with the advice of His Privy Council to order, and it is hereby ordered as follows,—

1 This Order may be cited as the Government of India (Adaptation of Indian Laws) Order, 1937, and shall come into operation on the first day of April, nineteen hundred and thirty seven

2 (1) In this Order the expression 'Indian Law' means a law as defined [illegible] three of the Act

[illegible] or the interpretation of this [illegible] of Parliament

3 The Indian laws mentioned in the Schedule to this Order shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to the adaptations and modifications directed by those Schedules to be made therein or, if it is so directed, shall cease to have effect

4 (1) Whenever an expression mentioned in the first column of the Table hereinunder printed occurs (otherwise than in a title or preamble or in a citation or description of an enactment), in a Central or Provincial Act or Regulation whether an Act or Regulation mentioned in the Schedules to this Order or not, then, unless that expression is by this Order expressly directed to be otherwise adapted or modified, or to stand unmodified or to be omitted, there shall be substituted therefor the expression set opposite to it in column two of the said table

Table of General Adaptations

Governor General of India in Council Governor General of India Governor General in Council Governor General Government of India	Central Government

Governor in Council Governor (except in the expression 'Governor's Province') Lieutenant Governor in Council Lieutenant Governor Chief Commissioner (except in the expression 'Chief Commissioner's Province') Local Government Local Administration	Provincial Government
Gazette of India local official Gazette local Gazette any other expression denoting a Gazette in which official notices of a government are published, not being the Gazette of a district or other sub division of a Province	Official Gazette

Any reference to the Governor (or Lieutenant Governor) of a named Province in Council shall be treated for the purposes of this paragraph as if it were a reference to the Governor (or Lieutenant Governor) in Council of that Province

(2) A direction in the Schedules to this Order that a specified Indian law or section or portion of an Indian law shall stand unmodified shall be construed merely as a direction that it is not to be modified or adapted in accordance with the foregoing provisions of this paragraph

5 (1) Where this Order requires that in any specified Indian law or in any section or other portion of an Indian law, certain words shall be substituted for certain other words or that certain words shall be omitted, that substitution or omission, as the case may be, shall except where it is otherwise expressly provided be made wherever the words referred to occur in that law or, as the case may be, in that section or portion

(2) Where this Order requires that in any Indian law a plural noun shall be substituted for a singular noun and *vice versa* or a masculine noun for a neuter noun or *vice versa* there shall be made also in any verb or pronoun in the sentence in question such consequential amendment as the rules of Grammar may require

6 (1) The following provisions shall have effect where any Indian law which under this Order is to be adapted or modified has before the commencement of this Order been amended, either generally or in relation to any particular area by the insertion or omission of words or the substitution of words for other words —

(*a*) effect shall first be given in the amending law to any adaptation or modification required by paragraphs three and five of this order to be made therein,

(*b*) the original law shall then be amended either generally or, as the case may be, in its application to the particular area, so as to give effect to the directions contained in the amending law or, where any adaptation or modification has fallen to be made under sub paragraph (a), in that law as so adapted or modified and

(*c*) all adaptations or modifications required by this Order to be made in the original law shall then be made in that law as so amended except so far as in the case of any particular area they may be inapplicable

(2) In this paragraph references to the amendment of a law by the insertion or omission of words or the substitution of words do not include references to an amendment which is effected merely by directing that certain words shall be construed in a particular manner

7 Subject to the foregoing provisions of this Order any reference by whatever form of words in any Indian law in force immediately before the commencement of this Order to an authority competent at the date of the passing of that law to exercise any powers or authorities or discharge any functions, in any part of British India shall, where a corresponding

new authority has been constituted by or under any Part of the Government of India Act, 1935, for the time being in force, have effect until duly repealed or amended as if it where a reference to that new authority.

8 In any Indian law in force immediately before the commencement of this Order any reference by name or description to any territory shall, unless the contrary intention appears or unless it has been, or is by this Order, otherwise expressly provided, be construed as a reference to the territory which bore that name or answered to that description at the date when the enactment containing that name or description came into operation·

Provided that in the application of any enactment to Madras, Bombay, Bihar or the Central Provinces, references in that enactment to Madras, Bombay, Bihar or the Central Provinces, as the case may be, shall be construed as exclusive of so much of those Provinces respectively as was separated therefrom on the constitution of the Provinces of Orissa and Sind

9 The provisions of this Order which adapt or modify Indian laws so as to alter the manner in which, the authority by which, or the law under or in accordance with which, any powers are exercisable, shall not render invalid any notification, order, commitment, attachment, bye law, rule or regulation duly made or issued, or anything duly done, before the commencement of this Order, and any such notification, order, commitment, attachment, bye law, rule, regulation or thing may be revoked, varied or undone in the like manner, to the like extent and in the like circumstances as if it had been made, issued or done after the commencement of this Order by the competent authority and under and in accordance with the provisions therein applicable to such a case

10 Save as provided by this Order, all powers which under any law in force in British India, or in any part of British India, were immediately before the commencement of Part III of the Government of India Act, 1935, vested in, or exercisable by, any person or authority shall continue to be so vested or exercisable until other provision is made by some legislature or authority empowered to regulate the matter in question

11 Nothing in this Order shall affect the previous operation of, or anything duly done or suffered under, any Indian law, or any right, privilege, obligation or liability already acquired, accrued or incurred under any such law, or any penalty, forfeiture or punishment incurred in respect of any offence already committed against any such law

12 For the avoidance of doubt it is hereby declared that—

(*a*) nothing in this Order transferring or assigning any functions to the Central Government shall be construed as excluding those functions from the operation of section on [illegible] section one hundred and twenty four of the [illegible]

(*b*) the transfer by this C[illegible] diction theretofore exercisable b[illegible] not be construed as excluding that jurisdiction from the operation of sub section (2) of section two hundred and ninety six of the said Act,

(*c*) nothing in this Order shall affect the provisions of any Order in Council for the time being in force made under section one hundred and fifty eight, section one hundred and fifty nine or section one hundred and sixty of the said Act (which empower Orders to be made regulating the relations of India and Burma as to their monetary systems, relief from double taxation, customs, and ancillary and related matters), or under any corresponding provisions in the Government of Burma Act 1935, and

(*d*) no repeal effected by this Order shall affect the operation of sub-paragraph (2) of paragraph fifteen of the Government of India (Commencement and Transitory Provisions) Order, 1936

(Sd) M P. A Hankey

1 The Indian Evidence Act, 1872

(1 of 1872)

Section 26 —In the explanation omit ' or in Burma"

Section 36 —For ' Government" substitute "any Government in British India"

Section 37 —For 'Act of the Governor General of India in Council" substitute ' Act of the Central Legislature" and for the words from ' for the time being" to the end of the section substitute by any laws for the time being in force or in a Government notification or notification by the Crown representative appearing in the official Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, Colony or possession of His Majesty is a relevant fact "

Section 57 —Substitute for paragraph (1) —

"(1) all Indian laws "

In paragraph (4) for the words from "of the Councils" to 'relating thereto" substitute ' of the legislatures established under any laws for the time being in force in British India "

In paragraph (6) for 'the Governor General or any Local Government in Council" substitute "the Central Government or the Crown representative "

In paragraph (7) for the *Gazette of India* or in the official Gazette of any Local Government" substitute ' any official Gazette "

Section 78 —In sub section (1) for "the Executive Government of British India substitute "the Central Government" , after the first ' departments" insert 'or of the Crown representative", and at the end of the sub section add "or, as the case may be, of the Crown representative", in sub section (2) for ' by order of Government" substitute "by order of the Government concerned" , and in sub-section (4) for "public act of the Governor General of India in Council" substitute Central Act "

Section 79 —For ' Native State in alliance with Her Majesty" substitute 'Indian State" and for the Governor General in Council" substitute ' the Central Government or the Crown representative "

Section 81 —For 'the *Gazette of India*, or the Government Gazette of any Local Government, or' substitute any official Gazette, or the Government Gazette"

Section 83 —For ' Government" substitute "any Government in British India "

Section 118 —After 'any portion of British territory has" insert "before the commencement of Part III of the Government of India Act, 1935"

2 The Banker's Books Evidence Act, 1891

(XVIII of 1891)

Section 2 —For sub section (1) sebstitute—

'(1) 'Company' means a company registered under any of the enactments relating to companies for the time being in force in any part of His Majesty's dominions or incorporated by an Act of Parliament or by an Indian law or by Royal Charter or by Letters Patent "

———

THE GOVERNMENT OF BURMA (ADAPTATION OF LAWS) ORDER, 1937.

WHEREAS by section one hundred and forty-nine of the Government of Burma Act, 1935, His Majesty is empowered by order in Council to provide *that*, as from such date as may be specified in the order, any law in force in Burma shall, until repealed or amended by the Legislature or other competent authority, have [illegible] as appear to His Majesty [illegible] ma :

And whereas a draft of this order has been laid before Parliament in accordance with the provisions of sub-section (1) of section one hundred and fifty-seven of the said Act and an Address has been presented to His Majesty by both Houses of Parliament praying that an order may be made in this terms of this order :

Now, therefore, His Majesty, in the exercise of power conferred on him as *aforesaid* and of all other powers enabling him in that behalf, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as *follows* :—

1. This Order may be cited as the Government of Burma (Adaptation of Laws) Order, 1937.

2. This Order shall come into operation on the separation of Burma and India.

3. (1) In this Order, 'Burman law' means a law as defined in section one hundred and forty-nine of the Government of Burma Act, 1935.

(2) The Interpretation Act, 1889, applies for the interpretation of this order as it applies for the interpretation of an Act of Parliament.

4. (1) The enactments mentioned in the Schedule to this order shall, until repealed or amended by the Legislature or other competent authority, have effect subject to the adaptations and modifications directed by that Schedule to be made therein or, where so directed, shall cease to have effect.

(2) Save as otherwise provided in that or in any other Burman law, every Burman law shall be deemed to have effect throughout the whole of British Burma.

5. (1) Whenever an expression mentioned in the first column of the Table here-in-under printed occurs (otherwise than in a title or preamble or in a citation or description of an enactment) in any Burman law then, unless that expression is under the last preceding paragraph expressly directed to be otherwise adapted or modified or to stand unmodified or to be omitted, there shall be substituted therefor the expression set opposite to it in the second column of the said Table.

Table of General Adaptations.

Expression	Substitute
Governor-General of India : Governor-General :	Governor.
Governor-General of India in Council : Governor-General in Council :	
Chief Commissioner of British Burma : Chief Commissioner :	
Lieutenant-Governor of Burma : Lieutenant-Governor :	
Local Government of Burma ; Local Government.	

Gazette of India, Gazette of British Burma, Burma Gazette, Local official Gazette, Official Gazette,	Gazette

(2) Any words contained in any Burman law, otherwise than in a title or preamble, which require the consent assent, approval, sanction or control of the Governor General or the Governor General in Council in relation to any thing done by the Local Government or the Governor shall be omitted.

(3) A direction in the Schedule to this order that a specified Burman law or section or portion of a Burman law shall stand unmodified shall be construed merely as a direction that it is not to be modified or adapted in accordance with the foregoing provisions of this paragraph

6 Where this Order requires that in any specified Burman law or portion of a Burman law certain words shall be substituted for certain other words or that certain words shall be omitted, that substitution or omission, as the case may be, shall unless the contrary intention appears, be made wherever the words referred to occur in that law or that portion

7 (1) Where any Burman law has before the commencement of this order been amended by the insertion or omission of words, or the substitution of words for other words, the adaptations and modifications directed to be made therein by this order shall be made in the enactment is in force at the commencement of this order, that is to say, as so amended

Provided that nothing in this paragraph shall be construed as extending the operation of any temporary amending enactment

(2) In this paragraph references to the amendment of law by the insertion or omission of words, or the substitution of words, do not include references to an amendment which is effected merely by directing that certain words shall be construed in a particular manner

8 Where this order requires the substitution in any enactment of a plural noun for a singular noun or *vice versa* or of a masculine noun for a neuter noun, or *vice versa*, or of a noun or adjective beginning with a consonant for a noun or adjective beginning with a vowel, or *vice versa* there shall also be made in any verb, pronoun or article in the sentence in question such consequential amendment as the rules of Grammar may require

9 The pro[illegible] which adapt or modify any enactment so [illegible]e authority by which, or the law in or in [illegible]rs are exercisable, shall not render invalid any notification, order, commitment, attachment bye law, rule or regulation duly made or issued, or anything done before the commencement of this order; and any such notification of order commitment, attachment, bye law, rule, regulation or thing may be revoked, varied or undone in the like manner, to the like extent and in the like circumstances as if it had been made, issued or done after the commencement of this order by the competent authority and under and in accordance with the provisions then applicable to such a case

10 Nothing in this order shall affect the previous operation of, or anything duly done or suffered under, any Burman law, or any right, privilege, obligation or liability already acquired, accrued or incurred under any such law or any penalty, forfeiture or punishment incurred in respect of any offence already committed against any such law

11 Save as provided in this order, all powers which under any law in force in Burma or in any part of Burma were at the commencement of this order vested in or exercisable by any person or authority shall continue to be so

vested or exercisable until other provision is made by the Legislature or by some authority empowered to regulate the matter in question.

12 (1) References in any Burman law to that or any other Burman law, or to any section or portion thereof, shall, except in so far as the contrary intention appears, be construed—

(*a*) as respects any period before the separation of India and Burma, as references to that law, section or portion as in force in all places to which it then extended, whether within or without Burma

(*b*) as respects any period after the said separation as referencee to that law, section or portion as in force in Burma

(2) The foregoing provisions of this paragraph extend to references to, or to any section or portion of, any Burman law by means of the short title of the law, notwithstanding that the Schedule to this Order alters that short title and notwithstanding that no consequential alteration is made in the reference.

13 For the avoidance of doubt it it is hereby declared that nothing in this order shall affect the operation of sub-paragraph (2) of paragraph eleven of the Government of Burma (Commencement and Transitory Provisions) Order, 193[illegible], or of any order in Council made under Part XI of the Government of Burma Act, 1935

THE SCHEDULE

The Indian Evidence Act, 1872

(I of 1872,

In the short title omit "Indian" and "1872'

Section 1—Omit "extends to the whole of British India and'

Sections 23, 126, 128 and 150—For 'barrister pleader attorney or vakil', and 'barrister, attorney or vakil substitute "legal practitioner'

Section 57—In clause (12) and in section 127 for "advocates, attorneys proctors, vakils pleaders and "barristers pleaders attorneys and vakils substitute "legal practitioners

Section 26—Omit In the Presidency of Fort St George or in Burma or elsewhere"

Section 37—For 'Act of the Governor General of India in Council or of any other legislat ve authority in Brit sh India constituted for the time being *under the* Indian Council Act 1861 the Indian Councils Acts 1861 and 189[illegible] or the Indian Councils Acts 1861 to 1909" substitute enactment in force at any time in British Burma or British India", for Gazette of India, or in the Gazette of any Local Government" substitute Gazette"

Section 57—In clause (1) for British India' substitute 'British Burma or British India'

For clause (4) substitute—

'(4) the course of proceeding of Parliament and of the Burma Legislature"

In clause (6) for British India and of all Courts out of British India established by the authority of [illegible] Local Government in Council substitute British Bur[illegible] having the force of law in British India" subst[illegible] Burma"

In clause (7) for [illegible] Burma" and for *Gazette of India* or in the official Gazette of any Local Government" substitute Gazette"

Section 65—In clause (*f*) for Brit sh Ind a" substitute "British Burma"

Section 66—For 'attorney" substitute 'advocate'

Section 74—For British India substitute "British Burma."

Section 78—For "Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government" substitute "Government" and for 'any such Government" substitute "the Governor"

For 'public Act of the Governor General of India in Council" substitute "enactment in force in British Burma"

For "British India" substitute "British Burma"

Section 79—For 'British India" substitute 'British Burma" and for "Native State in alliance with Her Majesty" substitute "other part of Burma"

Section 81—For "*Gazette of India*, or the Government Gazette of any Local Government, or" substitute "Gazette of Burma or the Government Gazette".

Sections 85 and 86—Omit "or of the Government of India"

Section 86—Omit the words from "An officer" to "territory or place".

Section 91—For Exception 2 substitute—"Exception 2—Wills may be proved by any probate thereof having effect in British Burma"

Omit section 113

The Bankers' Books Evidence Act, 1891.

(XVIII of 1891)

Section 1—Omit sub section (2)

Section 2—For clause (1) substitute the following —

"(1) 'Company' means a company incorporated or registered by or under the law of the United Kingdom, British Burma, British India or any British possession",

In clause (6) for "a High Court substitute "the High Court"

THE
INDIAN EVIDENCE ACT.

—o—

ACT I OF 1872.

Received the assent of the Governor-General on the 15th March, 1872

Preamble

WHEREAS it is expedient to consolidate, define and amend the Law of Evidence; It is hereby enacted as follows :—

Title of an Act.—"Originally, bills in Parliament were mere petitions to the King. They were entered on the rolls of Parliament, with the King's answer and at the [illegible] records into Statutes to which the[illegible] itle was first added about the eleventh [illegible] iginal title of a bill is amended at [illegible] when the alterations in the body [illegible] necessary, and in the Commo[illegible] in the third reading stage of a b[illegible] d by *Lord Mansfield* in *Rex* [illegible] was no part of the law, see al[illegible] 5, *Poweller's Case*, 11 Rep 336 [illegible] *nouth*, Ambl 22, *Chance* v [illegible] *t*, 6 C B N S 1; *Jefferys* v B[illegible] x D 194 "The [illegible]

[illegible] made to the preamble [illegible] *Chander* v. *Shoorothouse*, 9 W. R. (P. B.) [illegible] m v. *Imamuddin*, 2 A. 74 (90), [illegible] 4 M. I. A. 187.

e **Preamble** The preamble is undoubtedly a part of the Act, and may be used to explain but not to control, the enacting part, which goes often beyond the preamble, if the words to be found in the former are strong enough for the purpose *China Ingan v Mahomed*, 2 M H C R 322; *Salkeld v Johnson*, (1848) 2 Ex 283 'I very much regret said *Lord Alverstone C J* "that the practice of inserting preambles in Acts of Parliament has disappeared, for the preamble often helped to the solution of doubtful points" *London County Council v Bermondsey Bioscope Co*, 80 L J K B 144, But the preamble of an Act of Parliament cannot be resorted to in order to ascertain the intention of the Act unless there is an ambiguity in the enacting part *Taylor v Oldham County Corporation* 4 Ch D 395 = 46 L J Ch 105 = 35 L T 696 = 25 W R 178 In cases of doubt preamble can be legitimately invoked to determine the scope of the enactment *Emmanuel v Constable* 3 Russ 436, *Brett v Brett*, 3 Addams 219 *Wethered v Calcutt*, 61 R R 600 *Carr v Royal Exchange Ass Co*, 33 L J Q B 63, *Re Mısters*, 33 L J Q B 146 When the language and the object and scope of the Act are not open to doubt the preamble cannot restrict or extend the enacting part 4 Inst 330, *Per Lord Mansfield* in *Pettison v Banks*, (1777 Cowp 543, *Pattison v Sewell* (1766) 1 W Bl 659, *Copland v Davies*, (1872 L R 5 H L 358, *Bentley v Rotherham* (1876) 46 L J Ch 284, *R v Tiltos* (1723) 8 Mod 144 The meaning and effect of the preamble of a Code, must be understood to overlie the whole Act giving colour to and controlling its provisions and by showing the intention of the legislature supplying *pro tanto* the rule for the interpretation of these provisions *Ulabram v Imamuddin*, 2 A 74 (90)

Where the object or meaning of an enactment is not clear "the preamble of a Statute is a good means to find out the meaning of the Statute and as if it were a key to open the understanding thereof (*Coke Inst* 79 a) Where the intention of the Legislature is declared by the preamble, effect is to be given to the preamble to this extent namely that it shows what the legislature are intending and if the words of enactment have a meaning which does not go beyond that preamble or which may come up to that preamble, in either case that meaning is to be preferred to one showing an intention of the Legislature which would not answer to the purposes of the preamble or which go beyond them *Per Lord Blackburn* in *Overseer of West Ham v Iles* (1883) 8 App Cas 388 389 see also *The People v Utica Insur Co* 15 Johns N Y Rep 389, see also *Coosaw Mining Co v South Carolina*, (1891) 144 U S 550 at p 563 It has been sometimes said that the preamble may extend, but cannot restrain the enacting part of a Statute *R v Athos* 8 Mod 144, *Copeman v Gallant*, 1 P Wms 390 per *Lord Hope* in *Walker v Richardson*, (1837) 6 L J Ex 229, *Hayman v Fletcher* 32 L J C P 137 *Drummond v Drummond*, L R 2 Ch 44, *Karns v Co of Bunns Co* 6 C B N S 388 But it would be difficult to support this proposition *Maxwell*, 6th Ed p 91 citing *per Parker C B* and *Lord Hardwicke* in *Ryall v Rolle*, 1 Atk 174 182 So it is well settled that the preamble cannot either restrict or extend the enacting part when the the language and the object and the scope of the Act are not open to doubt A preamble in a Statute cannot govern clear expression in the enacting part thereof *Keshab v Bhaktram* 18 C L J 182 *Queen Empress v Indrajit* 11 A 262 (266), *Kalu v Bhairam* 14 A 147 *Sutton v Sutton*, 22 Ch D 515, *Mould v Improvement Trustees*, 4 C 343 In *Powell v Kempton Park Race Course Co* (1899) A C 143 at P 157 = 68 L J Q B 392, *Lord Halsbury* observed "Two propositions are quite clear one that a preamble may afford useful light as to what a Statute intends to reach and another, that if an enactment is clear and unambiguous, no preamble can qualify or cut down the enactment

So where the enacting part is explicit and unambiguous, the preamble cannot be resorted to, to control, qualify or restrict it, but where the enacting part is ambiguous, the preamble can be referred to, to explain and elucidate it. *Lal Mal v Harnam Singh*, A I R 1923 Lah 35 = 23 P L R 595 = 101 Ind Cas 661 In *Rex v Brandling*, 7 B & C 613 *Lord Tenterden* thus laid down the rule "If on a review of the whole Act a wider intention than that expressed in the preamble appears to be the real one effect should be given to it, notwithstanding the less extensive import of the preamble" In *Fellowes v Clay*, (1843) 4 Q B 313, *Lord Denman* observed "The preamble is often no more than a recital of the inconveniences, and does not exclude any others for which a remedy is given by the Statute. The evil recited is but the motive

for the legislat'on ; but remedy may both consistently and wisely be extended beyond the cure of that evil". In the well known *Sussex Peerage Case*, 11 C L & Fin 85, *Tindal C J* observed · "If the words of the Statute are in themselves precise and unambiguous then no more can be necessary than to expand those words in their natural and ordinary sense The words themselves alone do in such case, best declare the intention of the lawgiver But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the Statute, and to have recourse to the preamble, which according to *Chief Justice Dyer*, is a key to open the minds of the makers of the Act, and the mischief which they intended to redress" In *the Secretary of State* v. *Maharaja of Bobbili*, 43 M 529 P C *Lord Shaw* said "It is the section that governs an
of Improvement of Calc
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may be a most useful g
tion of a particular

90) F B 145, *Kristonath* v *T F Brown*, C L J. 8, *Kesavalu Nicker* v *The* = 92 Ind Cas 1053 = A I R 1926 Mad 381 = 50 M L J 301, *Nepen* v *Sajer Pramanik*, 103 Ind Cas 662 = A I R 1927 Cal 763, *Raj Mal* v *Harnam Singh*, 104 Ind Cas 661 = 28 P L R 505 Where a section, or an Act, is capable of two renderings or is said to mean less or more, than it says it is a maxim of interpretation that one must look at the *mad*, L R 5 A 201 = 46 A

I which we are bound to admin and I say so because of the at it is not merely a fragmentary enactment, but a consolidatory enactment repealing all rules of evidence other than those saved by the last part of section 2 of that enactment"—*Per Mahmood J* in *Collector of Gorakhpur* v *Palakdhari Singh*, 12 A. 1 F B at p 35

Interpretation of Statutes A Statute is the will of the Legislature, and the fundamental rule of interpretation, to which all others are subordinate, is that a Statute is to be expounded 'according to the intent of them that made it" 4 *Inst 330*, *Sussex Peerage*, 11 Cl & F 143 It is the fundamental principle of the interpretation of Statutes that their language must be understood in the most ordinary and popular acceptation *Per Mahmood J* in *Queen Empress* v *Abdullah*, 7 A 385 (398) (F B) The language of a Statute, taken in its

inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity repugnance or inconsistency, but no further' *Per Lord Wensleydale*, in *Grey* v *Pearson*, *oles* (1882) 7 App Cas (P C) 193 (2 *tton*, (1886) 12 App Cas at p 6 In repe (1858) 7 H L Cas 114, 115, *Lord* as in substance laid down by *Mr Justice* Hul s & Bro 618) It had previously , in *Doe* v *Jessop* (12 East, 293) as 'a rule of common sense as strong as can be' It has been stated by *Lord Cranworth* (when *Chancellor*) as 'a Cardinal Rule' from which, if we

le departed, we should launch into a sea of difficulties not easy to fathom [*Grundey* v *Pinniger*, (1852) 1 De G M & G 502], and as the Golden Rule when applied to Acts of Parliament, by *Jervis* C J, in *Mattison* v. *Hart*, 23 L J C P 108, at p 114" *Maxwell* p 5 . . . . . inter-pretation of Statutes that when the lang . . . two constructions, the Court should not . . . ad to an absurdity or obvious injustice *Khan Gul* v *Lakha Singh*, A I R 1928 Lah 609 (F B) The C . . . and should construe an enactment as . . . terms of the other Statutes which it . . . l A Statute ought to be so construed that if it can be prevented no clause, sentence or word, shall be superfluous, void or insignificant *R* v *Bishop of Oxford*, 4 Q B D 245, *Hough* v *Windus*, 12 Q B D 224, *Vasanbai* v *Radhibai*, A I R 1928 Sind 118

Rules of Construction, when language is plain "It is not allowable" says *Vattel*, "to interpret what has no need of interpretation" (Law of N C 263) *Absoluta sententia expositore no indiget* (2 Inst 533) Such language best declares without more, the intention of the law-giver, and is decisive of it [*Per Buller J* in *R* v *Hodnett* 1 T R 966, *Sussex Peerage* (1844) 11 Cl & F 143 *U S* v *Hartwell*, 6 Wallace 395, *U S* v *Wiltberger*, 5 Wheat 95] The Legislature must be in . . . -sed, and conse-quently there is no . . . v *Banbury* 1 A & E 142, *Fisher* v *B* . . . Court is bound . . . of the language of the Statute, . . . tutory language, even if the result of such construction leads to anomalies or be productive even of absurdity *Rajib* v *Lakhan*, 27 C 11=3 C W N 660 following, *Bank of England* v *Vagliano*, L R App Cas (1891) 107 p 145, *St John Hamstead* v *Cotton* 12 App Cas 6 (1886), see also, *Alfred* v *Wilkinson*, 47 B 843, *R* v *City of London Court* (1892) 1 Q B 273, *Mersey Docks* v *Turner*, (1893) A C at p 477, *British Farmers & Co*, *In re*, 48 L J Ch 56, *Crawford* v *Spooner* 6 Moo P C 9, *R* v *Skeen* 28 L J M C 94, *Abey* v *Dale*, 21 L J C P 104 The duty of the Court is not to make the law reason-able, but to expound it as it stands, according to the real sense of the words *Biffin* v *Yorke*, 5 M & G 428, *Dennis* v *Towell* 42 L J M C 33, *Plasterers Co*, v *Parish Clerks Co*, 20 L J Ex 362 A Statute need not be interpreted in the light of what is just and expedient, where it is otherwise clear from plain and unambiguous language *Gwyne* v *Burnell* 7 Cl & F 572 "Our decision", says *Lord Tenterden* in *R* v *Barham* 8 B & C 99, "may in this particular case operate to defeat the object of the Act, but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the Act in order to give effect to what we may suppose to have been the intention of the Legislature" "The Act says *Lord Abinger* in *A G* v *Lockwood*, 9 M & W 395, "has practically had a pernicious effect not at all contemplated, but we cannot construe it according to that result" "I can not doubt" says *Lord Campbell* in *Coe* v *Lawrence*, 22 L J Q B 140, "what the intention of the Legislature was, but that intention has not been carried into effect by the language used It is far better that we should abide by the words of a Statute than seek to reform it according to the supposed intention" It may have been an oversight in the framers of the Act," . . . x 88, "but we must const . . . See also *R* v *Male*, 3 A . . . 22 L J, Q B 225, *Gwy* . . . L J Ch 372; *Wilkins* v *Ju* . . . , *Palmer* v *Thatcher*, 3 Q . . .

. . . d from the words of a Statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the Statute *Fordyce* v *Bridges*, 1 H. L. Cas 1=11 Jur 157 Because the Court . . . ept from the words in which it is ex . . . at the time. *Logan* v *Courtown* (L . . . gh

v *Shaghunath*, 2 O W. N 713=90 Ind Cas 470 *Nanak Ram* v *Mohan Lal*, 1 A 487, *Madhusudan* v *Bamacharan*, 1 Hyde, 100, *Madhusudan* v *Raja Mohesh*, 3 B L. R A. C 200; *Jagodishhuruy* v. *Kailash*, 24 C 725 (F B)=1 C W. N. 374, *Guicebullah* v *Mohun Lall*, 7 C 127=8 C L R 409; *Kuar Nugshar* v *Kuar Mathura*, 25 O C 189=9 O L J 235; *Moza Sadique* v *Mohomed Karim*, 9 O L J ... uld be interpreted as simply as possible ... 1922) L B 27=67 Ind Cas 610 The ... as it stands and not to make a new, though it may be a better law *Ram Charan* v *Kumud Mohan*, 25 C. 571 (578)=2 C W N 297 The rule that a word used in a Statute is to be understood in the same sense throughout, is only a rule of presumption, by no means inflexible, and certainly not of such a character as to be irrebuttable by other rules of interpretation founded upon the especial context of statutory words or reasons and objects whereof any special section is enacted *Per Mahmood J* in *Baijnath* v *Sital Singh*, 13 A 224 at p 245, but see *Babu* v. *Jaswant* 35 B. 401

The meaning of an Act is not to be ir... framers intended to do but with reference to ... employ *Nur Muhammad* v *Lal Chand*, 7 I... Ind Cas 254=A I R 1925 Lah 436, *Tool*... 502=102 Ind Cas 115=A I R 1927 Cal 474 But in some cases it is more reasonable to hold that the ... manner than that a meanin... intended. *Ram Chunder* ... Cal 927 In a word then it is to be taken as a fundamental principle, standing as it were on the threshold of the whole subject of interpretation, that the plain intention of the Legislature, as expressed by the language employed is invariably to be accepted and carried into effect, whatever may be the opinion of the judicial interpreter of its wisdom or justice If the language admits of no doubt or secondary meaning, it is to be obeyed *Gopal Chandra* v *Guru Charan*, A. I. R 1929 Cal ... h leads to an anomaly can be giver... and admit... Lah 325 behind the... *S R Balkri*...

No Addition or Omission In *Vickers* v *Evans*, 79 L J K B 955, *Lord Loreburn L C* observed "We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself" The observation of *Lord Mersey* in *Thompson* v *Goold*, 79 L J K. B 911 also runs as follows "It is a strong thing to read into an Act of Parli... the absence of clear necessity, it is ... wro... 2 M & Gr 277, *per I*... *rd Westbury in* *Exp*... J. 351 When ... interpreter to add ... *to create* ... he words the ... lawgiver ... *Crawford* v *Spooner*, ... when the Court's ... any expression ... 25 All ...

silent as to them *Pedalba Reddi v. Varala Reddi*, A I R 1929 Mad 236=29 M L W 210=1929 M W N 81=52 M 432

Facts If the words are suffici... which if less correct gram matic... the Legislature *Maxwell* p 36 ... v *Palmer*, 18 L J Ex 409; *Caledonian R Co v N Brit R Co* 6 App Cas 114 *Edinburgh Tramways Co v Torbain*, 1 App Cas ... *Eastman Photograph C v Comptroller of Patents*, (1898) A C 571, *Direct U S Cable Co v Anglo-American Telegraph Co* (1877) 2 App Cas 391, *Walton Ex parte* (1881) 17 Ch D 746 "The literal construction, then, has, in general, but *prima facie* preference To arrive at the real meaning, it is always necessary to get an exact conception of the ... consider according to *Lord Coke* (*Hey*... 10 Rep 73a) (1) What was the law b... mischief or defect for which the law had not provided, (3) What remedy ... ment has appointed and (4) the reason of the remedy *Maxwell* p 39 The same view is reiterated by *Lindley M R* in *Mayfair Property Co, In re*, (1898) 2 Ch 28 at p 35 in the following word In order properly to interpret any Statute it is as necessary now as it was when *Lord Coke* reported (*Heydon's* cas (1854) 3 Rep 7 (a)) to consider how the law stood when the Statute to be construed was passed what the mischief was for which the old law ... and the remedy provided by ... *Lord Sinha* said 'It is a s... statute as they stand and ... the previous state of the law ... English law upon which it may be founded but when it is contended that the legislature intended by any particular amendment to make substantial changes in the pre existing law it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the statute can be taken to effect the change that is suggested as intended" *Abdur Rahim v Syed Abu* ... 5 I A 96=75 Cal 519=32 C W N 482=26 A L J 461=30 Bom L R 714=54 M L J 609 (P C) see also *Per Lord Sinha* in *Mt Ramanandi v Mt Kalawati*, A I R 1928 P C 2 *Hari Ram v Krishna Lal* A I R 1928 Lah 361, *Golab v Lala Sir ... Prosad*, 28 C 517=5 C W N 610 Where intention is not clear pre-existing law can be referred to So reference to previous state of law is permissible for solving doubts in construing *Rogers Pratt v Secretary of State*, 52 C 1=52 Ind Cas 273

It is an elementary rule that construction is to be made of all the parts together and not of one part only by itself *Co Litt 381 (a)* *Lincoln College case*, 3 Rep 59 (b) *Duryeand v Board of Trade*, 55 L J Q B 417, *Maxwell* ... best harmonises with the ... *Maxwell* p 51 An Act of ... ry meaning of the words ... in the English language as appli... very strong ground, derived from the ... construed *Hornsey Local Board v* ... Q B D 1=29 L J Q B 105 Or ... a Statute should be construed, so as to give some meaning to every part of it *Haromoni v Hari Churan*, 22 C 833 (840), *Swaminatha v Luthna* 15 M L J 116 (F B)=28 M 166 It is a well known rule of construction that each part of a Statute must expound every other part *Lalji v Emperor*, 5 P L J 78=1 Pat L T 117=(1920) Pat 125=54 Ind Cas 891=21 Cr L J 190 The Court must in each ...

... Ram Saji ... 7 (F B),

River Wear C...

It is a ... context ... or ... a defined ... occu... *Commissioner of Income Tax* v 7... B)=51 M L J 521=27 M L W ...

Same expression used in same meaning It is a well settled rule of construction that the same words are to be *prima facie* construed in the same sense in different parts of the same Statute *Per Chitty J* in *Spencer* v *Metropolitan Board of Works*, (1883) 22 Ch D 142, see also *Courtauld* v *Legh*, L R 4 Ex 130, *R* v *Poor Law Commrs* 6 A & E 1, *Re Kirkstall Brewery*, 5 Ch D 535, *Khan Gul* v *Lakha Singh*, A I R 1928 Lah 609 (F B)

Benificial Construction It is said to be the duty of the Judge to make such construction of a Statute as shall suppress the mischief and advance the remedy *Heydon's Case* 3 Rep 76, *Twistle* v *Hartwell*, 6 I R 429, *Fugcross* v *Grant*, 2 C P D 530 Even where the usual meaning of the language falls short of the whole object of the Legislature, a more extended meaning may be attributed to the words, if fairly susceptible of it If there are circumstances in the Act showing that the phraseology is used in a larger sense than its ordinary meaning, that sense is to be given to it *Per Lord Esher M R* in *Barlow* v *Ross* (1890) 24 Q B D 381 at p 389, *Gross in the goods of*, (1901) 73 L J P 82 In *Madura Devasthanam* v *Madura Municipality*, A I R 1928 Mad 569 at p 571, *Wallace J* observed "This result is also in consonance with the well known principle of interpretation of fiscal enactments, that if the language is at all ambiguous it must be interpreted in the manner most beneficial to the subject"

Special Act not affected by General Act A general Act sh[illegible] construed as repealing a particula[illegible] App Cas 9[illegible]0 [illegible] mere implication [illegible] *House*, 3 K & J [illegible] Id 381, *Kutner* [illegible] (1898) 1 Q B 45 [illegible] 4 L J Q B 151, *Lodge* v *H*[illegible] the maxim [illegible] neral words [illegible] out extend- [illegible] earlier and special legislation is not to be indirectly repealed, altered, or derogated from merely by force of such general words, [illegible] intention to do so" *Per Lord Selborne* in [illegible] Cas at p 68, *Hawkins* v *Gathercole*, 6 [illegible] Bridg 122, *Thames Conservators* v *Hall*, I [illegible] 1 Ex D 75, *Maxwell*, 314 Where a special enactment deals with a particular thing or class of things a more general enactment, even though its terms would cover the particular th[illegible] pplication thereto by reason of the parti[illegible] 1928 All 536, *Ko Maung Gyi* v *Daw I*[illegible]

[illegible] Statute, con- [illegible] ice or [illegible] may [illegible] icture [illegible] 1916) [illegible] Legis- [illegible] ice of [illegible] idera- [illegible] ation [illegible] I R [illegible] that in construing it absurdity should be avoided *Secretary of State* v *Fake Mohammad*, 15 C L J 185

Retrospective operation of Statutes Every Statute which takes away and impairs vested rights must be presumed [illegible] unless the language clearly supports a co[illegible] *Surf*[illegible] *Sell*[illegible] [illegible]

752=A. I R 1925 Nag 219 The Succession Act, 1865 was not retrospective, and did not apply to Wills made before the passing of that Act *Inchar l Pass Skinner* v *Durga Prosad*, 31 A 239=24 A W N 213=3 Ind Cas 66, *Sarkies* v *Prosonnomoyee*, 6 C 794 The leaning against giving certain Statutes a retrospective operation rests upon the presumption that the Legislature does not intend what is unjust This rule is based on the maxim *Nova constitutio futuris formam imponere debet nonpraeteritis* (A new rule ought to be prospective, not retrospective in its operation) Retrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation by which the conduct *of mankind is to be regulated ought when introduced for the first time*, to deal with future acts, and ought not to change character of past transactions carried on upon the faith of the then existing law *Per Willes, J* in *Phillips* v *Eyre*, L R 6 Q B 23 *The case of Moon* v *Durden*, 2 Ex Ch 22 *is a leading case* on the subject That was a case in which the plaintiff claimed money on the basis of a wagering contract During the pendency of the suit Stat 8 and 9 Vict C 109 was passed That Statute made all wagering contracts null and void and all suits brought on such contracts not maintainable The question raised was whether it operated to defeat the plaintiff's claim The Court of Exchequer decided it did not *Parke B* in delivering the judgment observed 'The language of the clause, if taken in its ordinary sense, as in the first instance we ought to take it, . . . and to all actions both present a . . .
Coke says 'a rule an . . .
formam imponere debet, . . .
ments in a Statute are generally to be construed to be prospective, and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice, and has been acted upon in many cases But this rule, which is one of construction only, will certainly yield to the intention of the Legislature and the question in this and in every similar case is, whether that intention has been sufficiently expressed

So it is abundantly clear th . . .

. . . which takes away or impairs vested rights acquired under existing laws, or creats a new disability in respect of transactions or considerations already past, must be presumed, out of respect . . . ective operation *Dish* v . . . *nnessa Khetun* v *Purna* . . . *Kedar Nath* v *Netram* 23 . . . *dal* 31 C W N 1007, . . . I R 1927 Cal 763, *Delhi Cloth etc, Mills* v *Income Tax Commissioner, Delhi*, 54 I A 421=8 Pat L T 791=25 A L J 964=53 M L J 819=A I R 1927 P C 242.

. . . he procedure . . . it *Gardner* . . . So no suitor . . . in, if during . . . *Costa Rica* . . . also *Wright* v *Stoom*, 22 . . . ction is more . . . to be given . . . vise than as . . . ithout doing . . . expressed in . . . be construed . . . Q B 551 . . . must unless . . . d before or . . . e procedure . . . All 657, see also *Kedar Nath* v. *Netram*, 23 N L R 60=101 Ind Cas 284=A. I R. 1927

Nag 127. While provisions of a Statute dealing merely with matters of procedure may properly, unless that construction be textually *inadmissible*, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the Statute are not to be applied retrospectively in the absence of express enactment or necessary intendment *Delhi Cloth etc Mills Co* v [illegible] 121=8 Pat L T. 791=25 A L J [illegible] 1927 P C. 212 In *Ram Singha* v. *Sl*[illegible] B), a suit for arrears of rent for less [illegible] Assistant Collector under the Agra Tenancy Act, when the old Tenancy Act, was in force Before it could be decided, the new Act came into force, by which the right of appeal was taken away The point of law that arises before the Full Bench, therefore is whether the coming into force of the new Tenancy Act, under which no appeal is provided, deprives the defendant of his right of appeal, which he would have had if the old Tenancy Act had continued to be operative The Full Bench answered the question in the following terms "It is clear to us that an appeal is a mere continuance of the original proceeding initiated by the filing of the plaint and that the right to continue that proceeding cannot be affected by a new Act unless it expressly says [illegible]

[illegible] =50 Mad 857 (F. B) [illegible] *Shyam Behari Lal*, A. I [illegible] *Ali Khan* v *Genda*, 26 A. 375 [illegible] be deemed to have been overruled by the pronouncement of their Lordships of the Privy Council in (1905) A C 369 and in A I R 1928 All. 437 (F B) So it is [illegible] not a mere matter of procedure [illegible] from the commencement of [illegible] *gh* v *Rasulldar*, A. I R

[illegible] of evidence is a law of procedure [illegible] alterations in the law of evidence are, therefore, retrospective in operation *Poras Ram* v *Meua Kumar*, Ibid Rul (1930) All 738=125 Ind Cas 762=28 A L J 793

Codifying Act, Construction of In *Bank of England* v *Vagliano*, 60 L J Q [illegible] Lor[illegible] a S[illegible] Coc[illegible] In [illegible] is [illegible] its [illegible] st[illegible] th[illegible] see if the w[illegible] this view If a Statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a Statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior

only to which there would be reasonably exceptions As the Lord Chancellor said "I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code" Then he gives some examples which I need not cite at length But I have here to deal, not with an Act of Parliament codifying the law, but with an Act to amend and to consolidate the law, and therefore it is I say those observations do not apply, and I think it is legitimate in the interpretation of the sections in this amending and consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the Legislature When a clause in an Act which has received a judicial interpretation is re-enacted in the same terms the Legislature is deemed to have adopted that interpretation *Campbell Exparte, In re* 5 L R Ch 703 23 L J 281=18 W R 1066, *Balmukund Dube, In the goods of*, A I R 1930 All 82=126 Ind Cas 357

Construction imposed by Statutes The Legislature must be presumed to have known the interpretation put by Courts and others on the terms of a Statute and when a provision of an earlier Statute is re-enacted in practically the same language in a later Statute, it is legislative recognition of the correctness of the earlier interpretation *Parmeshwar v Emperor* 3 Pat L J 537=19 Cr L J 251=44 Ind Cas 185=(1918) Pat 97=1 Pat L W 167 *Nagendra v Pean* 21 C L J 605=20 C W N 312, *Kent County Council Exparte* (1891) 1 Q B 725=60 L J Q B 435=65 L T 213=39 W R 115=55 J P 647, *per Lord Herschell* in *Young v* ... 526 *per James L J* in *Dale's Case*, 6 Q ... 1 Ch D 371, *Clark v Wallond*, 52 L J Q ... 1 Q B 25 *Varam v Golbral* 4 Pat L W ... 131 *Shantha Nandan v Brsudevanand* 52 A ... "When construction placed upon the provisions of the Code has been reproduced by the Legislature in successive Codes without alteration, the inference is that this constitutes a legislative affirmation of the construction adopted by the Courts" *Pratab v Sarat* 33 C L J 201=25 C W N 514=62 Ind Cas 318 In *Kalimuddin Mollah v Sahabuddin Mollah* 21 C W N 1 (F B) at p 11 *Mukherjee J* observed It is a well settled principle of construction that the Legislature is presumed to know not only the general principle of law but also the construction which the Courts have put upon particular Statutes and therefore where a section of an Act which has received a judicial construction is re-enacted in the same words, such ... that construction [*Jo* ... *ool v Debendra* 14 C L ... 316] The Legislature knows what the law is and has the power to alter the phraseology, if it transpires that its true contention has not been given effect to in judicial decisions the absence of such action on the part of the Legislature during a period of time may well be taken to indicate that the Courts have rightly ascertained its intention specially if in the interval, the Statute has been ... *Sheo Saran* 25 A L J

... putting a certain meaning on its words and the Legislature in a subsequent Act in *pari materia* uses the same ... [illegible] ... Cas 180 *Exp Thorne* 3 Ch D 457, *Ittualo Exp*, 5 Ch D 27, *In Campbell* L R 5 Ch 706, *Luton v Teal* 15 Q B D 405 *Ivery v Wool* (1891) 3 Ch 118, *Colonial Land v Whinney* 30 Ch D 285

Legislative Proceedings An enquiry into the vicissitudes which a ... Legislature ... measure ... Legislature is ... proceedings ... *Wahi I* ... in the Legislative Council cannot be referred to *Sarat* ... 31 C 628=8 C W N 578 It is a mistake to refer to the debates on the Bill

mble when before the Legislative Council for the purpose of construing an A *Gopal* v *Sakhoquat* 18 B 133 = P J 1893, 42, *Queen Empress* v *Srichur* 22 C 1017 (F B) *Kadir Bakhsh* v *Bhowani Prasad* 14 A 115 (119) = A W N 1892 5, *Dinonath* v *Jogi Sati Pr al* 27 C W N 115 = 36 C L J 220 *O Burre* ... v S *Joseph* *hr there* 13 Bur L T 179; *Krishna* v *Nel Perumall* 13 M 550 = S M W N 113 = 12 L W 92 = 56 Ind Cas 163 = 47 A 33 (P C) *Lori* [illegible] *Salram* 13 S L R 23 = 52 Ind Cas 139 The Court is not authorised to look into the proceedings of the Legislature to see what took place there during the passage of the Bill which passe into law or what was the reason why a particular clause was put in for the purpose of interpreting a Statute [illegible] *Watson* 3 C 929 = 11 C L J 350 = A I R 1927 Cal 144 = 98 Ind Cas [illegible] Court while interpreting an Act cannot seek the assistance of the [illegible] in the Legislative Council or the report of the Select Committee [illegible] *Committee* A I R [illegible] *Singh* v *Central Board and Local Council* (1906) K B 6 6 It is not proper to refer to the proceedings of the Legislative Council in order to determine the interpretation of the language of a section [illegible] A I R 1 25 All 121 = 25 A L J 1061

Objects and Reasons of a Bill One of the presumptions is that Legislature does not intend to make any substantial alteration in the Law beyond what it explicitly declares either in express terms or by clear implication, or in other words beyond the immediate scope and object of the statute *Maxwell* p 119 citing *Arthur* v *Bokenham* 11 Mod [illegible] *Heyd* [illegible] 3 Rep, 136 But in India where a Court has to construe a Statute it is the Statute alone which the Court is entitled to look to [illegible] not entitled to look to the reports of the Select Committee *Kadir Bakhsh* v *Bhowani* 14 A 145 (150) = A W N 1892 5 *Rajmal* v *Harnam* 104 Ind Cas 661 = 8 P L R 595 *Gopal Pandey* v *Parsotam* 5 A 121 (F B) = A W N [illegible] *Govind* (1922) Lah 211 *Zamindar of* [illegible] *Rup Kishan* v *Bhagat* 675 = 39 M L J 203 = 28 M L T [illegible] M W N 460 = 12 L W 217 = *Chidambaram*, 43 M 58 Ind Cas 871 It is unusual to refer to the objects and reasons given for introducing a Bill into the Legislative Council for they can safely be referred to, only as expressing the motives which were present to the particular member of that council and in the course of Legislation the objects and reasons so stated are altogether lost sight of and the law ultimately passed bears only a slight resemblance to the Bill on which it professes to be based' *Moothora* v *The Indian General Steam Navigation* 10 C 166 (F B) = 13 C L R 342 Whether the 'Objects and Reasons' may be resorted to when the intention of the Legislature as gatherable from the Act, is not clear is doubtful *Fadu* v *Gour*, 19 C 544 So it is well settled that in construing an Act of the Indian Legislature, where the words are absolutely clear and unambiguous, it is not within the province of a Court to look to the statement of the objects and reasons or to the proceedings of the Council with a view to discover whether the words used mean something above and beyond what they say *Rajmal* v *Harnam*, A I R 1928 Lah 35, *The Administrator General* v *Prem Lal*, 22 C 788 (800) = 22 I A 107, *Krishna Iyyanjer* v *Nalla Perumall* 43 M 550 = 47 I A 33 (P C), *Rup Kishore* v. *Govind Das* A I R 1922 Lah 211, but see *Meghraj* v *Ramgopal*, 78 Ind Cas 743 = 20 N L R 100, *Shantha* v *Basu Devanand*, 52 A 619 (F B)

Report of the Select Committee To construe the provisions of a section, it is hardly permissible to refer to the report of the Select Committee. *Tamijannessa* v *Purna Chandra Chakravarti* 103 Ind Cas 853 = A I R 1927 Cal 821; *Thiraj* v *Emperor* 119 Ind Cas 265 = A I R 1929 Lah 641

Headings of Sections "In England the headings prefixed to sections in some modern Statutes are regarded as preambles to those sections' *Maxwell* p 92 citing *Bayan* v *Child*, 19 L J Ex 264, *Shrewsbury* v *Beazeley*, 34 L J C P 328, *Eastern Counties R Co* v *Marriage* 9 H L Cas 41, *Latham* v *Lafone*, 36 L J Ex 97, *Hammersmith Ry Co*, v *Brand* L R H L 171, *Long* v *Kerr* 3 App Cas 536, *Rayson* v *South London Tramways Co*, (1893) 2 Q B 304 *R* v *Local Govt Road*, 10 Q B D 321 *West* v *Gwynne* 80 L J Ch 587, *Comp Broadbent* v *Imperial Gas Co*, 26 L J Ch 276, *Fletcher* v *Birkenhead Corporation*, (1917) 1 K B at p 218, *Union S S Co of New Zealand* v

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9 H L C 41 But when the effec

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the Courts are called upon to interpret
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A 756=23 A L J 725=89 Ind Cas 1
Ramdin, 48 M 395, but see *Janu* v *Fakir*.

Headings of Chapters In *Dwarka Nath Choudhary* v *Tafazzal Rahman Sarkar*, 20 C W N 1097, *Mr Justice Woodroffe held* that the Court could look at the heading of Chapter XI of the Bengal Tenancy Act for the purpose of construing the sections Under the English Law, the headings prefixed to sections or set of sections in some of the modern Statutes are regarded as preambles to those sections In India, the heading of a chapter may be looked to for interpreting the Statute, but neither the preamble nor the heading can be referred to for controlling the plain meaning of the enacting portion *Janu* v *Fakira*, 13 N L R 181

Marginal Notes Formerly the bill was, at one of its stages, engrossed

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Claydon v *Green* 3 C P 511, *Attorney General* v *Great Eastern Railway Co*
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Emperor v. *Lalman* 27 Cr. L. J. 1235=98 Ind. Cas. 19=A. I. R. 1927 Sind. ; *P. Nitee* v. *Mukhen Insre* 74 M. L. J. 701. The marginal note is not a part of the Act. *Shalgam Spinning and Weaving Co. Ltd.* v. *Paul Hemmeth* A. I. R. 1928 Bom. 41. The question whether a marginal note can be referred to for an exposition of the meaning of a section depends upon whether the note has been inserted by or under the authority of the Legislature. *Ram Saran* v. *Bhagwat* A. I. R. 1929 All. 53=51 A. 411 (F. B.).

Punctuation. In England bills for 1849 bills were engrossed on parchment without punctuations and as such they formed no part of the Act. Since 1849 punctuations appear on the rolls of Parliament, nevertheless it has been said they are not to be taken as parts of the Statute. *Lole Claypins* v. *Green* 5 C. P. 521; *I. G. v. G. I. R. C.* 11 Ch. D. 460; *Sutton* v. *Sutton* 22 Ch. D. 513; *Duke of Devonshire* v. *O'Connor* 24 Q. B. D. 478. It is an error to rely on punctuation in construing Acts of the Legislature. *The Maharaja of Burdwan* v. *Krishna Kamini* 14 C. 365: 14 I. A. 30 (P. C.). *Munilal* v. *Trustees for the Improvement of Calcutta* 45 C. 13=22 C. W. N. 1=44 Ind. Cas. 770. But see *Hindu Society* v. *Chief Gen.* 17 Bom. L. R. 56=39 B. 182=27 Ind. Cas. 194. Commas as are no part of the statute. *Lewis* v. *Chinubhai* 56 I. A. 65 53 C. W. N. 393=57 A. I. R. 1=31 Bom. L. R. 702 (P. C.).

Proviso. Arguments from a proviso which seek to extend the operative effect of the substantive enactment are not legitimate unless there is real ambiguity in the substantive Act. *West Derby Union* v. *Metropolitan Life Assurance Co.* 1897 A. C. 647. *Ramchandra* v. *Gopal Nath* 53 C. 192=A. I. R. 1926 Cal. 927=97 Ind. Cas. 376.

Schedule. A schedule is as much part of the Statute and is as much an enactment as any other part. *Per Brett L. J.* in *Att. Gen.* v. *Lamplough* (1878) 3 Ex. D. 229. Forms in schedules are inserted merely as examples and are only to be followed implicitly so far as the circumstances of each case may admit." *Per Tindall C. J.* in *Bartlett* v. *Gibbs* (1843) 5 M. & G. 96. But where there is a contradiction between the schedule and the enacting portion, "it would be quite contrary to the recognised principles upon which the Courts of law construe Acts to enlarge the conditions of enactment and thereby restrain its operation by any reference to the words of a mere form given for convenience sake in a schedule." *Per Lord Penzance* in *Dean* v. *Green* (1882) 8 P. D. 89; *Allen* v. *Flicker* 10 A. & E. 640; *R.* v. *Russell* 18 L. J. M. C. 106; *Interpretation of Deeds*, Wills etc. p. 206; see also *R.* v. *Baines* 12 A. & E. 227. Schedules annexed to an Act and the headings under which they are placed are parts of the enactment, but they are not to be taken into consideration if the language of the enactment is clear. 30 C. W. N. 531.

Illustrations. *The Law Commissioners say* — The illustrations are not mere exampl[illegible] ol
what it is [illegible] un
the whole l[illegible] le
law without them,' are correct if understood as merely importing that in view of
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ette of India
ners who were
in charge of framing Penal Code for British India observed: "The illustrations make nothing law which would not be law without them. They only exhibit the law in full action and show what its effects will be on the events of common life. Thus the Code will be at once a Statute book and a collection of decided cases in the English Law Books in two most important points. In the first place, our illustrations are never intended to supply any omission in the written law, nor
written law. They are merely
law to the affairs of mankind
but by the Legislature by
certainly than any Judge can
know what the law is which they mean to make.

"The power of construing the law in cases in which there is any real reason to doubt what the law is, amounts to the power of making the law. On this ground the Roman Jurists maintained that the office of interpreting the law in

doubtful matters necessarily belonged to the Legislature The contrary opinion was censured by them with great force of reason, though in language perhaps too bitter and sarcastic for the gravity of a Code .

"The decisions on particular cases which we have annexed to the provisions of the Code resemble the Imperial Rescripts in this, that they proceed from the same authority from which the provisions themselves proceed They differ from the Imperial Rescripts in this most important circumstances, and that they are not made *ex post facto*, that they cannot therefore be made to serve any particular turn, that the persons condemned or absolved by them are purely imaginary persons, and that, therefore, whatever may be thought of the wisdom of any judgment which we have passed, there can be no doubt of its impartiality " *Report of the Indian Law Commissioners* dated the 14th October 1837 In *Mahomed Syedol Ariffin* v *Yeoh Ooi Gark*, (1916) A C 575=43 I A 256=21 C W N 257 (P C) at page 264, *Lord Shaw* in delivering the judgment of the Court observed 'On the second point, their Lordships are of opinion that in the construction of the *Evidence Act* it is the duty of a Court of law to accept—if that can be done—the illustrations given as being both of relevance and value in the construction of the text The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of Jurisprudence as to the law with which they or the sections deal And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves The great usefulness of the illustrations, which have, although no part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the Statute, should not be thus impaired In *Lala Balla Mall* v *Ahad Sha* 35 M L J 614=16 A L J 905=29 C L J 163=23 C W N 233 (P C) at p 237, *Lord Atkinson* observed, "Hour illustrat
as part of the Statute The illustrations
authority i e the Legislature' *Charlesworth*
Satish Chandra Chakravarty v *Ramdayal De*, 32 C L J 94=24 C W N 982 (986 987) *Mr Justice Mukherjee* observed We are not unmindful that an illustration is useful so far as it helps to furnish some indication of the presumable intention of
on the section v
Sonatun, 7 C 132
v *Ganesha*, 1 A
Queen Empress v *Tulmaji*, 15 B 491 (196), *Nanak* v *Muhtulal* 1 A 487 (495), *Satya* v *Gobinda*, 14 C W N 114, *Rej* v *Lakhmat* 1 B 147 *Chotay Lal* v *Emperor*, 85 Ind Cas 722=1925 All 220, *Omid* v *Nidhi*, 22 W R 367 *Sujo* v *Bissambhar*, 23 W R 311, *Govinda* v *Thayamal*, 28 M 57 (61), *Balaram* v *Mangta*, 34 C 950 *Hyee Ismail* v *Wilson & Co* 23 M L T 320=45 Ind Cas 942 *K K Janoo* v *Joseph Heap & Sons Ltd* 46 Ind Cas 197 *Balmukund* v *Sohano*, A I R 1929 Pat 164 But see *Pria Krishna Swami* v *Aiyappa* 24 Ind Cas 924 If the meaning of the enactment itself were doubtful a reference to the illustration in order to clear the meaning would be justifiable But, if there be any conflict between the illustrations and the main enactment, the illustrations must give way to the latter *Siqutunnissa* v *Hidayat Husain* 22 A L J 425=80 Ind Cas 896=1924 All 748 It is the duty of the Court to accept, if that can be done illustrations given under the section as being of value in the construction of the text, it would require a special case to warrant their rejection on the ground of repugnancy with the section *Durga Priya* v *Durga Lali Roy*, 55 C 154=A I R 1928 Cal 204=109 Ind Cas 752

Illustrations and Marginal notes which is to be preferred Illustrations do not stand on the same footing as marginal notes Marginal notes may not
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nent *Ramlal*
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'It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act The contrary opinion originated in a mistake, and it has been exploded long ago There seems to be no reason for giving the marginal notes in an Indian Statute any greater authority

than the marginal notes in an English Act of Parliament On the other hand illustrations are part and parcel of enactment and it seems that when the Court is called upon to interpret a piece of an enactment which comprises both the substantive provision and an illustration of the same the Court is not justified in rejecting the illustration as a guide to the interpretation of the substantive provision *Ram Lal v Emperor ubi supra*, see also the observation of *Lord Shaw in Mahomed Syed Ariffin v Yeoh Ooi Gark*, 1916 (A C) 575=43 I A 256 (P C)

May —May mean shall The word "may" in certain circumstances means shall There may be something in the nature of the thing to be done in the object for which it is done or in other circumstances which may convert the option into a duty *Bengal ... v Special Manager, Court of Wards*, ... O L J 162=89 Ind Cas ...=A I R 19.. Oudh 119, see also *Government v Municipal Corporation* ... Ind Cas 721=A I R 1930 Rang 297 (F B)

Or' And In construing Statutes it is sometimes necessary to read the conjunctions 'or' and 'and' one for the other *Narayan v Chairman of Howrah Municipality* 87 Ind Cas 229=A I R 192. Cal 1067

New words to be read in a Statute Words not to be found in a section may be supplied by necessary implication if the context so requires 90 Ind Cas 180=L R 6 A 101=A I R 1925 All 610 (F B) But Judges are not entitled to read words into an Act of Legislature unless clear reason for it is to be found within the four corners of the Act itself *Bhagwandas v Rameshwar* 9 Pat 314=A I R 1930 Pat 99, *Vickers v Evans* 79 L J K B 954 *Everett v Wells* 2 M & G 269 *Jagadba v Baidya Nath*, 34 C W N 621=A I R 1930 Cal 767

Every word should recieve proper connotation In a statutary enactment every word used must receive its full and proper connotation in the construction *Oppoth Pidha v Pula Uppilla* A I R 1927 Mad 908 In the interpretation of every section of a Statute a reasonable construction must be given to every word contained therein *Emperor v Sheri* A I R 1928 All 207 (F B)=26 A L J 321=9 L R A Cr 51=9 A I Cr R 362 When two distinct words are used in the same section the ordinary rule of construction is that they do not mean identically the same thing *Emperor v Phuchai*, A I R 1929 All 33 (F B)

Equity and good Conscience Where there is a direction in an Act or Regulation that cases should be directed by equity and good conscience such a direction should generally be interpreted to mean that the rules of English law if found applicable to Indian Society and circumstances are to be applied *Per Lord Tomlin in Meherban Khan v Makhna*, 57 I A 168=32 Bom L R 882=34 C W N 529=A I R 1930 P C 142

Statutes ousting jurisdiction—Construction of It is an elementary rule that a Statute which purports to oust the jurisdiction of a Civil Court must be very strictly construed *Shaiba Prosad v Golammanjhi*, (1919) Pat 147=50 Ind Cas 451, see also *Ganesh Das v Harilal* 90 Ind Cas 279 An Act by which the jurisdiction of the ordinary Court is taken away must be strictly construed *Cheta v Baiya* 105 Ind Cas 507=A I R 1927 Lah 452 (F B), *Shewakram v Ghulam*, 103 Ind Cas 410, *Bildeo v Lal* A I R Pat 1928, 615 Jurisdiction vested in a superior Court is not ousted except by express language in or obvious inference from the provisions of a Statute *Mahamed Abdul v Emperor* 101 Ind Cas 471=28 Cr L J 439, see also *Burma v Burma Oil Co*, *v Baijnath*, 59 Ind Cas 960=3 U B R 212, *Kama v Bhajanlal*, 45 Ind Cas 654, *R v Abbot*, (1780) Dowg 553

Repeal by implication 'Repeal by implication is not favoured It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments on the Statute Book, or on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so Such an interpretation is not to be adopted, unless it is inevitable Any reasonable construction which affords an escape from it, is more likely to be in consonance with the real intention' *Maxwell* p 296 cited in *Gola v Emperor* 1929 Nag 17 (F B) at p 20=24 N L R 158, see also *Foster's Case*, 11 Rep 63 (a) The Legislature does not intend to make any substantial alteration in

the law beyond what explicitly declares, (*Arthur* v. *Bokenham*, 11 Mod 150; *Harbert's Case*, 3 Rep 13 b.) either in express terms or by clear implication, or in other words, beyond the immediate scope and object of the Statute In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning when used either in their widest, their usual, or their natural sense,
that which was actually intende
ever wide and comprehensive they
be construed as , and as not altering the law beyon *at Commissioners* v *Adamson*, 1 Q 80 L J K. B 636" *Maxwell* p s not abrogate a special one by mere implication It is remarked by *Lord Selborne* in the case of *Marcy Seward* v *The Vera Cruz*, (1884) 10 App Cas 59 "Where general words in a later Act are capable of r
extending them to subjects specir
not to hold that earlier and special
derogated from merely by force
particular intention to do so"

Application of the maxim—Expressio unius est exclusio alterius—A general rule of the construction of Acts of Parliament is *expressio unius est exclusio alterius* (The express mention of one thing implies the exclusion of another) *Per Sir Barnes Peacock* in *Blackburn* v *Flavelle*, (1881) 6 App Cas 628 at p 634 In *Drinkwater* v *Arthur*, (1879) 10 Sup Ct N S W, 103, *Hargrave, J* observed "If there be any one rule of law clearer than another as to the construction of all Statutes and all written instruments (as, for example, sales under powers in deeds and wills) it is this that where the Legislature or the parties to any instruments have expressly authorised one or more particular modes of sale or other dealing with property, such expressions always exclude any
or, as it is otherwise
183 b), enunciates
written instruments
covenant is to be
Case, 4 Rep 80, *Me*
R 58, *Mathew* v *Bl*
an express covenant by the tenant to repair,

authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the act authorised, under other circumstances than those defined *Expressio unius est exclusio alterius*,"

"Provisions sometimes found in Statutes enacting imperfectly or for particular cases only that which was already and more widely the law, have occa-

bear in mind that the method of construction summarised in the maxim cannot be applied without limitation for a failure to make an *expressio* complete, may easily arise from the accidents of legislative procedure and it is common to find provisions put into Statutes *ex abundanti cautela* and at the instance of the parties interested Consequently provisions some times found in Statutes enacting imperfectly or for particular cases only that which was already and more widely the law have occasionally furnished ground for a specious argument, based on the maxim that an intention to alter the general law was to be inferred from the partial or limited enactment But the maxim is plainly inapplicable in such cases The only inference which a Court can draw from such superfluous provisions (which often find a place in Act to meet unfounded objections and idle doubts) is that the Legislature was either ignorant or unmindful of the real state of the law or that it acted under the influence of excessive caution

This point of view is lucidly explained in the following passages from the judgment of *Farwell L J* in *Lowe v Darling* (1906) 2 K B 772=75 L J K B 1049 Acts of Parliament are not in my experience, expressed with such accuracy and precision as to justify the Court in striking out unambiguous words in order to make a sentence grammatical or logical The generality of the maxim *expressum facit cessare tacitum* which was relied on renders caution necessary in its application It is not enough that the express and tacit are merely incongruous it must be clear that they cannot co-exist'

In Colquhoun v Brooks, 19 Q B D 406, *Wills J* says "I may observe that the method of construction summarised in the maxim '*expressio unius exclusio alterius*' is one that certainly requires to be watched Perhaps few so called rules of interpretation have been more frequently misapplied and stretched beyond their due limits The failure to make the expressio' complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind and the application of this and every other technical rule of construction varies so much under differing circumstances and is open to so many qualifications and exceptions, that it is rarely that such rules help one to arrive at what is meant

In the same case (reported in 21 Q B D 52) in the Court of Appeal *Lopes L J* observed the maxim *expressio unius exclusio alterius* has been pressed upon us, I agree with what is said in the Court below by *Wills J* about this maxim It is often a valuable servant but a dangerous master to follow in the construction of Statute and documents The *exclusio* is often the result of inadvertence or accident and the maxim ought not to be applied, when its application having regard to the subject matter to which it is to be applied leads to inconsistency or injustice See *Colquhoun v Brooks* 21 Q B D 661 and on appeal to the Privy Council in (1888) 14 A C 493

The warning given by *Lord Halsbury* in following the maxim is expressed in the following words It might be that modern Statutes were drawn up with greater particularity and minuteness The misfortune in the framing of those Statutes was that any body of persons seeing a possibility of liability on their part, apply to Parliament to have special provisions inserted in their protection That application was occasionally complied with and then the argument arose which their Lordships had heard that day namely that any body who is not included in the enumeration of the particular persons so interested must be taken to be excluded by the operation of the Statute from protection just because they were not excluded and others were The doctrine applicable to such cases was that a great many things were put into a Statute *ex abundanti cautela* and it was not to be assumed that any body not specifically included was, for that reason alone, excluded from the protection of the Statute ' *Mac Laughlin v Westgarth*, 75 L J P C 117=94 L T 831=22 T L R 594

Penal Statutes, Construction of A Penal Statute when its language is ambiguous should be construed in the manner most favourable to the liberties of the subject, and this is more specially so, when the enactment is of an exceptional character *Reg v Bhistabin Madanna* 1 B 308 (F B) It should be construed very strictly *In re Ganesh Narayan* 13 B 600, *Q v Norottam*, 13 B 681 A penal Statute must be construed very strictly, that is nothing is to be regarded as within the meaning of the Statute which is not within the letter—

which is not clearly and intelligibly described ... Preamble
itself. *Empress* v *Kola Lal* ...
Queen Empress, 28 C 50 ...
Empress, 5 C W N. 10 ...
1888, 25; *Lal hmi Chand* v ...
Periya v *R*, 54 M 75 ...
568 In a penal Statute, if ...
prehensive to include with ...
Qu ...
(18 ...
Em ...
Em ...

of ...
sho ...
1926 Sind 213 (F B) The person charged has a right to say that the thing charged, although within the words is not within the spirit of the enactment *Ram Chunder* v *Gouri Nath*, 53 C 492 = 97 Ind Cas 376 In the case of penal Statues and fiscal ...
ought to be adopted ...
Ind Cas 593 = A ...
Singh, 102 Ind Cas ...
v *Bhai Kishan*, 28 P ...
it is clear that cr ...
accused *Said Ahm* ...
penal S ... narrow sense No violence
... care must
... in its strict
... reasonable
... the benefit
of the doubt must be given to the subject and against the Legislature which has failed to explain itself properly and clearly *Ismail* v *Emperor*, 26 Cr L J 1387 = 89 Ind Cas 523

The rule is slightly different in England "The rule which requires that penal and some other Statute shall be construed strictly was more rigorously applied in former time, when the number of capital offences was very large' *Maxwell* p 462 "I cannot concur" says *Day J* in *Newby* v *Sims*, 63 L J M C ... impose penalties therefore ... ink that neither greater nor ... Statutes" ... uction of a penal Statute depended in great measure on the severity of the Statute When it merely imposed a pecuniary penalty, it was construed less strictly than where the rule was invoked in *favorem vitae*" *Maxwell* p 466

Disqualifying provisions in an Act dealing with Municipal election are penal provisions and therefore ought not to be extended beyond their legitimate limit *Satyendra* v *Chairman*, 58 C 180 – 53 C L J 236 = 31 C W N 972

Ejusdem Generis, Principle of When two words or expressions are coupled to ... other it is obvious that the more g ... one *Maxwell* p 571 ... example, stand ing alone, ... they would be understood ... with them *R* v *Cook*, 2 E ... the word 'land" does not ... 'buildings," *Dewhurst* ... C 240 It is in this ser ...
unius est ...
construing ...
from the ...
affected I ...

s. *generis* rule of interpretation would not arise *Hallinglal Moosa* v *Secretary of State for India*, 43 M 65=37 M L J 332=53 Ind Cas 345

"I accede to the principle" said *Lord Campbell* in *R* v *Edmundson*, 28 L J M C 213, "laid down in all the cases which have been cited, that where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified" See also *Kali* v *Kesho* 51 Ind Cas 15

Stare decisis, scope of the doctrine The maxim of *stare decisis* (to stand by matter decided) is closely allied with another maxim *viz*, *Communis error facit jus* (common error some times passes as law). The law so favours the public good, that it will in some cases permit a common error to pass for right *Reg* v *Sussex*, 2 B & S 680 *Jones* v *Tapling* 12 C B N. S 846, s c 11 H L Cas 290 *Waltham* v *Sparkes*, 1 Ld Ryam 42 *Broom's Legal Maxims* p 112 So *communis error facit jus* is a sound maxim *Jagadish* v. *Sheo*, 28 I A 100 109=5 C W N 602=23 A 369, see also *Bhagwan Singh* v *Bhagwan Singh*, 26 I A 153 (166)=21 A 412=3 C W N 454=1 Bom L R 311, *Kedar* v *Hari*, 43 C 1 (10) Though 15 Rich II enacted that the Admiralty should have no jurisdiction over contracts made in the bodies of counties, nevertheless seamen engaging in England have always been admitted to sue for wages in that Court (*Smith* v *Tilly* 1 Keb 712), where the remedy is easier and better than in the Common Law Courts, on the ground it has been said (*Per Lord Holt* in *Clay* v *Sudgrave*, 1 Salk 33) that *communis error facit jus*, or rather as was observed by *Lord Kenyon* (in *R* v *Essex*, 4 T R 591) not *communis error*, but uniform and unbroken usage, *facit jus* *Maxwell* p 535 Where the language is obscure instead of being clear, we should not be justified in differing from the construction put upon it by contemporaneous and long continued usage. There would be no safety for property or liberty if it could be successfully contended that all lawyers and statesmen have been mistaken as to the true meaning of an old Act of Parliament' *Per Lord Campbell* in *Garham* v *Exeter* 15 Q B 73, see also *Herbert* v *Purchas* L R 3 P C 650, *Korgan* v *Caushay*, L R 5 H L 304 320

The maxim of *communis error facit jus* although well known must be applied with very great caution 'It has been sometimes said, observed *Lord Ellenborough* in *Isherwood* v *Oldknow* 3 M & S 396 397, '*communis error facit jus*, but I say *communis opinio* is evidence of what the law is—not where it is an opinion merely speculative and theoretical floating in the minds of persons, but where it has been made the ground work and substratum of practice'

The judicial rule —*Stare decisis* does however admit of exceptions where the former determination is most evidently contrary to reason *Broom's Legal Maxims* p 121 In *Chandra Benode* v *Sheikh Ila Bux*, 24 C W N 816 at p 851 *Mr Justice Mukerjee* observed, We are sensible of maintaining, wherever possible the authority of long established decided cases, but this doctrine is manifestly not of universal application In *Young* v *Robertson*, 4 Mac H L C. 314, *Lord Cranworth* observed ' There is another duty incumbent upon a Court of ultimate appeal which has been invariably observed, namely, that as regards those rules which regulate the settlement and devolution of property, those Courts which have to interpret the instruments and acts of parties must take care to be very guarded against letting any supposed notions as to the inaccuracy of any rule which has in fact been acted upon induce him to alter it so as to endanger the security of property and titles

In *Mercy Docks* v *Cameron*, 11 H L C 443 at p 510, *Lord Chelmsford* observed 'The Courts rightly abstain from overruling cases which have been long established because if they did so, they would only disturb, without finally settling, the law But when an appeal from any of the judgments is made to this House, however they may be warranted by previous authorities, the very object of the appeal being to bring those authorities under review for final determination, the House cannot, upon principle of *stare decisis* refuse to examine the foundation upon which they rest Equally explicit is the pronouncement of *Lord Loreburn* in *Wesham Union* v *Edmonton Union* (1908) A C 1 (4) where he observed " Great importance is to be attached to the old authorities, on the strength of which many transactions may have been adjusted and rights determined But where they are plainly wrong, and specially where the subsequent

cc ... they Pre
w ... tem
I ... to
do so by *itself affirming them*".

In a matter of fiscal enactment where the question is in doubt the rule of *stare decisis* should apply *Moti Singh* v *Harbajan Singh*, 103 Ind Cas. 657= A I R 1127 Lah 635

Mandatory provision There is no universal rule that disobedience of a man ...
pro ...
pro ...
circ ...

Means and includes ...
Legislature, as a rule, use ...
Queen Empress v *Narpat*, A ...

Proviso The office of a proviso is either to except something from the enacting clause, or to qualify or restrain its generality or to exclude some possible ground of misinterpretation of its extent *Reg* v *Vyankatswami*, 2 B H C 106 In case of repugnancy between a proviso and an enacting part, the former repeals the latter *A G* v *Chelsea*, Fit 29, 165

Saving clause A saving clause cannot properly be looked at for the purpose of extending an enactment, nor can it give a new or different effect to the previous sections of an enactment *Queen Empress* v *Sitaram* 11 B 657 Where the enactment and the saving clause, (which reserves something which would ...
the savi ...
been m ...
Yarmou ...
Rep 35 ...
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The late ...
should r ...
bodied i ...

Rules of Interpretation of Evidence Act In considering the rules of e ... matter *Gujju Lall* v *Fateh*
l ... *daree*, 14 W R 319 (320)
I ... owing statement of *Mr Justice Jackson* in *Gujju Lall* v *Fatteh Lall*, 6 C 171 (F B) at pp 183-184 should be borne in mind "In order to arrive at a conclusion on this point (*i e* on a quest ... Indian Evidence
A ... the direction of
a ... ning, and amend
in ... Act, is marked
by careful and methodical arrangement, and that many of the more important expressions used in it are plainly interpreted It would be wholly inconsistent

... but
... the
... lly
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... ied
Judges who have expressed a contrary opinion, that if it had been really the intention of th ... part ... rule from English rule they
wou ... *Ashutosh*
Cha ... considering ... difficulty
ing ... Evidence,
will ... ve regard,
and then inquiring what changes the Evidence Act ...
as I think we are bound to do, the Act itself as containing the scheme of the

law, the principles, and the application of these principles to the cases of most frequent occurrence. It may be that as observed by *Mr Norton* in his Preface (Law of Evidence 8th Edition), the framer of the Act overestimated what had been done, when he claimed to have reproduced within the compass of his 167 sections the whole of Taylor's Work that was applicable to India, and there can be no doubt that cases must arise for which no positive solution can be found in the Act itself and in such cases we shall probably be justified and shall always be safe in adopting English rules in so far as they follow or are in accord with the general tenor of the Act. But in respect of matters expressly provided for in the Act we must, so to say start from the Act, and not deal with it as mere modification of the law prevailing in England." See also *P* v *Gopal Das* 3 M 271, 279, ... In *I ... hod ...* v *Babu* 10 B 439 (442) *Sargent C J* said "It is true that although the code is in the main, drawn on the lines of the English Law of Evidence there is no reason to suppose that it was intended to be an ... copy of it." See also *Ve ... thal ... Bhat* v *Vishambar Pandit* 8 B 313 321.

In Annaci Muthu ... v *I ...* (1917) M W N 229=17 M L T 215=28 M L J 349=16 Cr L J 91 28 Ind Cas 518=39 M. 449 *Seshagiri Ayyar J* observed "The question remains whether the provisions of the Act are exhaustive of the rules of evidence and whether we can invoke the aid of the principles of jurisprudence or of English Law as supplementing and explaining the rules of evidence given in the Act. The high authority of *Elgee C J* in the *Collector of Gorakhpur* v *Palak Dhari Singh*, 12 A 1 (F. B) can be cited for the proposition that English decisions relating to evidence can be relied upon in India. I cannot agree with the learned Public Prosecutor that we are not entitled to refer to English decisions as the Act is self contained. Such a practice has the authority of every eminent Judge in India and I am not prepared to depart from it." See also *Mun ... Shee* v *N ... Dhunumsey S W Co*, 4 B 576 (581) In *the petition of Ram ...* ... M 48 *I* v *Peyari Lall*, 4 C L R 508 *Framji* v *Mohan Singh* 18 B ... *R* v *I ...*, 1 B 502, *R* v *Rama Bhaji*, 3 B 17 *I* v *H ...* 7 A 160 *Smith* v *I ... thias Ghella*, 17 B 129 (141)

In *Queen Empress* v *I ... ram* 16 B 414 at p 453 *Telang J* observed "According to the principle therefore stated by *C ... h, C J* in *Hamabi* v *Pamanji* 7 Bom H C Rep (A C J) p ... we are justified in looking to English decisions to elucidate the meaning of the Evidence Act, and evidence which the Judges in England have admitted and juries have acted upon must be held to be clearly within the terms of sections 11 14 15." In *Framji* v *Mohan Singh* 18 B 260 reference was made to American Case Law and in *R* v. *Elihi Bux*, B L R Sup vol F B 459 English, American and Scotch laws were referred to.

"There is a school of legal thought in India which holds that in construing Acts of the Indian Legislature the natural meaning of the sections should be given effect to regardless of previous decisions and especially of decisions other than those of Indian Courts. The Indian Evidence Act in general and s. 27 in particular are examples which in my opinion indicate the falsity of this point of view." *Per Lord Williams* in *Superintendent* v *Bhuyo*, 57 C 1062=34 C. W N 106

English Cases English cases on construction of English Statutes are of great assistance, sometimes in construing Acts of the Indian Legislature but of course, it is always necessary to see that the Indian Statute and the English Statute resemble one another in their purposes, and not only in a portion of a section which, for convenience of drafting has been adopted by the draftsmen of the Indian Act. *Persad Singh* v *Ram Pertab Roy*, 22 C 77 (81, 85) Where an Indian Act was passed for the purpose of extending to India the provisions of the English Act, English decisions may be referred to as a guide to the Act. *Ganesh* v *Harihar* 26 A 299 P C =31 I A 116=8 C W N 521=14 M L J 190=6 Bom L R 505, *Seth Tiloom Vasmal* v *Seth Haridas*, 4 S L R 26=7 Ind. Cas 595, *Mulchand Sunga Chand*, 1 B 23, but see *Mahomed* v *Ali Haidar*, 12 O L J 1 "In construing a section of an Indian Act which is professedly based on English enactment, which in fact reproduces word by word the language of the English enactment, we are in practice if not in theory, bound by the decisions of the English Court." *Per Mookerjee J* in *Ramendra* v *Brojendra*, 21 C W N 794=41 Ind Cas 944 "When we are

construing an Act which in many instances is taken, word for word, from an English Act, and when we are dealing with a branch of law which is essentially ... ly bound by it, yet we ought certainly ... of the English Court of appeal' ... India Ltd v The Official Assignee of ... Indian Act, help ... may be derived from the ... authoritative as the decisions of the Superior ... the Indian Law is similar or the same their authority is conclusive 12 Q B D 724, see also *Lovelock and Lewes v Malabar Timber Yards and Saw Mills*, 13 M L T 282 Unless the English Statute, and the Act of the Indian Legislature are *in pari materia* references, to English decisions, instead of affording any help will tend to confuse the consideration, of the matter in issue *Ezra v The Secretary of State*, 30 C 36=7 C W N 249 In construing a section of the Indian Act, cases bearing upon the construction of the similar provisions of an English Act, different in its language, can be of little or no assistance, *Collector of Dinagpore v Girija Nath*, 25 C 356 A Judge should not interpret Statutary law, when it provides for a specific procedure, by reference to a decision pronounced under a different system of procedure *Radha v Lal ...,* 31 C L J 283=24 C W N 151–56 Ind Cas 511 But where the point to be decided arises ur ... h law is unneces sary *Per Lord Shaw* ... *The Del...* *Tea Co*, 28 C W N ... W N 158=22 A J. 173=5 C 3012–6 ... R 1924 P C 40 So also rules relating to procedure under an Indian Act should not be interpreted ... relating to another Statute in England even whe... *Brojolal v Sharaju bala*, 51 C ... *Lakhmi*, 24 C W N 451 ...

law but in its application the C... Courts acquainted with Indian ... Courts which deal with people w... habits and intellectual development' *Syed Mohammad v Syed Ali Hyder*, 1 O W N 803 'It is a sound rule of interpretation" says *Lord Sinha*, 'to take the words of the S... witho... law ... 55 ... Sec ... Lah 364, *Sohan v Emp* 197=10 Lah 283

American Cases, Value of In *Scaramanga v Stamp* 5 C P D 295, at p. 303, *Cockburn C J* observed 'Although the decisions of the American Courts are of course not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of law—a law ... from a common source ... confidence in our ... authorities made ... on as I do upon principle, I am much strengthened by the American authorities to which my attention has been called' The following observations of *Sir John Woodroffe, J* in the preface to the Ninth Edition of his Evidence Act should be taken into consideration, while interpreting the same 'Amongst the text-books laid under contribution we wish particularly to indicate the work of *Professor J H Wigmore*, a valuable and exhaustive book written in an original and modern spirit a... nonsensical reasons' for the r... obtai... ich prevails in England and ... upon Indian Judges, yet and ... *Justice Cockburn* said in the d... England (*Scramanga v Stamp*, L R 5 C P D 295, 303) and *Sir Lawrence Peel* observed in India (*Braddon v Abbot*, Tailor and Bells Reports, 342, 359,

e 300, *Malcolm* v. *Smith, ibid*, 283 288), of great value to a correct determination of questions for which our own or the English law offers no solution". See also Preface to this book. But in this connection the advice given by *Lord Halsbury L C* in *Re Missouri Steamship Co* 42 Ch D 321 (330) should also be borne in mind. In that case he observed: "We should treat with great respect the opinion of eminent American lawyers on points which arise before us, but the practice which seems to be increasing of quoting American decisions, as authorities, in the same way as if they were decisions of our own Courts, is wrong. Among other things, it involves an inquiry, which often is not an easy one, whether the law of America on the subject in which the point arises is the same as our own". But this apprehension of his lordship is not applicable in interpreting the Indian Evidence Act. Vide preface to this book.

English Law of Evidence: its origin, growth and peculiarity. "At once, when a man rises his eyes," says *Prof. Thayer*, "from the common law system of evidence and looks at foreign methods, he is struck with the fact that our system is radically peculiar. Here a great mass of evidential matter, logically important and probative is shut out from the view of the judicial tribunals by an imperative rule, while the same matter is not thus excluded anywhere else. English speaking countries have what we call a law of evidence, but no other country has it; we alone have generated and evolved this large, elaborate, and difficult doctrine. We have done it, not by direct legislation, but, almost wholly, by the slowly accumulated rulings of Judges, made in the trying of causes during the last two or three centuries,—rulings which at first were not preserved in print, but, in the practice and tradition of the trial Courts, and only during the last half or two-thirds of this period have they been revised, reasoned upon, and generalized by the Courts in banc.

"When one has come to perceive these striking facts, he is not long in finding the reason for them. Indeed the very structure of the system thus produced points to the reason, when we observe its constant, anxious, and over anxious endeavour to prevent the tribunal to which the evidence is principally addressed from being confused and misled, and from dealing with questions which it has no right to deal with. It might seem strange and not worth while to keep alive so long a tribunal which has needed so much watching and so many safeguards, if one did not recall the immense persistence of legal institutions and usages, as well as the deep political significance of the jury and its relation to what is most valued in the national history and traditions of the English race. It is this institution of the jury which accounts for the common law system of evidence,—an institution which English speaking people have had and used, in one or another department of their public affairs, ever since the Conquest. Other peoples have had it only in quite recent times, unless, indeed, they may belong to those who began with it centuries ago, and then allowed it to become obsolete and forgotten. England alone kept it, and, in a strange fashion, has developed it.

"This institution, the jury, which is thus the occasion of our law of evidence, and which is also at the bottom of our system of pleading and procedure, and of very much in all branches of the substantive common law, has a peculiar interest for us . . . I hope that those who attentively consider the long and strange story of the development of the English jury and the immense influence it has had in shaping our law, will find here a basis for conclusions as to the scope and direction of certain much needed reforms in the whole law of evidence and procedure.

"A system of evidence, like ours, thus worked out at the forge of daily experience in the trial of causes, not created, or greatly changed, until lately, by legislation, not the fruit of any man's systematic reflection or forecast, is sure to exhibit at every step the marks of its origin. It is not concerned with nice definitions, or the exacter academic operations of the logical faculty. It is attending to practical ends. Its rules originate in the instinctive suggestions of good sense, legal experience, and a sound practical understanding, and they are seeking to determine, not what is or is not, in its nature, probative, but rather, passing by that enquiry, what, among really probative matters, shall, nevertheless, for this or that practical reason, be excluded, *and not even heard by the jury*. From the diversity and multitude of the casual rulings by the Judges,—rulings often hastily made, ill-considered, and wrong,—from the endeavour to follow

Pre

be made is often unfavourable to clear thinking, and the law of evidence largely shaped at nisi prius took on a general aspect which was vague, confused, and unintelligible One thing in particular added greatly to the confusion, namely the habit of assuming whenever evidential matter was rejected or received, *that the result was attributable to some principle of the law of evidence, while very often indeed, the reason lay wholly in* the rules of pleading, procedure or substantive law which happened to control the case *In this way the law of evidence came to be monstrously overloaded and was made to swallow up into itself much which belonged to other branches of law or to the wide regions of logic or legal reasoning* Thus not only were many of these other subjects clouded and thrown out of focus, but the law of evidence itself was intolerably perplexed *Thayer's Preliminary Treatise on Evidence* pp 1—4

Gradual change in the Law of Evidence as Jury system changed The old forms of trial were chiefly these (1) Witnesses, (2) The party's oath, with or without fellow swearers (3) The ordeal, (4) Battle Trial by witnesses appears to have been one of the oldest kinds of 'one sided proof To such witnesses, no cross-examination was allowed They were to state the facts on oath only (*Thayer pp 16 1*) In my opinion says *Brunner* (Schw 205) ' undoubtedly we are to include under the head of the formal witness proof these (1) the proof of age, (2) th ... of property in a moveable chattel ' In Bractons ... D 1234) and case 1362 (in 1220) we find that ag ... proved by twelve legal men produced by him Now these twelve men are not at all a 'jury' for the party selects them himself (*Thayer Pre Tre p* 19) In a peculiarly interesting part of his great work on the jury, *Brunner* points out that the old witness proof was in some cases transformed at the hands of the royal power into an inquisition so that the witnesses were selected by the public authority, as they were in ordinary jury (*Thayer p 19*) A witness to prove age must be 42 years of age By 1515 A D it was settled that a trial of a person s age ' shall be by twelve jurors, but in giving their verdict every juror should show the reasons inducing his knowledge of the age, such as being *son gossipe* or that he had a son or daughter of the same age, or by reason of an earthquake or a battle near the time of the birth and the like (*Kilway 176 b*) Gradually ' the peculiar function of the jury as being triers—grew to be the chief and finally as centuries passed their only one, while that of the other witness was more and more defined, refined upon and hedged about with rules It is surprising to see how slowly these rules came about The attaint which long held its place as the only way of remedying a false verdict

When they appeared the jury could disregard all they said and show ... were not accordant with what they knew Gradually it was recognized that while the jury might not be bound by the testimony, yet they had a right to believe it and that they were the only ones to judge of the credibility *Thayer Pre Treat pp 137 138* Originally the jury was punished for a false verdict, but in the course of time in case of unreasonable verdict without punishing the jurors a new trial was granted

In granting new trials it became necessary for the Courts to know the facts which the jurors knew Accordingly the old doctrine of basing the juror s verdict on their personal knowledge began to be discouraged The jurors were told that if any of them knew anything relating to the case they ought to state it publicly in Court

In 1670 in *Bushell s Case* Vaughan 135, 142, *Vaughan, C J* finally laid down the different functions of the witnesses and the jurors in the following words A witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses But a juryman swears to

what he can infer and conclude from the testimony of such witnesses by the act and force of his understanding, to be the fact inquired after, which differs nothing in the reason, though much in the punishment from what a Judge, out of various cases considered by him infers to be the law in the question before him' So two things stand out prominently in *Vaughan's* opinion in *Bushell's Case*, (1) The jury are judges of evidence (2) They act upon evidence of which the Court knows nothing and may rightfully decide a case without any evidence publicly given for or against either party *Thayer Pre Treat p 168* When the jury existed merely as a body of witnesses, supposedly familiar with the facts who from their own knowledge stated what the facts were the Court could, in the application of the law to the facts exercise no control over the result which was impossible when the character of the jury changed With the development of the jury into a reasoning inference drawing body of men, possessing the power to determine the ultimate facts in issue and by their verdict to judicially settle the controversy the situation to the mind of the Judge, was full of embarrassments To what conclusions might not these men come, men ignorant of the law and its methods unfamiliar with the ways of counsel, open to the influence of testimony and argument presented solely for the purpose of playing upon their sympathy passion and prejudice This was a situation to be deplored, and to be relieved of its dangers as far as possible In the eyes of the Judge the jury was an uncertain quantity which needed to be guarded against The jury, from the time it began to take on the character of an arbiter of the facts must have been a disturbing element in the work of the Court

In the submission of the facts which constitute the evidence in a case there have been embarrassments real or imaginary which have resulted in the development of a set of rules These rules relate to the use of facts in Court as evidence and make up the Law of Evidence' Accordingly with the beginning of the use of evidence before juries we find the beginning of the law of evidence Statements to which the Courts might listen without impunity were carefully kept from the jury by excludings rules established by the Judges

It must not be supposed that these excluding rules came into being all at once The development of the jury into its final shape was a gradual one, and the growth of rules governing the use of evidence before the jury was equally gradual It is immaterial to enquire here as to the kind of evidence, which was excluded that is to be found in any English treatise on the law of evidence It is sufficient to say that in general every thing except what was actually within the personal knowledge of the witness was considered unsafe to put before the jury Thus, hearsay and opinion were both objectionable In this way the susceptibility of the jury played its part in moulding the law of evidence into its modern form

The supposed ignorance of the average jury was also an important factor in the evolution of the rules of evidence Things likely to complicate the case to confuse the mind or mislead as to the real facts in issue were accordingly excluded —*McKelvey's Law of Evidence* pp 9 10

How important a part the jury played in the development of the Law of Evidence may be realised when one considers such a decision as that in *Dell v Waller*, 74 N W 617, where it was held that the admission of improper evidence in a case tried without a jury is not ground for reversal, and every practitioner is familiar with the custom prevailing where cases are tried before the Judge alone, or a referee, of taking little account of the ordinary rules of evidence *

Other Factors, having influence to shape the Law of Evidence With the expansion of the work of the Courts and the ever increasing volume of business brought before them, a necessity arose for the shortening of trials and the expediting of the work in every possible way This influence was a powerful one in its effect upon the admission of evidence Much that was logically relevant, and indeed worthy of consideration if minute inquiry were possible, became inadmissible, upon the theory that it was too remote, or of slight importance Collateral matters these were in the main —matters likely to lead to prolonged collateral inquiry, with a meagre result in the way of inference—compelling proof when finished Other things operated to make it easy and natural for the Courts to establish rules relating to the use of evidence The policy of the law in respect

* Vide also section 167 of the Indian Evidence Act.

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must be cast, building barriers within which they must be confined, and wearing grooves along which the wheels of judicial inquiry must run *Melchey's Law of Evidence*, p 10

Law of Evidence what it is "What is our Law of Evidence" asks *Prof Thayer* Then he answers the question in the following words "It is a set of rules and principles affecting judicial investigations into questions of fact, for the most part controverted questions It is concerned with the operations of Courts of Justice, and not with ordinary inquiries *in pais*, and even within this limited range, it does not undertake to regulate the processes of reasoning or argument, except as helping to discriminate and select the material fact upon which they are to operate *Thayer Pre Trea* p 263 The law of evidence"
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facts may, and what may not be proved in such cases II What sort of evidence must be given of a fact which may be proved, III By whom and in what manner the evidence must be produced by which any fact is to be proved After defining under the first head facts in issue and facts relevant to the issue he names four classes of facts whic ... ancy to the issue '1 Facts similar ... other (*Res inter alios acta*) 2 Th ... has asserted the existence of any fact (*Hearsay*) 3 The fact that any person is of opinion that a fact exists (*Opinion*) 4 The fact that a person's character is such as to render conduct imputed to them probable or improbable (*Character*) ... exceptions he points document r primarily y or an oral m, and the manner in which the proof of a particular fact must be made he lays it down that when a fact is to be proved evidence must be given by the person upon whom th ... t by his co ... petent, ... t oath, that the witness may be examined and cross-examined and his credit tested That brief statement, says the learned Judge will show what he regards as constituting the Law of Evidence properly so called With such valuable *dicta* for comparison, the statutory definition of the Law of Evidence seems to cover all the ground necessary for the guidance of its administration In the California Code of Civil Procedure, section 1825 and Hord's Oregan Laws section 687, which may be taken as fair types of code definitions it is thus comprehensively dealt with

The law of evidence is a collection of general rules established by law

'1 For declaring what is to be taken as true without proof,

'2 For declaring the presumptions of law both those which are disputable and those which are conclusive

'3 For the production of legal evidence,

'4 For the exclusion of whatever is not legal,

5 For the determining in certain cases, the value and effect of evidence' *The Blue Book of Evidence* § 1

Things excluded from the Evidence Act ' This brief statement says *Sir James Fitz James Stephen* in his Introduction to his Digest of the Law of Evidence " will show what I regard as constituting the Law of Evidence properly

le so called My view of it excludes many things which are often regarded a forming part of it. The principal subjects thus omitted are as follows —

I regard the question, What may be proved under particular issues? (which many writers treat as part of the Law of Evidence) as belonging partly to the subject of pleading, and partly to each of the different branches into which the substantive Law may be divided

"Again, I have dealt very shortly with the whole subject of presumptions My reason is that they also appear to me to belong to different branches of Substantive Law and to be unintelligible except in connection with them Take for instance the presumption that every one knows the law The real meaning of this is that speaking generally ignorance of the law is not taken as an excuse for breaking it This rule cannot be properly appreciated if it is treated as a part of the Law of Evidence It belongs to the Criminal Law In the same way numerous presumptions as to rights of property (in particular easements and incorporeal hereditaments) belong not to the Law of Evidence but to the Law of Real Property The only presumptions which, in my opinion ought to find a place in the Law of Evidence are those which relate to facts merely as facts, and apart from the particular rights which they constitute Thus the rule, that a man not heard of for seven years is presumed to be dead, might be equally applicable to a dispute as to the validity of a marriage, an action of ejectment by a reversioner against a tenant *pur auter vi* the admissibility of a declaration against interest and many other subjects, after careful consideration I have put a few presumptions of this kind into a chapter on the subject, and have passed over the rest as belonging to different branches of the Substantive Law

"Practice, again, appears to me to differ in kind from the Law of Evidence The rules which point out the manner in which the attendance of witnesses is to be procured, evidence is to be taken on commission, depositions are to be authenticated and forwarded to the proper officers interrogatories are to be administered, etc have little to do with the general principles which regulate the relevancy and proof of matters of fact. Their proper place would be found in Codes of Civil and Criminal Procedure I have however noticed a few of the most important of these matters

"A similar remark applies to a great mass of provisions as to the proof of certain particulars Under the head of Public Documents', *Mr Taylor*, gives amongst other things a list of all or most, of the Statutory provisions which render certificates or certified copies admissible in particular cases

"On several other points the distinction between the Law of Evidence and other branches of the law is more difficult to trace For instance, the law of estoppel, the law relating to the interpretation of written instruments, both run into the Law of Evidence I have tried to draw the line in the case of estoppels by dealing with estoppels *in pais* only, to the exclusion of estoppels by deed and by matter of record, which must be pleaded as such ; and in regard to the law of written instruments by stating those rules only which seemed to me to bear directly on the question whether a document can be supplemented or explained by oral evidence

PART I.

RELEVANCY OF FACTS

CHAPTER I.

PRELIMINARY

Short title

1 This Act may be called the Indian Evidence Act, 1872 **S. 1**

Extent

It extends to the whole of British India, and applies to all judicial proceedings in or before any Court, including Courts-martial, (other than Courts-martial convened under the Army Act)* (or the Airforce Act)† but not to affidavits presented to any Court or officer, nor to proceedings before an arbitrator,

Commencement of Act

and it shall come into force on the first day of September, 1872

The Law of Evidence—lex fori 'The law of evidence is the *lex fori* which governs the Courts Whether a witness is competent or not, whether certain evidence proves a certain fact or not, that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and the Court sits to enforce it' *Per Lord Brougham* in *Bain* v *Whitehaven and Furness Junction Railway Company* 3 H L C 1 at p 19 *Hamlyn & Co* v *Talisker Distillery*, (1894)
is taken in one country
commission or with the as-is
must be the law of the country where the suit is actually pending for which the evidence is taken as being the true *forum* See *per Cockburn C J* in *Dessilla* v *Fels*, 40 T L R 423—*Foote's Private International Law* p 530 but see the observation of *Woodroffe J* in, *In the matter of Rudolph Stallman*, 39 C 161–15 C W N 1053 at p 1065 cited under the head *the Act is not a Complete Code* under section 2 *infra*

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* Inserted by Act XVIII of 1919
† Inserted by s 2 of the Repealing and Amending Act X of 1927.

1. Kolhan in the District of Singhbhum—see Gazette of India 1881, Pt I p 501 (the Lohardaga or Ranchi District included at this time the Palamau District separated in 1891) and the Tarai of the Province of Agra, ibid 1876 Pt I p 505, Ganjam and Vizagapatam—See Gazette of India, 1899, Pt I, p 730, and under ss 3 and 5 of the same Act it has been declared in force in the Pargana of Manpur—by Reg 2 of 1926 and in Panth Piploda by Reg I of 1929 The powers of a Local Government and those of a High Court were at the same time conferred on the Agent Governor General Central India, for the purposes of this Act—vide Government Edition 1931, p 9

British India For definition of "British India" vide section 3 Cl (7) of the General Clauses Act (X of 1897) The following places are within British India —Amin Laccadive Islands (Queen v Cheria Koya 13 M 353); Andaman and Nicobar Islands (Ardeshir v Bombay B and C I Ry Co, 9 B 241), Island of Perim (Queen v Mancel Ledl and 10 B 258) and Ajmer and Merwara Freeman v Bombay Baroda and Central India Ry Co 9 B 244) The Native States and Tributary Mahals are not within British India, vide Emp v Pitambar 5 Bom L R 473 Muhammad v Queen 25 C 20 P C, Queen v Abdul Latif 10 B 186 Empress v Keshub 8 C 985 Indiramani v Bhagat 16 C 667 Empress v Chandulal 8 B 1 2

Application of the Evidence Act in places outside British India A complete list of places into which the Indian Evidence Act (I of 1872) has been declared to be in force is given in the Appendix The Evidence Ordinance of Ceylon is merely the application to Ceylon of the Indian Evidence Act Kanapathipillai Gabriel v Thalamby 52 I A 372=A I R 1925 P C 229

Judicial proceedings An enquiry is judicial if the object of it is to determine a jural relation between one person and another, or a group of persons or between him and the community generally but even a Judge acting without such an object in view is not acting judicially Queen Empress v Tulja, 12 B 36 (42) Alexander John Forbes v Ameeroonissa Begum 10 M I A 340 According to section 4 (m) of the Criminal Procedure Code judicial proceeding "includes any proceeding in the course of which evidence is or may be legally taken on oath A proceeding under s 318 of the Criminal Procedure Code of 1861 was held to be a judicial proceeding Empress v Magistrate of Kheda, 1 B H C A C J 153

The proceedings under Chapter XXXVI of the Code of Criminal Procedure, 1898 are judicial in their nature and must not be conducted as if they were merely ministerial matters The notes of evidence, therefore must not be inadequate and vague and the order recorded must be based on distinct findings of fact Laraiti v Ram Dail 5 A 224=A W N 1883 220 A Magistrate's order under Ch XX of the Criminal Procedure Code is a judicial proceeding Reg v Ganpatrao Rat Un Cr C 59 (F B) An execution proceeding is a judicial proceeding Khondkar v Panchkouri 12 C L J 619=8 Ind Cas 1106=12 Cr L J 21, see also Bahadur v Eradatulla 37 C 642 (F B), Emperor v Sheo Sankarpuri, 10 N L R 1— Chaman v Crown 1 P R 1910, Bholanath v Emperor, 10 C W N 55 Dalhanesuar v Harish Chandra 10 C L J 450 An enquiry in which evidence is legally taken is for the purposes of the Act included in the term "judicial proceeding" Queen Empress v Tulja, 12 B 36 (42) Where the Legislature has authorised the formation of a judgment, and the grant or the withholding of a certificate on that judgment the inquiry is a judicial enquiry Queen v Price L R 6 Q B 418, see also Atchayya v Gangayya, 15 M 138 (F B) at p 147

An enquiry conducted by a Magistrate into the truth of allegations against a subordinate official, contained in a petition presented to a Deputy Commissioner, is a judicial proceeding Emperor v Auna Sah, 28 A 89=A W N 1905, 195=2 A L J 717=2 Cr L J 454 The test which has to be applied to a particular proceeding before a Court to determine whether it is or is not a judicial proceeding "for the purposes of s 476 is, whether, in the course of that proceeding, the Judge has power legally to take evidence on oath not whether he has actually taken such evidence Chaman v Crown, 1 P R 1910 Cr =161 P L R 1910=5 Ind Cas 257=11 Cr L J 90

An enquiry under the Legal Practitioners Act is a judicial proceeding Subba Chetti v Queen 6 M 252 (253), Gouri Sankar v King Emperor, 9 A L J 156, Nallasivam v Ramalingam, 32 M L J 402=18 Cr L J 785 So also

is an enquiry by a Magistrate before issuing an order under section 145 of the Criminal Procedure Code *Queen Empress v Iounarasinha*, 19 M 18 The proceeding of a Court holding a preliminary enquiry under s 476 of Criminal Procedure Code is a judicial proceeding *Abdulla v Emperor*, 37 C 52

An enquiry under s 8 of the Reformatory Schools Act ... ing *Queen Empress v Manaji*, 14 B 381
Rat Un Cr C ...
to issue a search
A proceedi...
Cr Pro Code is ...
589, *Crown v* ...
of the Criminal P...
Kishun, 36 C ...

1909 Cr The Collector hearing objectic...
Tax Act is a Revenue Court and his ...
Emperor v Rup Singh, 44 P R 1909 Cr
The announcement of an order under ...
is a stage in a judicial proceeding *Queen Empress v Saliq Ram* 18 P R 1897 Cr An investigation by the police, under s 161 Cr Pro Code is a stage of a judicial proceeding. *Nga Po Ke v Queen Empress*, U B R (1897—1901) Vol I, 31 An order made under s 202 of the Bengal Municipal Act is a judicial proceeding *The Nabadwip Municipality v Purna Chandra*, 29 C W N 817

Judic...
where the ...
something ...
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v *Gangay*...
Gholam Ismail, 1 A 1 (13), *Alexandar v Amirunnissa*, 10 M I A 340 An enquiry by a ... Act is not a judicial proceeding, *Ezra v* ... *rga Das v Queen Empress*, 27 C 820 ... to a crime alleged about to be committed is not a judicial enquiry *Chandrasigha v Mohan Singh*, 4 C L J 181=8 Bom L R 705 (P C)=30 B 523=1 M L T 301 A departmental enquiry under section 197 of the Bombay Land Revenue Code is not a judicial proceeding *In re Chota Lal*, 22 B 936 An order passed by a first class Magistrate under sections 518, 520 of the Criminal Procedure Code 1872, was held not to be a judicial proceeding *Reference No 62 of 1877* Rat Un Cr C 129 A Magistrate cannot be said to be acting judicially in directing a search to be ... uch he would ... 36 C 433=1 ... It is doubtful whether the proceeding under the Land Registration Act is a judicial proceeding *Hira Nand Ojha v Emperor* 9 C W N 127

Court—For definition of the term *vide* s 3 *infra*

Courts Martial ...
1869) It is also appl...
(vide s 68 of Act XIV ...
Act must adopt the s...
ordinary jurisdiction i...
martial can be compelled to answer any question or produce any document which he could not be required to answer or produce in similar proceedings in a criminal Court, *Powell* p 28, Army Act, 1881, (44 and 45 Vict (58 sections 127, 128) This is an exception to the general rule that the *lex fori* determines the law of evidence (*Woodroffe p 105*)

Affidavits Order XIX of ...
regards affidavits, under rule 1 ...
the Court (i) to order any partic...

1. (n) to allow the affi lavit of any witness to be rea l at a hearing or trial on su conditions as it may think reasonable, with this proviso that when the oppos party *bona fide* desires to cross examine a witness, and the witne s can produce l, such witnes s evi lence shall not b allowe l to be given by affi lav The first of these powers, which can be exercised by the Court even against t wishes of both parti s, can be advantageously employe l to the man fe t savi of expen e in proof of formal matters The secon l, which, subject to the provi can be exercise l by the Court at the instanc of one party, but against the wi of the other, enabl s n prop r cases, the evidenc of an absent witne s to brought b fore the Court without the expensive interposition of a commiss ion or examiner *Powell* p 69 An affi lavit is ordinarily not evi lence, unless t party seeing to us ts of or ler XIX *Kri hna Madhura*, 63 Ind party de ires to cross exami a witness who can be r a l at the trial if t cross examining party objects *Bla lburn* v *Boles* 7 Ch D 68 An affi lav once filed cannot be withdrawn for the purpose of preventing the deponent bei cross examine l thereon *In re Quart Hill, etc* 21 Ch D 642 This rule applicable to a foreigner r s lent out of juris liction making an affi lavit *Stra* v *Gelb hmidt* (18) 8 T L R 239 *The Parisian*, (1887) 13 P D 16 T the Court has a lis retion to refuse to or ler the atten lance of a witne s f cross examination *Da Lemla l* v *Browne* W N (1887) 205, *Strauss* v *Goll chbmit* (1892) T L R 239 Where it is not possible to cross examine th deponent the Court may act upon th affi lavit *Shea* v *Green*, (1886) 2 T L I 533 It is essential where evidence by affi lavit is giv n that every ca e is take by the solicitors and others engaged in their preparation that the affidavits sho represent the real facts in or ler that they may be thoroughly relie l upon a the remarks of *Eve J* in *Rummens Ge ll* (1910) 129 L T J 263 An affi lav of information and belief not stating the source of information and belief i ina lmissible in evi lence whether on an interlocutory or a fin il application *P J I Young Manufacturing Co* v *Young* (1900) 2 Ch 753 C A

Pro ... Arbitrators As to proceedings b fore arbitrators, th Indian Evidenc Act is not appli *Tr carl* v *Wilson* 4 C 231, the on the ground that the arbitrator used in evidence a letter written by a party s attorney and *state l to be without prejudice* An application to confirm the award was refuse l by the learne l Judge of the first instance upon the ground that the defendant had acte l ... *Ma rkby J* letter stress, rneys jously in the course of negotiation betwe n the attorneys on both sides for an amicable ... are clearly y an l on the e Act herein) al m n a take in ht not wrong cted to *judice* think onfirm e, that same B 363 rred to tors act pire or

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a single arbitrator occupies a judicial position and exercises judicial powers, and, is bound, as far as practicable, to follow legal rules.'

Sa ... vidence which is before him the ... ve agreed that he Biler (Co v

... Esher said "The parties have agreed to go before an umpire who is not bound by the strict rules of evidence enforced in a Court and to be bound by his decision, and in my judgment the Court ought not to fetter the arbitrator or the parties by its own rules of evidence, but should consider whether something has been discovered since the award which the arbitrator might think material, and which might alter his decision

This rule is of course contrary to the decision laid down by *Chief Baron Alexander* in *Attorney General* v *Davison*, 4 Mcle & Y 160 166 where he observed 'But I have already understood that arbitrators are bound by the same rules of evidence as the Courts of law But in India an award of the arbitrators cannot be se ... strict compliance with the rules ... M 85 (87) The view express ... *o, ult supra* is scarcely in accor ... ase of *East & West India Dock* ... Q B 295

If ir ... to the o ... mony, or ... now settl ... for the m ... 593 *Per* ... *bell* v *Iu* ... refuses to hear evidence ... *Samuel* v *Cooper* 2 A & E 752, *Brophy* v ... *Maina Koer* 12 C L R 564 p 566 trator of evidence of collateral ma ... 1 D & L 498 An arbitrator side in the absence of the other ... opportunity to meet his oppo ... 9 (311) It is the duty of the arbitrator ... terms of the agreement in pursuar ... re him *Krishna* v *Bilja* 2 B L R Ap 25 Where an arbitrator has taken no evidence upon matters referred to for arbitration and has not allowed a party an opportunity of proving his contention he is guilty of misconduct *Drolı* v *Rajkumar* A W N 1889 124

Repeal of enactments

2 On and from that day the following laws shall be repealed —

(1) all rules of evidence not contained in any Statute, Act, or Regulation in force in any part of British India,

(2) all such rules, laws and regulations as have acquired the force of law under the 25th section of the Indian Councils Act, 1861,* in so far as they relate to any matter herein provided for, and

(3) the enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule

* 24 & 25 Vict c 67

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed.

Repeal of enactments Where an Act is repealed, and the repealing enactment is repealed by another, which manifests no intention that the first shall ... rule was that the repeal of the second Act ... *ab initio* and not merely from the passing ... 7 citing 2 Inst 686, 4 Inst 325, *Case of Hopwood*, 10 B & C 39; *Tattle* v *Grimwood*, ... L J Ch 321, *Kemp* v *Waddingham*, (1866) ... oes not apply to repealing Acts passed since 1850 So the mere repeal of a Repealing Act, or the repealing portion of a Repealing Act does not by ... ealed portion thereof 1 Weir 781 = 7 ... t c 63, s 11 In the absence of a contrar... on old Act cannot be deemed to affe... the new Act came into force *Mulunl*... the rule of estoppel based on a *dict*... , that a mort... gor, does not apply, and ... rules of evidence which ... orce in British India *Nur* ... *Mahomed* v *Kesar* ... 13

Repeal by implication Statutes are not to be considered as repealed by implication unless the repugnancy between the new provision and a former Statute be plain and unavoidable *Sitapathi* v *Queen*, 6 M 32 One Statute may be impliedly repealed by a subsequent Statute necessarily inconsistent with it, but the inconsistency must be so great that they cannot both be to their full extent obeyed *Emperor* v *Mulshankar* 12 Bom L R 750 = 7 Ind Cas 963 = 11 Cr L J 548 For such a repeal the provisions of the latter Act must be so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together *Co Litt* 112, *Shep Touchst* 88, *West Ham* v *Fourth City*, (1892) 1 Q B 654, *O Flaherty* v *McDowell*, 6 H L Cas 142, *Brown* v *G W R Co*, (1885) 9 Q B D 753, *Sims* v *Doughty*, 5 Ves 243; *Constantine* v *Constantine* (1801) 6 Ves 100

The Act is not a complete Code The Indian Evidence Act is not a fragmentary enactment but a consolidatory enactment repealing all rules of evidence other than those saved by the last part of this section *Collector of Gorakhpur* v *Palakdhari* 12 A 1 at p 35 The Indian Evidence Act has re... *Lekraj* v ... employ ... it itself"

"The evidence Act does not contain the whole law of evidence governing this country Section 2 of the Act ... Statute, Act or Regulation in force ... Evidence Act and in other Acts and ... matters of evidence One of such S... which, as applicable to this country ... Evidence Act' *Per Woodroffe J* in ... 164 = 15 C W N 1053 at p 1065 In the same case the learned Judge continued "Where evidence is taken in this country the evidence receivable must be governed by the rules of procedure here in force It has however been argued that where evidence is received from abroad its admissibility ... English ... the ... ence ... ust ... obliga... tter for ... p 153, ... 31, 35 and cases there cited) The matter is one which may on a future occasion require consideration but though disposed to assent to the argument

of tl ... as such S.
a dec ... it was
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Emp ... *Queen*

The rule under Mahomedan Law prescribing ... years as the period of "*gestation*" is a rule of evidenc ... When this is read with s 5 of the Punjab ... are not bound by that rule under that A ... see also 1 P R 1881 It is not open to Court to apply the principles of justice, equity and good conscience inconsistent with the Act *Meer Jangoo* v *Chote Sahib*, 6 N L R 161 = 8 Ind Cas 1121

The Evidence Act is a separate Statute dealing with an important branch of law, and its provisions are independent of the rules of procedure contained in the Criminal Procedure Code and must have full scope unless it is clearly proved that they have been repealed or altered by another Statute *Rannun* v *Emperor*, 7 Lah 84 = 91 Ind Cas 901 = 27 P L R 583 = A I R 1926 Lah. 88

Clause I All rules ... to evidence are repealed by clause ... *Yusuf Ali* v. *Ayub Beg*, 11 A L J 355 ... *Ali* v *Budh Singh*, 7 A 297, *Parai* ... *an* v. *Ismail*, 10 A 289 (300) This cl ... law on the subject of evidence *Lelraj* v *Mahpal*, ...

Clause II ... the Government in ... Act, 1861, 24 & 2 ... enactment In ... duction of a day ... a like nature were in force in other Non Regulation provinces ... p 77

Proviso There are various Statutes of the British Parliament and Acts of the Indian Legislature which contain provisions relating to evidence Those Statutes and Acts of ... passed before the Indian Evidence Act, (I c ... *In re Rudolph Stallman*, 15 C W N 1053, ... A 70 = 5 C 754; *Queen Empress* v *Kartick* ... Statutes and Acts are made in Whitely Stoke pp 822—827 So in *Over* v *Over*, 49 B 1925 Bom 231, it has been held that s 58 of ... to the Indian Divorce Act

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context —

Interpretation-clause

"Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence

"Court"

Interpretation clause "A definition is the most difficult of all things There is far greater probability of a correct use of terms than of a correct definition of them The best definition, therefore, is that by use A correct use renders definition unnecessary, because the law will speak plainly without it And where it is unnecessary to define it is also dangerous because an incorrect definition will confound the correct use"—vide *Solicitors' Journal* Vo XX p 869

... "A definition clause does not ... nch the word may ... ntext which the ... ding to their ordi- nary m ... (J) 9— ... *Ram L* ...

3. same meaning is implied by the use of the same expression in every part of an Act *Courtauld v. Legh*, L R 4 Ex 130 *R v Poor Law commrs*, 6 A & E 68, *Queen v Naglal ala*, 22 B 235 p 238

... Act is framed only for the purpose ... ultimate scope Special ... objects *Queen Empress* ... the Act is not meant ... in a trial by Jury, the Court' does not exclude the jury In such a case it means and includes both Judge and Jury *Ibid* A Sub Registrar is a public officer; his proceedings are judicial proceedings within the meaning of section 228, Penal Code, and his Court is a Court within the meaning of that word in the Evidence Act *In re Sadhasee Lal*, 22 W R Cr 10 = 13 B L R App 40 The Court means all persons, except arbitrators legally authorized to take evidence *Alchayya v Gangayya* 15 M 138 (147) = 2 M L J 61 (F B) So the definition of Court applies to a Registrar holding an enquiry, and taking evidence under the ... *In re Venkata Chela*, 10 M 151, but see *R v* ... 36 (43), *Attorney General v Moore*, 3 Ex ... under Order XXI, r. 1—r 10 of Civil ... Criminal Procedure Code is a person legally ... is a Court *Alchayya v Gangayya*, 1... ... includes all Magistrates *Queen v Alaqu*, 16 M 421 (422), *Abdul A... v The Crown*, 17 Cr L J 491 = 36 Ind Cas 171

Includes Where in an interpretation clause it is stated a term includes so and so, the meaning is that the term retains its ordinary meaning and the clause enlarges the meaning or ... which the ordinary meaning would not inc... *Firm of Chandalal* A I R 1924 Sind 8... 3 A L J 845 = 89 Ind Cas 630

Judges No definition of the word "Judges is given in this Act The word 'Judge' means the presiding officer of a Civil Co... the definition of the term given in the Civil Procedu... same The word is also defined in section 19 of ... *v Kirby*, ... Registrar

Magistrate No definition of this term also is given in the Act The General Clauses Act (X of 1897) lays down the following definition of the term "Magistrate, shall include every person exercising all or any of the powers of a Magistrate und... force' Vide s 3(31)

... C 317 A Magistrate is not a Court while he is passing an order under s 144 of the Criminal Procedure Code *Natarangan v Ranga swami*, 44 M L J 328

Judicial interpretation of "Court" ...

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15 A 141 (113), he was held not to be a Court In *Queen Empress* v *Tulja* 12 B 36 (42), the enquiry contemplated by sections 73, 75 of the Registration Act (III of 1877) appears to have been ... the case of the *Queen* v ... Madras High Court in the c... otherwise In delivering ... therefore clear to my mind that the Registrar exercises more than mere administrative function—in the examination of witnesses he is bound to observe the rules of evidence, and he is to consider the ... form his own conclusions The learn... B 36 appeared to consider the Reg... the fact appears to have mainly influ... *Nath* v *I I Brown and other*, 11 C 176 A District Registrar is not a Court within the meaning of section 622 of the Code of Civil Procedure of 1882 *Manavala* v *Gounden*, 30 M 326 Under the Land Acquisition Act, the proceedings of the Collector regarding the measurement and valuation of the land and resulting in his award are administrative and not judicial *Ezra* v *The Secretary of State* 1 C L J 227 = 32 C 605 = 9 C W N 151 affirming 7 C W N 249, *Durga Das* v *Queen*, 27 C 820, *Galstaun* v *Banka* 31 C W N 825 A ... proceeding under ss 69 and 70 of the Bengal ... v *Kolil*, 17 C 872 So also a Certificate ... f the Bengal Public Demands Recovery ... *al* 28 C 217, but see *Jhara Lal* v *Mohant* 2 Pat 257 Similarly a Deputy Collector is a Court when he is holding an enquiry under the Bengal Land Registration for registering the name of a person *Panga Singh* v *Hara Khul* 17 Ind Cas 710, see also *Queen Empress* v *Munda* 24 M 121 A tribunal constituted under the Calcutta Improvement Act (V of 1911) is also a Court *Nundo Lal* v *Khetra Mohan*, 45 C 585 So also is an Income Tax Collector *Nataraja* v *Emperor* 36 M 72, *In re Punam Chand* 38 B 642 A District Judge is a Court while he determines election disputes under s 22 of the Bombay District Municipalities Act (Bom Act III of 1901) *In re Nanchand* 37 Bom 865

A commissioner appointed to take down evidence of a witness is not a Court *Seadul Ali* v *Emperor* 11 C W N 909 Neither an arbitrator appointed by a Court is a Court *Mula Mal* v *Chiranji* 3 P R 1914, *I ulliah* v *Veera Sami* 17 M L J 490

As regards the meaning of the word "Court" in s 195 of the Criminal Procedure Code *vide Kanhayalal* v *Bhagwan Das*, 48 A 63, *Bilas* v *Emperor* 47 A 934, *Galstaun* v *Banku* 31 C W N 825, *Nunda* v *Khetra* 45 C 585

Fact "Fact" means and includes—

(1) any thing, state of things, or relation of things capable of being perceived by the senses

(2) any mental condition of which any person is conscious

Illustrations

(a) That there are certain objects arranged in a certain order in a certain place is a fact

(b) That a man heard or saw something is a fact

(c) That a man said certain words is a fact

(d) That a man holds a certain opinion has a certain intention acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation is a fact

(e) That a man has a certain reputation is a fact

Facts different meanings of 'Fa... in English Law books for various th... completed and operative transaction wh... executing a certain sort of writing, ... (*factum*) (c) As designating what exists ... fully, exist,—*de facto* as contrasted with *de jure*, (d) And so generally, as

S. 3. indicating things, events, actions conditions, as happening, existing, really t place This last is the notion which concerns us now It is what Locke exp (*Vide Human Understanding* Book IV C 16, s 5) when he speaks of ' particular existence or as it is usually termed, matter of fact' The fundam conception is that of a thing as *existing* or being true It is not limited to is tangible or visible or in any way the object of sense; things invisible, thoughts intentions fancies of the mind, when conceived of as *existing or b true* are conceived of as facts *The question of whether a thing be a fact or is the question of whether it is or whether it exists* whether it be true inquires into the truth, the reality, the actuality of things, are inquiries the fact about them Nothing is a question of fact which is not a question the existence reality, truth or something of the *re teritis* *Thayer's Pre. Tr Ev* p 191 Ordinarily, a fact is somethin ... act or deed or event ... as strictly true or ... *Standard Dictiona* ... American cts s w ... ment with respect ... v *Vanderbilt* 10 How Pr (N Y) 175 ... *State* v *How* 150 Ind 370=50 N E 299, *Iad* ... ible *Hiden* v *Guggenheim* 89 Fed 598 ... convement, and accompli ... A fact is something fixed, unchang

Fact legal meaning of *Mr Stephen* in the first two editions of his *Dige of Evidence* defined fact in the following words, "Fact" means (1) every thing capable of being perceived by the senses (2) every mental condition of which every person is conscious For this definition he was keenly criticised by a very able writer in *the Solicitors Journal* ... who said "the proper ... tion ... and among ot ... negligence custom ... qualities of persons ar ... really applicable only to the rudest form of ... any ... The ... of a writing and thought no definition was necessary The ... edition, and all later ones *Stephen* dropp ... attempt at definition and substituted in art 1 this " 'Fact' includes the fact that any mental condition, of which any person is conscious, exists, ' and in his preface to the third edition, after saying that he 'had been led to modify the definition of fact by an acute remark made on this subject in the Solicitors' Journal," he added that, "the real object of the definition was to show that I used the word 'fact' so as to include states of mind' *Thayer Pre Treat Ev* p 192 "No satisfactory defini tions of the term 'fact' has been or perhaps can be given Broadly it applies to whatever is the subject of perception or conse...

A "fact" as the term is us ... or said, an act or action whi ... state of mind at a given time is ... anger, the feeling is a fact If the operations of the ... emotion is felt, as joy, grief, or knowledge, skill, intention, this effect on the mind produce an effect, as process is led up to and produce a desire or intention is a fact When the mental state of mind is a fact Wilfulness is a desire or intention to do a certain thing, such result; hence wilfulness is a fact This, at least, to produce a certain ascertain the existence of a fact by means of evidence is the general rule We item of the evidence are not necessarily such facts as call in operation of the law. *Burr Jones, Ev* § 10(a) The evidence, and each

What is the real meaning of the word "fact" The popular acceptation of the term "fact" does not include any mental condition of which any person is conscious It stops at a fact being an existing or true thing The legal meaning is not limited to what is tangible or visible or in any way the object of sense *Burr Jones,* Ev § 10(a) The framer of the Evidence Act also intended that the word be not understood only in its popular sense as denoting some event which occured or something which was done, as opposed to something said or some opinion or feeling of mind or body So under this definition state- ments, feelings, opinions and states of mind ar ... circumstance of which ... ness we became aw ... as to relevancy are

... purpose of proving or disproving

the matter to which they relate *Cunning Ev p 80*, see also *Stephen's Dig Ev Preface to Third Edition* The state of a man's mind is as much a fact as the state of digestion *Bowen L J* in *Edington* v *Fitzmaurice*, 29 Ch D 483 cited in *Field's Evidence 8th Ed p 14*.

Bentham's definition Bentham defined fact as follows —"By fact is meant the existence of a portion of matter, inanimate or animate, either in a state of motion or in a state of rest" This is very uninstructive *Mr Best* has given no definition, but he seems to have indorsed the definition given by *Bentham* But all such definitions, including that of *Bentham* indorsed by *Best*, labour under the disadvantage that no accurate definition has yet been given of what is legally underst

Stephen
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Bentham's Classification of Fac
and psychological, (2) events and
This division of course does not acco
Thayer Pre Treat Ev p. 191.

is a fact considered to
inate being, by virtue, not
those which it has in
logical fact is considered
to have its seat in some animate being; and that by virtue of the qualities by which it is constituted animate *Bentham, Jud. Ev C 3*; *Best Ev* § *12* Thus the existence of visible objects, the outward acts of intelligent agents, the *res gestae* of a law suit etc, range themselves under the former class; while to the latter belong such as only ex
the sensations or recollections
any proposition, the desires
intention in doing particular ac ,
his introduction to his Evidence Act, classifies facts stated in clause (1) as external facts and those stated in clause (2) as internal facts 'During the whole of our waking life' he says "we are in a state of perception Indeed conscious ness and perception are two names for one thing according as we regard it from the passive or active point of view We are conscious of everything that we perceive, and we perceive whatever we are conscious of Moreover, our percep tions are distinct from each other, some both in space and time, as is the case with all our perceptions of
with all our perceptions *External*
facts—Whatever r
the whole sum of
with which we a
existence of the ex
knowledge of it is
which we draw
situated for that p

S. 3. intention will, wish, knowledge, opinion, are all perceived by the person who feels them When it is affirmed that a man is angr
that he knows the meaning of a word that he s
by accident, each proposition relates to a
perceived as a noise or a flash of light The
classes of propositions is this, when it is affirmed that a man has a given intention, the matter affirmed is one which he r
affirmed that a man is sitting or standing the
be perceived *not only by the man himself,*
and favourably situated for the purpose But the circumstance that either even is regarded as being or as having been capable of being perceived by some or th other, is what we mean and all that we mean, when we say that it exists o existed, or when we denote the same thing by calling it a fact The word 'fact is sometimes opposed to theory, sometimes to opinion, sometimes to feeling bu all these modes of using it are more or less rhetorical When it is used with any degree of accuracy it implies something which exists and it is as difficult to attach any meaning to the assertion that a thing exists which neither is, no under any conceivable circumstances could be perceived by any sentient being as to attach any meaning to the assertion that anything which can be so perceived does not, or at the time of perception did not, exist" *Stephen's Introduction, pp 19 to 21*

How psychological events are proved It was formerly considered that psychological facts were incapable of direct proof by the testimony of witnesses and their existence could only be ascertained either by confession of the party whose mind is their seat or by presumptive inference from physical facts *Be. Ev Art 12* But it is now recognis ... is as muc
en L J ...
are permit
ot generally
What passes in a man's mind can be collected from his acts. *R* v *Shiply*, 4 Doug 73 (177), *Field Ev 8th Ed* 14

Events and states of things There are two other divisions of facts which deserve to be noted One, is that they are either events or states of things By an "event" is meant some motion or ... ome abou
either in the course of nature or through
latter case it is called "an act" or "an
the existence of the tree is ' a state of t
on Evidence § 13

Positive or Negative facts The remaining division of facts is into *positive* or *affirmative*, and *negative* In this may be seen a distinction, which belongs not, as in the former case, to the nature of the facts themselves, but to that of the discourse which we are under the necessity of employing in speaking of them
tain denomina
xistence of it
lent to the exis
less this sort of
it may be the
A negative fact
ough, in many
instances, according to the mode of expression commonly employed in speaking of it, the real nature of it is disguised Thus, by health, is meant nothing more than the absence, the non existence, of disease, by minority, the individual's non-arrival at a certain age, by darkness, the absence of light, and so on — *Bentham Jud Ev Vol 1, p 50*

... of fact ... understand ... the Stat ... "In the first place what is
'fact to mean and inclu le
of being perceived, by the
son is conscious' This
then, is the only sense in which, in interpreting the Statute, I can understand the word fact" *Per Mahmood J* in *Queen Empress* v *Abdullah*, 7 A 385 (399) F B "A misrepresentation as to the intention of a person (in stating the purpose for which the consent is asked) is a misrepresentation of a 'fact' within

the meaning of section 3 of the Evidence Act" *Emperor* v *Soma*, 36 Ind Cas 851 (851)=17 P. R 1916 Cr =18 Cr. L J 18; see also *Re N Jaladu*, 36 M. 453 The word "fact" as used in s 157 of the Evidence Act, does not mean merely "event" but also a continuing fact such as possession. *Muthalaghri* v. *Pappu Naicken*, 25 Ind Cas 510

Matter of fact Matter of law "Matter of fact" is anything which is the ... law' is the general law of the land, of which ... *Best Ev. 8th Ed p 19* The true question ... though related senses It means, in the first place, a question which the Court is bound to answer in accordance with a rule of law—a question which the law itself has authoritatively answered, to the exclusion of the right of the Court to a ... with what is considered to be ... questions are questions of fact—... to include everything that is not l... more than one meaning In ...

Illustrations Illustrations (a), (b), and (c) are illustrations of the first clause and (d) and (e) of the second This division which was made by *Bentham* has been adopted in the Code, to prevent any metaphysical doubts as to "mental conditions' being facts *Norton p 93, Stephen's Dig Ev 3rd Ed Introduction*

"Relevant

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts

Relevant facts The relevant facts are facts other than *facts in issue* which ... that th... them ... word ... words must be taken in thei... Comm...

admissibility of facts says *Phipson* "is for the most part determined by their logical relevancy to the issue, or that connection between the two which, in the ordinary course of events, renders the latter probable from the existence of the former ... admissi... the tw... which i... "evider... or "pri... evident... fact I. ... first d... law of evidence, namely logical relevancy, for the purpose of determining whether or not the fact offered can be evidence If the fact meet this test, it may

S. or may not be admitted For flanked around the general principle in the law of evidence, that what is logically relevant is admissible, are numerous excluding rules, which say that this or that fact though logically relevant, is inadmissible *McKelvey's Law of Evidence* p 13 The word 'relevant' in the Indian Evidence Act, means admissible *Per Lord Hobhouse* in *Lala Lalhmi Chand Harder Sha*, 3 C W N 268 (notes) So a fact in order to become relevant must be admissible in evidence under any one of the sections 5 to 55 Such facts which are themselves in issue may affect the probability of the existence of facts in issue *Stephen's Introduction* p 13

English Law—Test of relevancy The meaning of the term according to Scottish law comes nearer to the conception of the term according to English lawyers namely, the sufficiency in law of what is alleged in support or defence of an action (*Standard Dictionary*) The word comes from the French, *relever* to assist So whatever testimony was offered, which would assist in knowing which party spoke the truth of the issue was relevant and when to admit it did not override other formal rules of evidence it ought to have been taken" *Planter* v *Planter*, 78 N Y 80 It is not necessary however that it should itself bear directly upon the point in issue for if it be but a link in the chain of evidence tending to prove the issue by reasonable inference, it may nevertheless be relevant *Schuchardt* v *Allen* 1 Wall (U S) 359, Relevancy is that which conduces to prove a pertinent theory in a case *Levy* v *Campbell*, (Tex) 20 S W 196 But there is no definition or Statute or theory of relevancy which can very greatly aid in solving the constantly recurring problem, whether a given fact offered in evidence is relevant to prove the proposition in issue *Burr Jones* § 135 *Prof Thayer*, who seems of all the writers on evidence to have acquired a giant grasp of his subject, says 'There is a principle not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence as contrasted with the old formal and mechanical system—which forbids receiving anything irrelevant not logically probative How are we to know what these forbidden things are Not by any rule of law The law furnishes no test of relevancy For this it tacitly refers to logic and general experience —assuming that the principles of reasoning are known to its Judges and ministers just as a vast multitude of other things are assumed as already sufficiently known to them There is another precept which should be laid down as preliminary in stating the law of evidence, namely, that unless excluded by some rule or principle of law, all that is logically probative is admissible These rules of exclusion have had their exceptions, and so the law has come into the shape of a set of primary rules of exclusion, and then a set of exceptions to these rules *Preliminary Treat, Evidence* pp 263—264

Reasons of the exclusionary rules The qualification to the general rule is that it does not always follow merely because a fact is logically relevant that it is always admissible There may be a very great number of minute details all logically relevant but which if they existed in many cases would take such a long time to be given in evidence that the business of the Court would be clogged In *Amoskeag Co*, v *Head* 59 N H 332, *Doe C J* thus stated the reason · "The trial to which parties are entitled is not an endless one nor one unreasonably protracted and exhausting There may be a vast amount of evidence, relevant in a certain legal sense but not so unimportant, when compared with an abundance of better evidence easily available, as to be properly excluded The parties being allowed upon collateral issues an equal range amply sufficient for the purposes of justice under the circumstances of the particular case, they are not necessarily entitled as a matter of law, to go further in that direction' But there is another reason for the exclusion of logically relevant evidence It is thus stated by *Prof Thayer* "Some things are rejected as being of too slight a significance, or as having too conjectural and remote a connection, others, as being dangerous in their effect on the jury, and likely to be misused or over estimated by that body, others as being impolitic or unsafe on public grounds, others on the ground of precedent It is this sort of thing, as I said before,—the rejection on one or another practical ground, of what is really probative,—which is the characteristic thing in the law of evidence, stamping it as the *child of the Jury system*' *Thayer Pre Treat Ev* p 266

"Facts in issue" The expression "facts in issue" means **S.** and includes—

any fact from which, either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows

Explanation.—Whenever under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

Illustrations.

be in issue :—

that A intended to cause B's death ;
that A had received grave and sudden provocation from B ;
that A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature

Facts in issue, what are they Facts in issue are those facts which are ... pleading in a civil case; ... "not guilty," in a criminal ... is therefore, little difficulty ... Facts in issue are, ... y the ... l 78 ... ssue" ... other ... it or ... is the ... w of ... olves ... with ... at A ... Facts ... tence ... ct' is ... ' or 'principal fact' Vide *Mckelvey's Evidence*, p 5

"Document" "Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustrations

A writing is a document ·
Words printed, lithographed or photographed are documents
A map or plan is a document .
An inscription on a metal plate or stone is a document ·
A caricature is a document

... Many so- ... l evidence ... which the thoughts of men are represented by writing, or any other species of conventional

3. mark or symbol', and expressly includes milk man's score, exchequer tallies, and the like (*Best p 213*) *Stephen's* definition is similar, though more restricted "Any substance having any matter expressed or described upon it by marks capable of being read" (*Dig Law Ev Art 1*) Within those definitions, a ring or banner with an inscription a musical composition, and a savage tattooed with words intelligible to him If would all be documents Photographs, caricatures, wooden tallies and the like would probably be excluded under *Stephen's* definition not apparently under the others *Best* p 213 The definition given in this Act is wider than the definition mentioned in *Stephen's Digest* This definition seems to include all those things mentioned above This definition is in accord with the definition of the term given in s 29 of the Indian Penal Code and s 3 (16) of the General Clauses Act (X of 1897) Where a draft petition was prepared with the intention of being used as evidence of a matter, it was held that it fell within the terms of this section *Q v Shufait Ally*, 10 W R Cr 61 = 2 B L R 12 An agreement in which some of the executants signed is a document *Jama Somu Lyer v Emperor* 41 M 589 = 43 Ind Cas 593 = 19 Cr L J 1 Letters or marks imprinted on trees and intended to be used as evidence that the trees had been passed for removal by the Ranger are documents *Emperor v Keshtappa Khandappa*, (1925) A I R 327 = 27 Bom L R 599 = 26 Cr L J 1014 = 87 Ind Cas 839

Wharton defines a document as an instrument upon which is recorded, by means of letters figures or marks, matter which may evidentially be used In this sense the term applies to writings to words printed, lithographed, or photographed to seals plates or stones on which inscriptions are cut or engraved, to photographs and pictures, to maps and plans So far as concerns admissibility, it makes no difference what is the thing on which the words or signs offered may be recorded They may be on stone or gems or on wood as well as on paper or parchment *Wharton Ev* § 614, see also *Reg. v Daye*, (1938) 2 K B 33 A book is of course a document *Field v Lawlnet Val Water Co* 26 Atl 55

Evidence' "Evidence" means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry

such statements are called oral evidence,

(2) all documents produced for the inspection of the Court such documents are called documentary evidence

The ambiguity of the word 'evidence' The meaning of the word 'evidence' in English Text Books is ambiguous It sometimes means the words uttered and things exhibited by witnesses before a Court of Justice At other times, it means the facts proved to exist, by those words or things, and regarded as the ground work of inferences as to other facts not so proved Again, it is sometimes used as meaning to assert that a particular fact is relevant to the matter under enquiry

Evidence—Different meanings of the word The ambiguity of the word, is the cause of a great deal of obscurity apart from that which it gives to the rules above mentioned In scientific inquiries, and for popular and general purposes, it is no doubt convenient to have one word which includes —(1) The testimony on which a given fact is believed, (2) the facts so believed, and (3) the arguments founded upon them In judicial inquiries however, the distinction is most important, and the neglect to observe it has thrown the whole subject into confusion by causing English lawyers to overlook the leading distinction which ought to form the principle on which the whole should be classified I mean the distinction between the relevancy of facts and the mode of proving relevant facts

"The use of the one name 'evidence' for the fact to be proved, and the means by which it is proved, 'has given a double meaning to every phrase in which the word occurs' Thus, for instance the phrase 'primary evidence' sometimes means a relevant fact, and sometimes the original of a document as opposed to a copy 'Circumstantial evidence' is opposed to 'direct evidence' But circumstantial

evidence usually means a fact from which some other fact is inferred, whereas 'direct evidence' means testimony given by a man as to what he has himself perceived by his own senses It would thus be correct to say that circumstantial evidence must be proved by direct evidence—a clumsy mode of expression which is in itself a mark of confusion of thought The evil, however, goes beyond mere clumsiness of expression People have naturally enough supposed that circumstantial and direct evidence admit of being contrasted in respect of their cogency, and that different canons can
they ought to satisfy before the Court
confuses the theory of proof, and is an
word 'evidence' *Stephen's Introduction* pp 4, 5, 8, 9.

Evidence,—meaning of the word generally When we look back to the derivation of the word "evidence," we are awed by the vast area the subject
out,
the
ance
evidence is understood to be anything that makes evident or clear to the mind or such things collectively, any ground or reason for knowlege or certitude in knowledge; proof whether from immediate knowledge or from thought, authority or testimony; a fact or body of facts on which a proof, belief or judgment is based; that which shows or indicates
ce is and
ve believe
sense "it
is sub-
ved' *Hubbet* v *United*

Evidence—Meaning of the word in the Act The word "evidence" in the Act signifies only the instruments
the Court, *viz*, witnesses and d
vinced of these facts *Gobaya*
Cr L J 881=A I R 1929 Nag 242 (F B), *vide* also *Step Intro* p 3 The English Law divided evidence into person
evidence of *documents* and *things*
signifying only the instruments
before the Court, such as witnesses and documents, a thing such as a struggle etc, in the case of murder [see *post*, section 7, illustration (*b*)] is not evidence in the sense in which the term is used in the Act, but a 'relevant fact' to be proved by 'evidence,' the oral testimony of those who saw it *Norton Ev p 95* So the definition of "evidence" in this Act is defective When in a controversy between a tailor and his customer, involving the fit of a coat the customer puts on the coat and wears it during the trial, (as in *Brown* v *Foster*, 113, Mass at p 137), a basis of inference is supplied otherwise than by reasoning or by statements, whether oral or written; and it seems impossible to deny to this the name of "evidence" It is what *Bentham* called
when
Thayer
Gopal,
9 So
it does include those facts which in
directly to the sense of the Court or
Prof Greenleaf "evidence in legal
which any alleged matter of fact, the
truth of which is submitted to investigation, is established or disproved" *Green Ev vol I* § 1 It "includes all the legal means, exclusive of mere argument, which tend to prove or disprove every matter of fact, the truth of which is submitted to judicial investigation" *Taylor vol I* p 1, *Powell Ev 1*

The word "evidence" as defined in this Act does not include the whole

S. 3. duced for inspection of the Court" So also would be the examination of the accused before the committing Magistrate when given in evidence at the Sessions trial When one of the several accused persons makes a confession involving himself and some of the co accused, it may be taken into consideration as against all the persons so involved (vide s 30 infra) Such statements are also excluded from the definition of the word "evidence" *Cun Ev p 61* The term "evidence" in its ordinary sense signifies that which makes apparent the truth of a matter It is no doubt more frequently applied to proof before a judicial tribunal but it is not necessarily confined to this sense; it applies with equal correctness to express the information acquired by any person who undertakes an enquiry on any matter in question *Srinivasa v Queen* 4 M 393 (395) The demeanour of a witness is evidence, *vide R v Mathub* 21 W R Cr 13, 14 "A consideration of the demeanour of the witness upon the trial says *Starkie*, "and of the manner of giving his evidence both in chief and upon cross examination, is often times not less material than the testimony itself *Starkie Ev* 4th Ed 822, *Best* ... *v Beitrand* L R 1 P 535, see also *Hoomesh v Rashmoni*, 21 C 279 (284)

So it is clear that the definition of evidence is incomplete It does not include the statements and admission of parties their conduct and demeanour before the Court and circumstances coming under the direct cognizance of the Court and having a material bearing on the question in issue It does not include the absence of producible witnesses or evidence, as to which *vide* section 114 *ill (g)* *Whately Stokes Code Vol II* p 843 Besides facts proved there are also certain notorious facts of which without proof the Court takes judicial notice (*vide* s ... *infra*) and the facts which the Court either must or may presume These are also not evidence under the Act (*vide Cun Ev p 81*) In an action for breach of promise to marry the fact that the defendant was silent on a certain occasion has been held to be statutory evidence' corroborative of his promise to marry (*vide Bessela v Stern* 2 C P D 266 (...) though it would not fall under *Stephen's* definition *Phipson* ... *Ed* 1 ... When relevant fact is proved and is expressly authorised by law to be taken into consideration, it is "evidence" though the result has not been expressed in these words by the legislature, and must be used in the same way as everything else that is evidence" *R v Ashootosh* 4 C 492 (F B) Confession made by one prisoner affecting himself and others jointly under trial for the same offence is evidence, although the Act has not so called it *Ibid*, referred to in *R v Krishna Bhat*, 10 B 326, but see *Queen v Khandia* 15 B 66, *Rej v Bayaji* Rat Un Cr C 311, *K E v Pakiri*, 2 L B R 272 A statement made by an accused person during a police investigation, on solemn affirmation before a Magistrate is evidence. *Queen v Alagu*, 16 M 421 distinguishing *Queen v Bhama* 11 B 702 The term 'evidence' is not necessarily confined to proof before a judicial tribunal but applies also to information acquired by any person, who undertakes an inquiry on any matter in question *Srinivas v Queen* 4 M 393 (395)

The terms 'evidence' and 'proof The terms are often used in such a manner as to include at one time the media by which the facts are established and at another the effect or conclusions produced by the test ... that attempt has been frequently made but ... between the terms "evidence" ... meaning ... full co ... More ac ... medium ... 277; *Ja* ... evidence is ... 73 'W ... over all of the evide ... N W 935 ... *State*, 101 Ga 9 ... 65 Am St Rep ... intellect and ... 108 N Y ... onvince the ... Proof is that ... Common ... of appropriate evidence which ... Evidence, therefore, differs from proof as ... *Wills on Cir Ev* 2, 3; *Greenl Ev* 1

Testimony The dictionary meaning of the word testimony is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact" *Webster* In *Bouvier's Law Dictionary*, the following definition occurs 'The statement made by a witness under oath or affirmation" So testimony

is a species of evidence by means of witnesses The broader term 'evidence" includes that which is given by witness, or offered by documents *Carroll* v *Bancker*, 43 La Am 1078 Clause (a) defines testimonial evidence

Testimony—Evidence—Proof The three words, 'testimony, "evidence' and "proof" stand in their order of importance as follows (1) *Testimony*—that kind of evidence which consists of verbal declarations of a witness (2) *Evidence*—the means of proof, subdivided into several species or kinds, one of which is testimonial evidence (3) *Proof*—the result of evidence

ought under the circumstances of the particular case, to act upon the supposition that it exists" "It would appear, therefore, that the Legislature intentionally refrained from using the word, evidence' in this definition but used instead the words, 'matters before it' For instance a fact may be orally admitted in Court The adm
word 'evidence' as given in th
before whom the admission
order to determine whether the
C J (*Sir Ramesh Chandra*) with *Maclean J* concurring in *Joy Cooma*: v *Bundholall* 9 C 363 (366), see also *Ahar Rai* v *Jhunjur Tewari*, 16 C W N 4?6, *Per Maclean C J* and *Banerjee J* in *Dwarka Nath* v *Prosonno Kumar*, 1 C W N 682

Difference between oral and Documentary evidence "Legal Evidence is not confined to the human voice or
object capable of making a truthful
classified as documentary evidence I
who speaks, in documentary evidence the witness is the thing who speaks In either case the witness must be competent, i e must be deemed competent to make a thruthful statement, and in either case the competency of the witness ... the difference being that
presumption, and in
ctual testimony, and
witness is tested by
his own cross examination, while in documentary evidence the credit of the witness it tested by the cross examination of those who must be called to have this competency" *Per Hamersley J*, in *Curtis* v *Bradby*, 65 Conn 99=48 Am St Rep 177

Several classification of Evidence By the text writers evidence is classified under the following heads (1) Direct or circumstantial evidence (2) real or personal, (3) original or unoriginal

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erefore, is founded
on experience and observed facts and coincidences establishing a connection

S. 3. between the known and proved facts and the facts sought to be proved *Common Wealth* v *Webster*, 5 Cush (Mass) 295=52 Am Am Dec 711 (723); *Nabaran* v *Emperor*, 11 C W N 1085 *Legal Remembrancer* v. *Moti Lal*, (S B) 41 C 173=17 C W N 1253 see also sections 6—16 of the Act So direct evidence is that which proves the fact in dispute directly without any inference or presumption, and which if itself true conclusively establishes the fact Indirect evidence is that which tends to establish the fact in dispute by proving another, and which though true does not of itself conclusively establish the fact, but which affords an inference or presumption of its existence Direct evidence is that which immediately points to the question at issue Indirect, or circumstantial evidence is that which only tends to establish the issue in proof of various facts sustaining by their consistency the hypothesis claimed Vide *Cal Code Civ. Pro* §§ 1831, 1832 So evidence is either direct or indirect according as the principal fact follows from the evidentiary—the *factum probandum* from the *factum probans*—immediately or by inference *Vide Best* § 27 *Emperor* v *Ali* 4 Bur L T 97 Various ... of circumstantial evidence is codified under ss 6-16 of the Evidence Act

Classification defective—It is clear from the definition given above that direct evidence' means testimony given by a man as to what he has himself perceived by his senses whereas circumstantial evidence usually means a fact from which some other fact is inferred These facts are called relevant facts in the Evidence Act But a relevant fact or a fact which is called circumstantial requires to be proved by some evidence oral or documentary So it is correct to say that circumstantial evidence must be proved by direct evidence—a clumsy mode of expression which is in itself a mode of confusion of thought *Vide Stephen's Introduction* (p 5) In direct evidence the facts apply directly to *factum probandum* while circumstantial evidence is proof of a minor fact which by indirection, logically and rationally demonstrates the *factum probandum* *Beason* v *State* 43 Tex Cr 442 But in *Harris* v *Newland* 10 N C 122, a different definition is given of circumstantial evidence Evidence is of two kinds that which, if true, directly proves the fact in issue, and that which proves another fact from which the fact in issue may be inferred But this definition of circumstantial evidence is against the accepted definition of the term Vide *Burril on Circumstantial Evidence*, 4 *Best on Presumptions* 12, *Wills on Circumstantial Evidence* p 19

"When the existence of any fact is attested by witnesses as having come under the cognizance of their senses or is stated in documents, the genuineness and veracity of which there seems no reason to question, the evidence of the fact is said to be direct or positive By circumstantial evidence, on the contrary, is meant that the existence of the principal fact is only inferred from one or more circumstances, which have been established directly" *Best on Presumptions* p 246 In *State* v *Goldsborough*, 1 Hurst C C (Del) 302, *Gilpin C J* in charging the jury, thus defines circumstantial evidence Circumstantial or presumptive evidence is, where some facts being proved, another fact follows as a natural or very probable conclusion from the facts actually proved so as readily to gain the assent of the mind from the mere probability of its having actually occurred It is the inference of a fact from other facts proved, and the fact thus inferred and assented to by the mind is said to be presumed that is to say, it is taken for granted until the contrary be proved And this is what is called circumstantial or presumptive evidence"

"Direct and circumstantial evidence" says *Burr Jones*' are not different in their nature For as *Wharton* says, All evidence consists of reason and fact co-operating as co-ordinate factors" Circumstantial evidence is merely direct evidence indirectly applied And direct evidence, when closely analysed is found to possess the inferential quality Direct and circumstantial evidence are not, therefore, in any sense opposed to each other" *Burr Jones Ev* § 6 b

Circumstantial evidence, value of Circumstantial evidence to be relied upon must not merely point to the inference to be drawn but it must be of such a nature that it can possibly lead to no other inference *Kamal* v *Nandalal* 56 C 738=33 C W N 711=116 Ind Cas 378=A I R 1929 Cal 37; *Pirt Chord* v *Emperor*, 30 L J 18=112 Ind Cas 850; *Chiraguddin* v *Emperor*, 15 Cr L J 193=23 Ind Cas 501=18 C W N 1147 The facts proved by circumstantial evidence should be inconsistent on a reasonable hypothesis with the innocence

pronounced *Emperor* v *Surnomoyee*, 14 C 621; *Harju Mull* v *Iman Ali*, 8 C W N 4 Cr L J 316=19 Ind Cas 1004=244 ... C. 684, *Emperor* v. *Jugat Ram*, 48 Ind. ... *mperor*, 42 Ind Cas. 129=65 P L ... 1909, *Irajala* v. *Emperor*, 30 C W. I ... 16 Cr; *Johura Bibi* v *Emperor*, 35 C ... C. 391 (409); *Daulat* v *Emperor*, 77 I ... N 446. W

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evidence against an accused but forming him cannot sustain a conviction *Isuni K* But circumstantial evidence of the stronge *Queen* v *Elahi Bux*, 5 W R Cr 80 (91)

J 465

was not intended to exclude circumstantial seen, heard and felt *Neel Kanto* v *Juggo-* umstantial evidence of the most strongest *Queen* v *Elahi*, 5 W R Cr 80 p 94

Where no *prima facie* case had been made out against the accused, it is open to the accused to rely safely on presumption of innocence or on the infirmity of the evidence for the prosecution But when *prima facie* case is made out and the presumption of innocence is displaced, then the force of circumstantial evidence is augmented whenever the party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain *Issar Singh* v *The Crown*, 7 S L R 109=15 Cr L J 497=24 Ind Cas 585

In the absence of direct evidence a person may be convicted solely on circumstantial evidence *Empress* v *Ananda Kishore*, 4 C W N cxvi

"Where there is nothing but the evidence of circumstances to guide you" said *Mr Justice Bayley*, those circumstances ought to be closely and necessarily connected and to be made as clear as if they were absolute and positive proof" *Rex* v *Dawning*, Salop Summer Assizes, 1822 cited in *Wills' Cir Ev* p 288 Every circumstance therefore which is not clearly shown to be really connected with the hypothesis it is supposed to support must be rejected from the judicial balance, in other words, it must be distinctly established that there exists between the *factum probandum* and the facts which are adduced in proof of it a real connection, either evident and necessary, or so highly probable as to admit of no other reasonable explanation *Wills Cir Ev* 289 *Sir Alfred Wills* in his admirable book lays down the following rules specially to be observed in the case of circumstantial evidence "(1) The facts alleged as the basis of any legal inference must be clearly proved, and beyond reasonable doubt connected with the *factum probandum* (2) The burden of proof is always on the party who asserts the existence of any fact, which infers legal ... ct or circumstantial evidence, the ... e of the case admits (4) In order ... facts must be incompatible with

the innocence c reasonable hypc doubt of the guil *Cir Ev Chapte* case based on

3 transportation for life. *In re Venulada*, 2 Weir 276, *Queen Empress v. Dharmai gal* S C 159, Oudh

between The term imstantial evidence, iption', *ex vi termini*

imports an inference from facts, and the adjective "presumptive" as applied to evidentiary facts, implies if not the certainty at least the great probability of some relation between the facts and the inference Circumstances generally, but not necessarily, lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only apparent and not real, and even when the connection is real, the deduction may be erroneous Circumstantial evidence is thus a more general term than presumptive evidence *Wills Cir Ev 21*

Circumstantial evidence—Wills' explanation 'On a superficial view direct and indirect or circumstantial, would appear to be *distinct* species of evi... which those ... tantial evi... tinction is, to the fact ... umstantial evidence is equally direct in its nature but, as its name imports it is direct evidence of a minor fact or facts of such a nature that the mind is led intuitively, or by a conscious process of reasoning towards or to the conviction that from it or them some other fact may be inferred A witness deposes that he saw A inflict on B a wound, of which he instantly died, this is a case of direct evidence B dies of poisoning, A is proved to have had malice and uttered threats against him, and to have clandestinely purchased poison wrapped in a particular paper, and of the same kind as that which has caused death, the paper is found in his secret drawer and the poison gone *The evidence of these facts is direct, the facts themselves constitute indirect or circumstantial evidence as applicable to the enquiry whether a murder has been committed, and whether it was committed by A*' *Wills Cir Ev* ... 0

Direct and circumstantial evidence—Advantages and disadvantages As regards admissibility direct and circumstantial evidence stand generally speaking on the same footing (*Best* § *294*) Direct and presumptive evidence (using the words in their technical sense)" says *Mr Best* 'being as has been ... d charac... ferior to ... n direct ... st § 295, but two chances of error—namely those which arise from mistake or mendacity on the part of the witnesses, while in all cases of merely presumptive evidence there is a third,—namely, that the inference from the facts proved may be fallacious ... The proper effect of circumstantial ... more accurately stated by *Lord Chief* ... *Wills Cir Ev p 46* The learned ... connect themselves with each other ... body so as to carry conviction to the minds of a jury it may be proof of a more satisfactory sort than that which is direct' So where the proof arises from the irresistible force of a number of circumstances which we cannot conceive to be fraudulently brought together to bear upon one point, that is less ... mstances direct evidence may be" *Rex v Smi*...

In *People v Videto* 1 Park ... ibly set forth the advantages of circumstantial ... to the jury 'In most cases of conviction upon presumptive proof or circumstantial evidence there are many different witnesses swearing to several distinct circumstances, all teneding to the same result, each of which circumstances is a necessary link in the chain of evidence required to produce a conviction of the accused, and there is therefore the less danger of perjury in such case in consequence of the number of perjured witnesses which would be necessary for the prosecution to produce to effect an unjust conviction For if one perjured

witness should swear to a fact forming only one link in a chain of circumstances, the rest of the witnesses being honest, he will be in danger of detection from the discrepancy between his testimony and theirs; when he might be sworn positively, but falsely, to the commission of the crime by the accused, without the possibility of being contradicted For this reason, although from the imperfection and uncertainty which must ever exist in all human tribunals, I have no doubt that there have been cases in which innocent persons have been convicted on presumptive proofs, yet from my knowledge of criminal jurisprudence, both from reading and observation I have no hesitation in expressing the opinion that when there has been one unjust conviction upon circumstantial evidence alone, there have been three innocent persons condemned upon the positive testimony of perjured witnesses." In *Commonwealth v Harman*, 4 Pa 269 *Chief Justice Gibson* of *Pennsylvania* observed 'Circumstantial evidence is, in the abstract, nearly, though perhaps not altogether, as strong as positive evidence; in the concrete, it may be infinitely stronger A fact positively sworn to by a single eye-witness of blemished character is not so satisfactorily proved as is a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of undoubted credibility "

Circumstantial evidence where to be resorted to—"The argument founded upon the abundance of the circumstances" says *Sir Alfred Wills*, "and the consequent opportunities of contradiction which they afford, belongs to another part of the subject While each of these incidents adds greatly to the probative force of circumstantial evidence in particular cases, they have clearly no connection with an inquiry into the value of circumstantial evidence in the abstract However numerous may be the independent circumstances to which the witnesses depose, the result cannot be of a different kind from, or superior to, that strong moral assurance which is the consequence of satisfactory proof by direct testimony, and for which if such proof be attainable, every tribunal and every reasonabl[illegible] to substitute indirect or circumstantial [illegible] *prima facie* afford strong reason for [illegible] p 18

Danger of circumstantial evidence in jury trial In a jury trial great caution is to be observed by the Judge as regards circumstantial evidence In cases of such evidence process of inference and deduction are essentially involved,—frequently of a delicate and perplexing character liable to numerous causes of fall[illegible] mind itself, which has been pr[illegible] uneven mirror, imparting its o[illegible] *Ev* 18, *Best on Presumptions*, p [illegible], *Bentham, Rationale of Judicial Ev* B V C XV S IV.

Circumstantial Evidence—Two kinds of Circumstantial evidence is of two kinds, *conclusive* and *presumptive* "conclusive," when the connection between the principal and evidentiary facts—the *factum probandum* and *factum probans*—is [illegible] accused of [illegible] place, etc ; [illegible] evidentiary is only probable, whatever be the degree of persuation which it may generate *Best Ev* § 293

Real or Personal Again evidence is either real or personal By real evidence is meant evidence o[illegible] class of things is the source, persons being [illegible] to them in common with t[illegible] *rei vel facti*" of the civilians [illegible] mmediate, where [illegible] where its exis[illegible] [illegible] sed to th[illegible] the ju[illegible], and sa[illegible] tion be[illegible] ment of[illegible] term, *Be*[illegible] 150—

S. 3. 1168 The real evidence is known by the name of "immediate" evidence For obvious reason there is no class of evidence so convincing and satisfactory to a Court or a jury as that which is addressed directly to the senses of such Court or jury Such objects are, when it is convenient, brought into the court room for such inspection If this is not convenient or possible, the Judge or Jury may if it seems practicable and neces- [illegible] a view of the object or premises in questio [illegible] to the senses of the tribunal has been des [illegible] That the Court, early paid a high tribute to this class of evidence is shown by the fact that where the point of issue was evidently the object of sense," the Judges sometimes dispensed with a Jury and decided the q[illegible] their own senses [illegible] Black Com 331. [illegible] is by oral testimony of witnesses and by [illegible] to can be seen by the Jury, subject alwa[illegible] consistency demands that if the ends of [illegible] it should be produced by them It is not calling for any unusual exercise of any of their senses *Burr Jones* § [illegible] In *Real v Territory*, 129 Am St Rep 861, *Inman P J* observed 'But this does not make them witnesses in the case They have simply tested the credibility of the witnesses by the personal experience and observations of the jurors A thousand things in the lives and observations of the jurors may influence them in doing this, but a knowledge of these things has never been regarded as making the jurors witnesses in this case [illegible] tents of the bottle [illegible] prosecuting witness [illegible] rs did not learn any [illegible] her words, they were [illegible] before them to test its true character" Similarly in *Gentry v Mc Ginnis*, 3 Dana, (Ky) 282, *Robertson C J* said The counsel denies that personal inspection by the jurors on the trial is proper or allowable evidence To a rational man of perfect organization the best and highest proof of which any fact is susceptible is the evidence of his own senses This is the ultimate test of truth and is therefore the first principle in the philosophy of evidence Hence autopsy, or the evidence of one's own senses, furnishes the strongest probability, and indeed the only perfect and indubitable certainty of the existence of any sensible fact [illegible] others, do [illegible] oof. Their own [illegible] factory to them- [illegible] the policy of [illegible] been permitted but required to decide on autoptical examination whenever it was practical and convenient"

So the remains of a deceased person may be produced when in a fit condition for [illegible] an [illegible] fror [illegible] *gest* [illegible] pro [illegible] lim [illegible] and [illegible] Jury may decide [illegible] of a person On [illegible] nspection ; and so [illegible] with a putative [illegible] 60 *infra*

written evidence is delivered through oral (5) When real evidence is reported, either by word of mouth or otherwise *Best* § 29

Hearsay Evidence "There is a great head of the law of evidence, comprising indeed, with its exceptions, much of the largest part of all that truly belongs there, forbidding the introduction of hearsay The true historical nature of this rule is hinted by the remark of an English Court, two centuries ago and over, when they checked the attempt of a woman to testify what another woman had told her. The Court, it was quietly remarked, 'are of opinion that it will be proper for Wills to *give her own evidence*'. [*Eliz Canning's Case*, 19 St Tr 383 (406)] That is to say, the objection went to the medium of communication; witnesses before the jury, in giving ordinary testimony, had by that time been allowed for some three centu-
and seer, as they said in the
witnesses to Courts in older
not be testimony at second hand
vide s 60 infra

A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists

"Proved"

A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

'Disproved'

A fact is said not to be proved when it is neither proved not disproved

"Not proved"

"Proved", meaning of "Proof" said *Lord Moulton* in *Hawkins* v *Powells Coal Ltd*, L R (1911) 1 K B
265 "does not mean
impossible It means

in our acts, in our thoughts we c
upon just and reasonable convictions
Per Lord Coleridge J in *Rex* v *I*
cited in *Wills' Cir Ev* p 50 So
case it is never meant that he must p
can be done is to adduce such evi
done by direct evidence or by inference
ft to rest in surmise, conjecture or
Powells Coal Co Ltd, ubi supra
W N. 265 at p 270 *Jenkins C J*
thus observed; "Demonstration or a conclusion at all points logical can not be

3. expected nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable Accepting the external test which experience commands, the Evidence Act in conformity with the general tendency of the day adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof See also *Prasannomoyi* v *Baikuntha*, 49 C 132; *Ganesh* v *Lakhan*, 23 C L J 209 So none but Mathematical truth is susceptible of that high degree of evidence, called demonstration, which excludes all possibility of error, and which, therefore, may reasonably be required in support of every mathematical deduction Matters of fact are proved by moral evidence alone by which is meant, not only that kind of evidence which is employed on subjects connected with moral conduct, but all the evidence which is not obtained from intuition, or from demonstration" *Greenleaf Ev* § 1

Standard of belief ... lance to ... left to ... *South* ... rarely the consequence of strictly logical process It is either partially or entirely the out growth of education—bias, affection, fear, or some other influencing passion We believe what we wish to believe, and what we are in the mood of accepting as true The same evidence which to one may be convincing to another may seem absurd *Per Vice-Chancellor Pitney*, in *Duvale* v *Duvale*, 34 Atl. Rep 885 at p 896 So there is no standard by which the weight of conflicting evidence can be ascertained *Per Sutherland J* in *People* v *Superior*, Ct 5 Wend (N Y) 1.4 (126) In estimating the weight of ... many ounces, pounds, or tons, and yet we kn... ht from the lightest feather to the most ab... do is to note all the facts and circums... ite and relative weight by the lights of conscience and experience *Boylan* v *Meeker*, 28 N J H 274 (333) We have no test of truth of human testimony, except its conformity to our ... *Per Vice chancellor Van Fleet* in *Dagger* ... nd in *Jersey City Bank* v *O' Rourl* ... which all evidence has upon the mind is determined by observation and experience, the only original instructors of wisdom *Whitaker* v *Parker Per Beck J* 42 Iowa 585 (587)

Evidence which will satisfy one Court may not satisfy another Any attempt to lay down a provision that such evidence as does not satisfy a particular Court shall be insufficient in the future to prove a similar fact before any other Court is an attempt to make law rather than interpret it *Raghupat* v *Emperor*, 100 Ind Cas 535=28 Cr L J 311=A I R 1927 Oudh 140

Legal proof, what it is In *Barindra Kumar Ghose* v *The Emperor* 37 C 467=14 C W N 1114 at p 1178, *Carnduff J* observed "Legal proof ... he defini... Evidence ... lering the ... existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists' When the section speaks of the matters before the Court, it means of course, the matters properly before it; whence it follows that, if and when relevant matter has been admitted in evidence, one must be careful—I would here refer to the provisions of section 167 c ... to be in any ... sible, ... admit ... n between ... proof ... t enacts a rule of pr ... that this is not a har... nptio juris et de jure *Emperor* v *Shrinivas*, 7 Bom L R 969=3 Cr L J 33, see also *Jarat Kumari* v. *Bissessur*, 39 C. 245; *Borsogomoff* v *Nahapiet Jute Co*, 6 C W. N 495 (505)

Suspicion conjecture, etc, probative force of "Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify " *Per Andrews C J* in *People* v *Vanzile*, 143 N ion"
(C C no
upon it, is without rudder and compass" (
conjecture or suspicion to take the place of legal proof ' *Per Carnduff J* in *Barindra* v *Emperor*, 37 C 467=14 C W N 1114 at p 1178 In the same case *Jenkins C J* observed "Another matter to which I desire to allude is the general character of the evidence From the nature of the case it is to a large extent circumstantial, and in dealing with it, the rules especially applicable must be borne in mind There is always the danger in a case like the present that conjecture or suspicion may take the place of legal proof, and therefore it is right to recall the warning addressed by *Mr Baron Alderson* to the jury in *Reg* v *Hodges* 2 Lewis C C 227 Where he said 'the mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenious the mind of
matters to over reach and
take for granted some
to render them complete '
there may be a strong mo
25 W R Cr 43

So neither juries nor Courts are permitted to render verdicts or judgments upon guesses or surmises *Iaggle* v *Allen*, 24 N Y App Div 594, see also
511 (P C) 'It is not the habit of
The Ship Henry Eubank, 1 Sumn
ers of right to mere conjecture and
possibilities" A mere conjecture built upon a bare possibility will not suffice to transfer the money
another *Pauley* v *St*
1039 P C—12 C
becomes inconsistent
plaintiff has produced sufficient evidence to establish his case he is not to be defeated upon mere surmise or conjecture *Lord Chief Justice Kenyon* said, he remembered an instance, 'bordering on the ridiculous where in an action on the game law
not charged
fright, and
to grant a new trial

In *Mina Kumari* v *Bejoy Singh*, 44 I A 72 at p 77=44 C 662—21 C W N 585 *Sir Lawrence Jenkins* observed that though in cases of alleged *benami* transactions there may be grounds for suspicion, yet the Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony See also *Al* 28 C W N 62—81 Ind Cas 667, *Promode Kumar Ro* *Manil Lal* v *Raja Bejoy Singh*, 25 *eeman Chander* v *Gopal Chander*, 1 *nat Indu* 23 C W N 321 (P C) *Bipin Krishna* v *Priya Bratia* 26
must rest not upon suspicion but
testimony *Luchuram* v *Radha Char*
15, *Jasoda Lal* v *Balaram*, 35 C
Nagendra 66 Ind Cas 691 *Motilal*
Kumari v *Bjoy* 21 C W N 585
Balwant v *Daulat* 8 A 315 *Jac. Bir* v
v *Mahabir*, 9 C 656, *Kali Chandra* v *Shib Chandra*, 6 B L R 501

Mere suspicion of fraud 'Astute as Courts should be" *says Knaff J* in *Muirhead* v *Smith* 35 N J Eq 303 (309) 'in the detection of fraud, they are no justified in finding it on grounds which show no more than its possible existence When the acts of parties admit of a reasonable interpretation in favour of honesty and fair dealing, they should receive it.' In a suit to set aside a fraudulent conveyance "tangible facts must be proved, from which a legitimate inference o

3. a fraudulent intent ... a suspicion of wrong, nor should a ... Church C J in Jacqer v Kelly, 52 N ... IP (C C) 88 (112) Mr Justice Grier addressed the jury as follows "you must remember that the burden of proof is on the party who alleges fraud That fraud, though proved by circumstances, can never be presumed, for fraud is a crime It is not enough to show suspicious circumstances Suspicion is not proof It does not require a great deal of ingenuity to cast suspicion of fraud upon any transaction" In *Sreemanchunder v Gopaul Chunder*, 11 M I A 28 at p 44, *Lord Westbury* said "In matters of this description (he was dealing with a charge of fraud in connection with a sale in execution of a decree) it is essential to take care that the decision of the Court rests ... established by legal testimony" So ... ely on suspicion unsupported by l... 305= 70 Ind Cas 555=36 C L J, 396

Suspicion in Will cases In *Tyrrell v Painton*, (1894) P 151 at p 157 *Lindley L J* said "The rule in *Barry v Butlin*, 2 Moo P. C 480; *Fulton v Andrew*, L R 7 H L 448 and *Brown v Fisher*, 63 L T 465, is not in my opinion confined to the single case in which a Will is prepared by or on the instructions of the person taking large benefits under it but extends to all cases in which circumstances exist which excite the suspicion of the Court, and wherever such circumstances exist and whatever their nature may be, it is for those who ... affirmatively that the t... where th... fraud or ... for proving the Will " The suspicion to which allusion is made must, I think ... oubt that may arise from ... investigation of the transac ... But when a caveator impugns a Will on the ground that it was obtained by the exercise of undue influence, excessive persuasion or moral coercion, it lies upon him to establish the case In ... that the decision of the C... by legal testimo... Cas 777

Matters before it "When the section speaks, of the matters before the Court it means of course, the matters properly before it" *Barindra v Emperor*, 14 C W N 1114 (1178) The expression "matters before it" in this definition includes matters which do not fall within the definition of 'evidence' as given in section 3 *Bhairon Prasad v Lakshmi Narayan*, A I R 1924 Nag 385 Therefore in determining what is evidence other than "evidence" in the phraseology ... the defini... judicial ... the word ... take ... 363 ... nna, ... court ... three ... by ... nts ... view ... the ... nion ... to ... the ... not ... a ... er to ... so ... him ... rule

which is a
third class
other cases
9 C 363

they are not evidence as defined by the Act
L J 138 So also commissioner s report is
re to see that it is filed as an
301 = 51 M L J 637 Ordinarily
of great importance *Abdul* v
v *Emperor*, 37 C 340 = 14 C W
N 422 ' there are no doubt passages in the judgment of *Woodroffe J*, which might seem to imply that the observation of a fact by the Magistrate could not be admitted But a careful peru what
is meant is that mere observation v of
evidence and a case cannot be the
Court locally If in looking at a place in order to understand the evidence the Magistrate thereby understands that the description of the place given in the evidence is erroneous or false he is certainly not precluded by the laws of evidence from holding that the facts stated by the witnesses who gave that erroneous or f
himself a wit
shown that
most importa
matters befo
To hold otherwise would be in direct conflict with *Joy Comar s case* 9 C 363 which so far as we know has never been dissented from *Aitai Rai* v *Jhingur Tewari* 16 C W N 426 (429) = 39 C 476 But a Judge without giving evidence in a case as a witness cannot import into a case his own knowledge of particular facts *Haropersad* v *Sheo Dyal* 26 W R 55 P C = 3 I A 286 see also *Mithan Bibi* v *Bashere Khan* 11 M I A 213 = 7 W R P C 27

only for the
it should
Ind Cas
60 The
s generally

the wrong impression from the mind of the Magistrate by cross examining him The danger is intensified if the Magistrate holds the local enquiry *exparte* *Ram Sahai* v *Dwarka Singh* 61 Ind Cas 712 = 1 P L T 569 So where a Magistrate makes use of knowledge derived from a local inspection without affording the accused an opportunity to cross examine or to explain the points against him he acts with material irregularity sufficiently to vitiate the trial *Moran* v *Emperor*, 61 Ind Cas 794 = 2 Pat L J 455 It is not only not objectionable but
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bear
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rule 9 Civil Procedure Code a Judge in a civil case makes a local inspection in person at his discretion The decisions in *Pai Kishori Ghosh* v *Kumudini Kanta Ghosh* 14 Ind Cas 377 = 15 C L J 138 *Anant Lal* v *Gokul Sahu* 35 Ind Cas 344 and *Dwarka Prosad* v *Malhu Lal* 52 Ind Cas 241 are cases the decisions of which are based on the omission from Order XXVI rule 9 of the Code of Civil Procedure of the words that occurred in section 392 of the old Code which provided for the issue of a commission for a local investigation only in cases where it could not be conveniently conducted by the Judge in person *Safapathy* v *Perumal* 62 Ind Cas 790 = 44 M 640 As the rule now stands a Judge may issue a commission in any case when he deems it fit to do so irrespective of his own inconvenience *Ibid* Sometimes the question arises whether the report of a process server can be considered by a Court as matters before it But the report of a process server is not admissible in evidence unless he be examined as a witness with regard to it *Fateh Mahammad* v *Hakim Khan* 96 Ind Cas

825=A I R 1926 Lah 620 So the Court can take into consideration the following things which do not fall within the definition of the word evidence in deciding a case (1) any material object brought before it (rules 60 of the Evidence Act and section 218 of the Criminal Procedure Code), (2) the demeanour of witness, [Vide Coghlan v Cumberland, (1898) 1 Ch 705, Bombay Cott ... notorious facts of which the Court can take ... the parties or thei ... accused and (7) ... her by a Court or by commissioners appointed by a Court Vide ... v Queen, 4 M 393 (395)

But personal knowledge of the Judge and matters not relevant duly proved cannot be the basis of any judgment. *Durga Prosad v Ram Doyal*, 38 C 153, see also *Hurpershad v Sheo Dyal*, 3 I A 286, *Mitham v Basir*, 7 W. R 27 (P C), *Narain v K E* 5 O C 37 *Rousseau v. Pinto*, 7 W R 190, *R v Ram charan*, 24 W R Cr 28, *Vallabha v Madhusudan*, 12 M 495, (500); *Sooraj v Khoode*, 22 W R 9 The same rule is true in cases of arbitration *Kanhye v Ram*, 24 W R 81 "A Judge is not entitled to rely on specific facts not proved by the evidence in the case but known to him personally or otherwise but he may use his general knowledge and experience in determining the credibility of evidence adduced before him and apply it to a decision of the specific facts in dispute in the case" per *Sunder Ayyar J* in *Lakshmayya v Varadaraja*, 36 M 168, see also *British South African Co v Lennon*, 31 I A 273 (P C) In the ... the Judge

unless both the parties after he so mentions to them his said personal knowledge of that particular incident, state that they have no objection to his continuing as Judge"

Probable—Probability is the term generally used to express the preponderance of the evidence or arguments, in favour of the existence or non existence of a particular event or proposition, and sometimes as assertion of the abstract and intrinsic credibility of a fact or event *Wills' Cir Ev p 8*

Prudent Man—Truth being a phrase used in reference alike to things capable and to things incapable of absolute and quasi-mathematical demonstration, the evidence appropriate to inquiries after truth must necessarily be different according to the class of the events or propositions which are the subjects of inquiry This classification, however, is not founded on any essential difference in the nature of truths themselves, ... and ability of perceiving them, ... the object of knowledge can ... absolutely and really as it is ... of probability of a prudent man is laid down *Vide* next topic

Distinction between Factum Probandum and Factum Probans Evidence is always a relative term It sign... the *factum probandum*, or proposition to be pro...

...ature ...spect ...tions ...oved ? ... each ...inally ...posi ...y be

offered that *John Doe* left the ... S.
turn becoming a proposition, the
Doe's shoes fit the track left
becoming a proposition, may be
stand who has placed the shoe in the tracks ...
its turn becomes a proposition requiring the
Facts, more or fewer
Proposition or Evidenti ... of the moment
—*Wigmore's Principles*

Distinction between Inference and proof "Inference is the persuasive operation of each separate evidentiary fact, as to an *Interim Probandum* Proof is the persuasive operation of the total mass of evidentiary facts, as to a *Probandum*

"We are dealing here, always, with a state of mind, a mental process, and analogies are helpful

"An inference may be likened to a push given to a wheel chair in which the thinker is sitting The door of th ... towards the door Party A gives the ... ; Party B ... on does

... may or may not have reached the door —In studying the various kinds of evidence, therefore, we are not expecting proof from any one piece, but only an inference No question of proof arises until all the evidence—pushes, have been given

"N...
about
or stror
the pr
from the house without it This process may or may not result in our belief that he lost it or that he never put it on, but in either case our belief as to one or the other propositions is distinct from our inference The advocate asks the tribunal to infer, and the tribunal proceeds to infer, *i e* to think probatively, but this inference may or may not result in belief The term 'inference' has been some times used ambiguously to include either or both the process and the result" *Wigmore's Principles of Judicial Proof* § 4

Real Foundation of Proof "The real foundation of Proof is always the recognition of resemblance and difference between things or events known and observed, and those which are on their trial,—whether such recognition is based (1) on knowledge already reached and formulated in names or propositions or (2) on direct observation and experiment (1) In proportion as we openly and distinctly refer to known principles (already generalised knowledge) is Proof deductive (2) in proportion as we rapidly and somewhat dimly frame new ...al, or
...owth
...valry
and interaction between two opposite processes
"S... ...deductive That is
... under the shadow
to sa ... r Unless we have
of sc ... within the sweep
some
of which to bring our Thesis, we reach no foundation broader than itself,
no assurance beyond what m ...
been found to contradict the the
required for all rationalization
that a certain sign is trustwor
an assertion that the sign is
the Thesis In other words all rat
tically But there is yet a me
and deductively, and, with certain
make some use of it.

'Although the dependence of any Thesis on its Reason must be rationalized—i e must have the underlying principle made clear—before the testing operation can be called complete yet in regard to special dangers it makes considerable difference whether that principle is at first definitely apprehended or not—

professes to rely (1) upon laws

Proof—and that which rests upon what n

or perception of resemblance and difference or observation and experiment—that which is commonly known in its highest form as Inductive Proof

as the Argument from Analogy The required limitations

the first place, a clear recognition

or law connecting the cases is in the case of *Inference* commonly dropped out of sight or at least left highly indistinct yet the whole cogency of Inductive Proof depends upon the extent to which such principle is first rendered definite and then confronted with observable or

preserving the distinction lies in the

ration

rations

make it of course extremely difficult in practice to label every argument at once with one or the other name Some times as where the Reason is a direct statement of the Principle itself or again where it consists of a record or some experiment no hesitation need practically be felt as to where the danger lies but in a large number of cases we have no means of deciding whether the argument may best be classed as emperical or deductive or both "But because

we need not consider

if we can be

an argument

However we

ction between

them has a certain real importance as already shown, and all that is intended to be done with it is to recognize that so far as the given argument may be seen to belong to one or the other class so far we are already on the track of special dangers'—*Vide Professor Alfred Sidgwick Fallacies* pp 212 A brief examination will show that in the offering of evidence in Court the form of inference is always inductive

Suppose to prove a charge

fixed design to kill the deceased

to kill B therefore A probab

semblance of a syllogism The form of inference is exactly the same when we argue yesterday *Dec* 31 A slipped on the side walk and fell, therefore the side walk was probably coated with ice' or 'To day A who was bitten by a dog yesterday died in convulsions therefore the dog probably had hydrophobia So with all other legal evidentiary facts whether circumstantial or testimonial we may argue last week the witness A had a quarrel with the

nd with a

After B s

probably

an adult of

an affray

obably true

that B did strike first In all these cases we take a single or isolated fact and upon it base immediately an inference as to the proposition in question This is the Inductive or Emperic process

proposed

is thus

in the

is are

obably

would kill B'?

least capable

y forcing into

prominence the implied Law or generalization on which it rests more or less obscurely Thus it is nothing peculiar to litiguous inference that this possibility of turning it into deductive form exists here also But it is not a question of what the form might be——for all inductive may be turned into deductive forms——but of what it is, as actually employed ; and it is actually put forward in inductive form

"(2) Even supposing this transmutation to be a possibility, it would still be usually undesirable to make the transmutation for the purpose of testing probative value; because it would be useless We should ultimately come to the same situation as before Thus, in one of the instances above 'A repaired machinery after the accident, therefore A was conscious of a negligent defect in it'; suppose we turn this into deductive form 'People who make such repairs show a consciousness of negligence , A made such repairs, therefore, A was conscious of negligence' We now have an inference sound (in form, at least) deductively, i e if the premises be conceded But it remains for the Court to declare *whether* [illegible] examina [illegible] his new [illegible] tes (shows proves, probably shows, etc) that they are conscious of negligence' But here we come again, after all, to an inductive form of inference The consciousness of negligence is to be inferred from the fact of repairs, just as the presence of electricity in the clouds was inferred by Franklin from the shock through the kite string i e, by a purely inductive form reasoning So with all other evidence when resolved into the deductive form , the transmutation is useless because the Court's attention is merely transferred from the syllogism as a whole to the validity of the inference contained in the major premise, which presents itself again in inductive form

For practical purposes, then, it is sufficient to treat the use of litigious evidentiary facts as generally inductive in form" *Wigmore's Principles of Judicial Proof*, § 9

Form of Inference—Occasional deductive form Nevertheless the deductive form occasionally may be used,—even must be used, in seeking to discover the real points of weakness of inference The two commoner cases of this [illegible] osed general [illegible] involving a [illegible] *Principles of*

Practica[illegible] [illegible] fallacious Inference [illegible] the loophole [illegible] these, we sha[illegible] in weighing t[illegible] the opponent[illegible] thus set fort[illegible] source of fall[illegible] convenient [illegible] of causes, or unknown antecedents, or of arguing either *post hoc ergo propter hoc* or *per enumerationem simplicem*', or of neglecting to exclude alternative possibilities, or of forgetting that facts may bear more than one interpretation [illegible] or of failing to see below the surface, or—perhaps on the whole the best of all—of unduly neglecting points of difference

"The form of proposed inference is, a case or cases brought forward, of which a certain conclusion is asserted to be the best explanation If, then some better explanation is possible, the theory as stated is impeachable [illegible] By the "best' [illegible] of all possible [illegible] w, is narrowed, [illegible] ible way against [illegible] on the cure, the [illegible] riment conduct [illegible] of real value [illegible] ble theories are [illegible] all precautions

3. have been taken against that crudest kind of unchecked generalization which the ... ction against ... r, more directly ... struct—concrete

over all its possible ... the conditions under ... is the main lesson of ... is each case is, Wha ... right one out of all those conceivable? The methods of Inductive Proof may be viewed as attempts to answer this question." *Sidgwick's Fallacies* p 270 The peculiar danger, then, of Inductive Inference is that there may be other explanations, than the alleged Probandum one, for the fact taken as the basis of proof Therefore this principle is to be examined from the point of view of the opposing parties in a legal trial Proponent and opponent in turn offer evidence Both counsel and the tribunal therefore need to examine each piece of evidence, first, from the proponent's point of view, next, from the opponent point of view, and finally, from the tribunal's point of view. *Wigmore Principles of Judicial Proof* § 11

Same from the View point of the Proponent of Evidence "If the potential defect of Inductive Evidence is that the fact offered as the basis of the conclusion may b ... conclusions, the failure to exclude ... e, from the stand point of proof, a fata ... hypothesis were open, there might ... obability for the Inference desired ... ot print on the sand, he could not ... was absolutely prove ... own somnambulism ... of inference, evidence of an extraordinary degree of probability. The provisional text, then, from the point of view of valuing the inference, would be something like this *Does the evidentiary fact point to the desired conclusion* (not as the onl ... explanation) mos ... Or (t ... e mos ... ones ... the ne ... e only ... nation of this Probans? ... y be illustrated ... will raise ...

... kes ... prom ... possibl ...

upon the practical availability of stronger facts But the general ... mode of reasoning of the Courts substantially illustrates the dictates of scientific logic." *Wigmore's Principles of Judicial Proof* § 12.

S.

Same from the view point of the opponent of evidence "Where the scientist is dealing with the subject of Proof in Logic, the single stage of the inquiry is whether the argument offered as involving Proof does really fulfil the logical requirements But wherever, in the applications of logical principles to specific practical purposes, two parties are found contending, the proponent and the opponent—as in a formal debate, and, pre-eminently, a trial at law—the treatment of the inference falls into two stages. Whenever, on the evidential fact off . . . complete proof . . . a probable inf . . .

. . . ponent He may now properly show, by . . . of these hypotheses, thus left open, is . . .

admitted in evidence, but its for . . . showing that some explanation of it other than the proponent's is the true one"

"Thus every sort of evidentiary fact may call for treatment in a second aspect, by the opponent, viz What are the other hypotheses which are available for the opponent as explaining away the force of the fact already admitted?

"The explan . . . a fact The grea . . . the less the value . . .

Principles of Judicial Proof § 13

There are other processes available to the opponent in opposing the proposed Inference 'He has three processes in all He may, (1) As already seen, seek to explain away the proposed inference Or, (2) he many deny the existence of the evidentiary fact itself Or, (3) he may offer some new and rival evidentiary fact, tending independently to disprove the Probandum

"But in neither of the latter two cases is he using any new logical principle In (2) he is not contesting the logical value of the proponent's inference but . . .

. . . inference pointing directly at the Probandum, but negatively, he thus becomes a Proponent, in turn as to that new rival evidentiary fact; and the same logical principle applies, in valuing his new proposed inference, that applied to the proponent's original inference

"To illustrate

"To charge A with murder, the prosecution shows a specific threat, an old quarrel, and traces of blood on his clothes The defendant may answer:

(1) Explaining . . . tion, explaining away . . . this is the complemen . . . facts of quarrel and . . . complementary proces . . . original facts, . . .

"(2) D . . .

. . . ableness, here the defendant is simply a proponent of new evidentiary facts, just as the prosecution was for its own evidence, this new question of relevancy depends on precisely the same tests as the prosecution's original evidence

"All an opponents modes are reducible to these three In the first, he is an opponent by logical nature of his argument In the second, he is an opponent from the contradictory point of view, but this may require him to become a proponent of either a new circumstance or a new witness In the third, he becomes himself the proponent of a new argument, which the original proponent may now attack as an opponent The first is inherent in the probative use of the proponent's original fact, the other two are not inherent, and may or may not be resorted to"—*Wigmore's Principles of Judicial Proof* § 14.

3.

applicable more fruitful of results against a concrete or an ... thesis than against a directly abstract one. And the right of the ... over all its possible rivals, depends entirely upon the depth of our ... the conditions under which ... is the main lesson of Logic ... is each case is What cert... right one out of all those conceivable? The methods of Inductive Proof ... be viewed as attempts to answer this question" *Sidgwick's Falla...* The peculiar danger, then, of Inductive Inference ... is that there may be ... explanations, than the alleged Probandum one, for the fact taken as the ... of proof. Therefore this principle is to be examined from the point of view ... the opposing parties in a legal trial. Proponent and opponent in turn offer evidence. Both counsel and the tribunal therefore need to examine each piece of evidence, first from the proponent's point of view, next, from the opponent's point of view and finally from the tribunal's point of view. *Wigmore's Principles of Judicial Proof* § 11.

Same from the View point of the Proponent of Evidence. If the potential defect of Inductive Evidence is that the fact offered as the basis of the conclusion may be open to one or more other explanations or conclusions the failure to exclude a single other rational hypothesis would be, from the stand point of proof, a fatal defect, and yet, if only that single other hypothesis were open, there might still be an extremely high degree of probability for the Inference desired. *When Robinson Crusoe saw the human foot print on the* sand, he could not argue inductively that the presence of another human being was absolutely proved, there was at least (for example) the hypothesis of his own somnambulism. Nevertheless, the fact of the foot print was, as a basis of inference, evidence of an extraordinary degree of probability. The provisional text, then, from the point of view of valuing the inference, would be something like this. *Does the evidentiary fact point to the desired conclusion* (not as the only rational hypoth... ...only most plausible or most natural out ... ...r (to state the requirement more ... most ...vaue ones? ...red, the net ...ct, the only explanation of this Probans?

"This test for the probative value of a proposed inference may be illustrated from various sorts of evidentiary facts.

"The fact that A left the city soon after a crime was committed will raise a slight probability that he left because of his consciousness of guilt, but a greater one if his knowledge that he was suspected be first shown. Here the evident notion is that the mere fact of departure by one unaware of the charge is open to too many innocent explanations but the addition of the fact that A knew of the charge tends to put these other hypothesis into the back ground, and makes the desired explanation or conclusion—i e a guilty consciousness—stand out prominently as a m... ...ther possible hypotheses— ... epidemic in t... greater naturalness of the desired expl...

"Thus, throughout the whole rea... ...nd testimonial the theory of the inductive ... that the ... desired conclusion based ... as the other hypothesis or ... e or natural. The degree ... videntray facts, depending ... with those facts somewhat upon the practical availability of stronger facts. But the general spirit and mode of reasoning of the Courts substantially illustrates the dictates of scientific logic." *Wigmore's Principles of Judicial Proof* § 12.

probative value if they were substantially similar to each other in all respects except the presence of x This test is of comparatively rare employment in circumstantial evidence, because instances rarely occur which fulfil this requirement, unless where prearranged experiments are possible, but in testimonial evidence, the argument is frequently employed

To illustrate The injury to the [illegible] ributed by the defendant to sewer gas; for [illegible] which, under conditions as nearly as possib[illegible] untiff's hou e, except the absence of sewer g[illegible] nd thus argues that the sewer gas was the cause

The purpose in using both these subordinate tests is always the same general one—to secure a fair probability for the claimed hypothesis, as again t and in competition with other poss ble ones—*Wigmore's Principles of Judicial Proof* § 19

[illegible] Evidence does not involve any [illegible] already analyzed Corrobora- [illegible] may be several mental processes [illegible] quent use of the term 'corrobora [illegible] witness or two, duplicating the assertion of some prior witness But this is not a new logical process

(2) But the term "corroboration" is also used to signify the auxiliary evidential facts offered by [illegible] which the opponent seeks to weaken [illegible] fact of the proponent, and in [illegible] logical [illegible]

[illegible] *consists in offering data* [illegible] l (as above noted) this may prop[illegible] attempt to establish any [illegible] of them may cause the [illegible] *ove these grounds of* hesitation The mere fact of the witness's making an assertion does not require us to believe the matter asserted, our knowledge of human nature forbids this [illegible] cautiously [illegible] less, [illegible] estimony, [illegible] orrobora- [illegible] varieties

Proof in Civil and Criminal Cases "Demonstration, or a conclusion at all points logical cannot be expected nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable Accepting the external test which experience commands, the Evidence Act in conformity with the general tendency of the day adopted the requirements of a prudent man as an appropriate concrete standard by which to measure proof The Evidence Act is at the same time expressed in terms which allow full effect to be given to [illegible]

[illegible] of the day adopted the requirements of the prudent man as an appropriate [illegible]

[illegible] conscience of the Court can never be bound by any rule, but that which coming from itself dictates a conscientious and prudent exercise of its judgment And

3. speaking for myself where whatever be the form of proceeding, charges of a fraudulent or criminal character are made against a party thereto it is right to insist that such charges be proved clearly and beyond reasonable doubt though the nature and extent of such proof must necessarily vary according to the circumstances of each case There is a presumption against crime and misconduct, and the more heinous and improbable a crime is the greater of necessity is the force of the evidence required to overcome such presumption I cannot

[illegible] a person
cord It
minal acts
And this
requires a

See also *Starkie Ev* 817 *Best Ev* 76 *Taylor Ev* § 112, *R* v *White* 4 Fort & I in 383 *R* v *Madhub* 21 W R Cr 13, *R* v *Behare*, 3 W R 23 25 *R* v *Gocool* 2) W R Cr 3l *Trial of Lord Cornwallis* 77 St Trials 149 *Trial of R I Crossfield* 26 St Tr 218 The phrase proof beyond a reasonable doubt by no means imports a proof which calls for a mathematical reduction in the shape of the demonstration of guilt but is often far removed from it *Burr Jones* § 5 A reasonable doubt is not to be a mere quibble, an idle doubt created by questioning for the sake of a doubt nor suggested without some foundation in the evidence It is such a doubt only as in a fair reasonable effort to reach a conclusion upon evidence using the mind in the same manner as in other matters of importance prevents the jury from coming to a conclusion in which their minds rest satisfied *Commonwealth* v *Costley* 118 Mass 1 (16)

Perhaps the best definition of reasonable doubt ever promulgated was that uttered by *Chief Justice Shaw* in *Commonwealth* v *Webster*, 5 Cush 295=52 Am Dec 711 (730) He observed in that case Then, what is reasonable doubt? It is a term used probably pretty well understood but not easily defined It is not mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt It is that state of the case which after
all the evidence leaves the mind of
they feel an abiding conviction to a
The burden of proof is upon the
independent of evidence are in favour of innocence and every person presumed to be innocent until he is proved guilty If upon such proof there is reasonable doubt remaining the accused is entitled to the benefit of it by an acquittal For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances that the fact charged is more likely to be true than the contrary but the evidence must establish the truth of the fact to a reasonable and moral certainty a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are found to act conscientiously upon it This we take to be proof beyond reasonable doubt because if the law which mostly depends upon considerations of a moral nature should go further than this and require absolute certainty, it would exclude circumstantial evidence altogether In *People* v *Strong* 30 Cal (Am) 151 155 *Currey C J* says that it is 'probably the most satisfactory definition ever given to the words reasonable doubt in any case known to criminal jurisprudence

Similarly in *Com* v *Costley*, 118 Mass 1 *Gray C J* said Proof 'beyond a reasonable doubt is not beyond all possible or imaginary doubt but such proof as precludes every reasonable hypothesis except that which it tends to support It is proof to a moral certainty as distinguished from an absolute certainty As applied to a judicial trial for crime the two phrases are synonymous and equivalent each has been used by eminent judges to explain the other, and each signifies such proof as satisfies the judgment and conscience of the jury, as reasonable men and applying their reason to the evidence before them, that the crime charged has been committed by the defendant and so satisfies them as to leave no other reasonable conclusion possible

The general rule [illegible] on its
merits and that the [illegible] the
effects of a confession [illegible] the
degree of proof referred to in s 3 of the Evidence Act has been reac[illegible] not.
Ma 9 Emperor v *Nga Po Tha*, U B R (1913) 2nd Qr 170=28 Ind Cas 166=14

Cr L J 566 The ... S.
section 114(b) amounts
Magistrates that a fa
of s 3, if there be
witness *Crown* v *Ra*
Cas 534

Stricter degree of proof in criminal cases Section 3, lays down what degree of certainty is sufficient to hold that a fact is proved *Abdul* v *Crown* 32 P R 1873 Cr Under s 3 a fact is said to be proved, when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of a particular case, to act upon the supposition that it exists A stricter degree of proof is required in criminal proceedings, the persuation of guilt must amount to such a moral certainty as convinces the mind of the tribunal as reasonable men, beyond all reasonable doubt It is the business of the prosecution to bring guilt home to the accused, to the satisfaction of the minds of the jury but the doubt, to the benefit of which the accused is entitled, must be such as rational, thinking sensible men may fairly and reasonably entertain, not the doubt of a vacilating mind, that has not the moral courage to decide, but shelters itself in a vain and idle scepticism There must be doubts, which men may honestly and conscientiously entertain *Ali Lok* v *King Emperor*, 3 L B R 216=4 Cr L J 382 'There is a strong and marked difference as to the effect of evidence in civil and criminal cases In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision, but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required The seric ... condemnation both to the accused and ... eater evils which flow from it than from a ... induced the laws of every wise and civilised nation to lay down the principle, though often lost sight of in practice, that the pursuation of guilt ought to amount to a moral certainty
as convinces th
able doubt" *P*
Cooper v *Slade*,
2 Lew C C ...
that it is better that ten guilty men
man should suffer" *Per Holroyd J* in
see also Hale P C Ch 39, *Wills' Cir Ev* 51... The fouler the crime is, said
Lord Nottingham C, "the cle
of Lord Cornwallis, 7 State T
said *Baron Legge*, "the mor
should be made out to you
'The greater the ... *Holroyd* "the stronger is the proof required
... ng on the above
... ed on reason and
... he best means of
discovering truth, and are an integral part of our legal system, essential alike for private and social security Nevertheless language of most dangerous tendency in regard to them has occasionally fallen from the learned judges, which implies that they may be modified, according to the enormity of the ...

under any circumstances they may be relaxed according to notions of supposed expediency, they cease to be in any correct and intelligible sense, rules for the discovery of truth and the most valued rights of civilized men become the spor... of relaxation would
be t
and
crim
relative enormity or penal consequences. *Wills* ...

3. "moral certainty" is here used in ... certainty, or of any certainty properly so called, for the ... the law accused person can never be exclu... of criminal evidence, that degree of assurance which induces a man of sound mind to act upon it without doubt upon the conclusion to which it leads *Black's Law Dict* It is also defined as a high degree of impression of the truth and fact falling short of an absolute certainty, but sufficient to justify a verdict of guilty even in a capital case *Burrill Cir Ev* § 189

In ordinary civil cases a Judge of fact must find for the party in whose favour there is preponderance of proof although evidence be not entirely free from doubt In criminal cases no weight of preponderance of evidence is sufficient short of that which excludes all reasonable doubt' *Per Birch J* in *Queen* v *Madhub Giri* 21 W R Cr 13 at p 20 Convictions must be based on substantial and sufficient evidence not merely moral convictions *Queen* v *Sorob Roy* 9 W R Cr 28 When prisoners confess in the most circumstantial manner to having committed a murder the finding of the body is not absolutely essential to conviction *Queen* v *Petta* 4 W R Cr 19, see also *Queen* v *Poorusoolah* 7 W R Cr 14 A Judge was held to have exercised a proper discretion in not passing sentence of death in a case in which the dead body was not found *Queen* v *Baldudruddeen* 11 W R Cr 20 *Abbu Sildar* v *Empress* 11 C 643

The difference between the trial of a civil and a criminal case is that in the former it is the duty of the parties to place their case before the Court as they think best, whereas in the latter it is the duty of the Court to bring all relevant evidence on the record and to see that justice is done *Emperor* v *Janki* 4 ... A 283 = 60 Ind Cas 322

If the Judge of the Appellate ... was a right one and had any doubt ... been comm... used *Milar*... ra v *Empress* 13 C L R 25 ... set aside the order of the origi... is wrong *Ibid*, see also *Protap* v *Rex* 11 C L R 25 *Laljee* v *Girdar* 43 C 838 *Shunmugaraja* v *Manikka* 32 M 400 *Imdad* v *Pateshri* 32 A 391 The Pathans of the Peshwar district being always disposed to exaggerate and add two charges against the guilty and totally false one against the innocent Peswar murder cases invariably introduced into the evidence an element of doubt of a very intangible character But an acquittal cannot be based on this kind of doubt Section 3 of the Evidence Act lays down what degree of certainty is sufficient to hold that a fact is proved *Abdul Karim* v *Crown* 39 P R 1873 Cr

In all criminal cases, it is necessary that there should be a charge a finding and a conviction as a foundation for the sentence everything should be strictly ... substantial ... Bom ... mere ... principle ... and ... to conjecture, the accused should not be called upon to make his defence ... Un Cr C 772 = Cr Reg 36 of 1895

Corpus delicti, proof of—in ... evidence *Corpus delicti* is a collective name for the ... is ... It ... e ... e ... d ... h ... s —and not till then—do we require ... includes the facts that an injury has been inflicted and in circumstances showing that it was criminally inflicted, the enquiry who inflicted it begins only when the *corpus delicti* has been established *Wills Cir Ev* 324, *Evans* v ... Cons R 85 *Rex* v *Burdett* 4 B & Ald 95, 123 *R* v *Ahmed* ... *Poorusoolah*, ... able from ... ties of this

kind may present themselves in practice, so many cases have occurred of convic

Cir Ev p 325, *Abu Sikdar* v *Queen Empress*, 11 C 642, *R* v *Bepari Singh*, 7 W R Cr 34

In cases of homicide three propositions must be made out in order to establish the *corpus delicti* (1) That a death has taken place (2) That the deceased is identified with the person alleged to have been killed (3) That the death was due to unlawful violence or criminal negligence and it is not till these propositions have been proved that the question—not included in the inquiry as to *corpus delicti*—Is the accused or suspected person the culprit, arises *Wills' Cir Ev* 333 "I will never convict any person' said *Sir Mathew Hale* "of murder or man slaughter, unless the fact were proved to be done, or at least the body found" 2 P C Ch 39, see also *R* v *Bepari*, 7 W R Cr 34 But the above rule may in certain cases lead to absurdity and injustice and a murderer can escape conviction by successfully preventing discovery of dead body So now it is clearly established that the fact of the death may be legally inferred from such circumstances of presumption as render it morally certain, and leave no ground for reasonable doubt *Wills' Cir Ev* 335

The terms "evidence" and proof These terms are often used in such a manner as to include at one time the *media* by which the facts are established, and at other the effect or conclusions produced by the testimony It is true the attempt has frequently been made, but without great success to distinguish between the terms "evidence' and "proof' The latter term in its popular meaning more c
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character as to convince the intellect and conscience of men of a fact then that fact is proved Proof is that degree and quantity of evidence that produces conviction" *Nevling* v *Commonwealth*, 98 Pa 322, 328 "Proof is that quantity of appropriate evidence which produces assurance and certainty Evidence, therefore, differs from proof as cause from effect" *Wills Cir Ev* 2, 3, *Greenl. Ev* § 1

4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact is proved, unless and until it is disproved, or may call for proof of it

"May presume"

Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved

"Shall presume"

When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it

"Conclusive proof"

Presumption, meaning of The word "presumption in its legal significance, is used in English Law to describe either an inference or a rule of law Where the word is used synonymously with "inference" it deserves no special

are many and various As a matter of fact it sometimes designates a rule of substantive law, and sometimes a rule of procedure, or other branch of adjective law. *McKelvey's Evidence* p 79 So in English Law, following the Civil Law,

S. 4. presumptions are divided into three kinds: (1) presumptions of fact (*praesumptiones facti vel naturae,*) (2) rebuttable presumptions of law (*praesumptiones juris*) and (3) conclusive presumptions of law (*praesumptiones juris et de jure*) There is another class recognized in English text-books, viz, mixed presumptions, or presumptions of mixed law and fact *Nort Ev* 97 The effect of this section is to do away with the distinction known to the English Law between presumptions of fact and presumptions of law, all the presumptions are made to fall under one or other of the three classes mentioned in the present section *Cun Ev* 84

Origin of Rules These rules it is likely, all had their beginnings in logical inference however independent of it they may have become in their final shape Now the basis of inference is experience The Judge and the jury go into Court with the experience of ordinary human beings, and, in the process of drawing inferences constantly call upon such experience Coupled with the facts introduced as evidence at the trial it forms the basis of the inferences necessary to arrive at a determination of the facts in issue It happens that, in the almost innumerable cases that are tried certain facts or groups of fact have been repeatedly presented to Courts as foundations for inferences and the inferences being reasonable ones, judged by the experience of the Court and jury have been repeatedly drawn until a rule has crystalized It is not difficult to see why these rules developed so early and where so readily adopted by the Courts Judges have always been suspicious of juries and have seized every opportunity to establish rule for their guidance and to control their conclusions from the evidence introduced The mind of the Judge was supposedly nothing if not logical, while the untrained minds of the jury were open to the influences of prejudice sympathy, and a thousand other things Logical inference was therefore made the basis of a vast number of such rules which the Judges established and which they called presumptions,—rules relating to the manner of proving cases, and in this sense having to do with the law of evidence; fixing for example, when sufficient evidence was introduced or when a party must introduce further evidence if he would win his case *M Kelvey's Ev* 80 As to the effect of a presumptions *Prof Thayer* says "They have the same effect (and no other) which they have in all the other reasons of legal reasonings Their effect results necessarily from their characteristic quality,—the quality viz, which imputes to certain facts or groups of fact a *prima facie* significance or operation In the conduct then, of an argument or of evidence, they throw upon him against whom they operate the duty of meeting this imputation Should nothing further be adduced they settle the question involved in them in a certain way He therefore who would not have it settled so must show cause" *Thayer Cas Ev 2nd Ed p 41*

Presumption of facts Presumption of facts, according to English Jurists, consist of those inferences which have never hardened into rules of law and as to which therefore the Judge is not entitled to direct the jury that they are bound as a matter of law to draw them, in other words they are common probabilities of fact which the jury may draw or not, as in their judgment the circumstances of the case may appear to warrant *Wills' Ev 2nd Ed* 43 So a presumption of fact, is nothing more than an argument more or less cogent, it is an inference of one fact drawn from other facts It is for the jury to draw that inference or not as they think fit, they are not bound as a matter of law to draw it It is the duty of the Judge, when there is no evidence from which a reasonable man would honestly draw the inference, to withdraw that question from the jury, but if there is any evidence upon the matter, he must leave it to the decision of the jury If they do draw the inference, their verdict will not be disturbed, but equally it will not be disturbed if they decline to draw it *Powell Ev* 386 So there are no special rules which govern the subject of logical inferences, and presumptions which are merely inferences relate to all classes of things and cases *McKelvey's Ev* § 37 The cases which are so often cited as illustrating the proposition that there is a presumption against the party who suppresses or destroys evidence or fails to call a witness within his control are all cases where what is talked of is inference *Carpenter* v. *Penn, Ry. Co,* 13 App Div 328=43 N Y. Supp 203 The first clause' says *Mr Norton,* appears to point at presumptions of fact, or natural presumptions, or as the civilian termed them, *hominis tantum*" *Nort. Ev* 96 Inferences or presumptions

are always necessarily drawn whenever the testimony is circumstantial, but presumptions, specially so-called, are based upon that wide experience of a connection existing between the *facta probantia* and the *factum probandum*, which warrants a presumption from the one to the other, whenever the two are brought into contiguity Presumptions are drawn from the course of nature; for instance, that night will follow day, the seasons follow each other, death ensue from a mortal wound, and the like, or from the course of human affairs, from a famil[illegible] sage of society, domes[illegible] on 114 *illustrations* a[illegible] virtue of law, but by spontaneous operation of the reasoning faculty, all that the law does for them is to recognize the propriety of [illegible] think fit The Court may presume them, i e which the fact suggests at once, and call o[illegible] or may refuse to draw the inference and call [illegible] facts by which the inference was suggested Thus, in the case of a man found in possession of stolen goods shortly after the theft and unable to account for his possession, the Court may either presume the guilt of the accused and throw upon him the onus of proving his innocence; or it may refuse to presume his guilt and may throw upon the prosecution the burden of proving it Besides these natural presumptions there are several instances of presumptions as to documents dealt with in sections 86—88, and 90, in which the Court is, in like manner, empowered to throw the burden of proof on which party it pleases, to presume a fact or to call for proof of it, as it thinks best *Cun Ev* 85 "A presumption of any fact" says *Abbott C J* in *R* v *Burdett*, 4 B & Ad 161, 'is properly an inferring of that fact from other facts that are known; it is an act of reasoning

Presumptions of law Presumptions of law are of two kinds First, conclusive or imperative presumptions, that is, legal rules not to be overcome by any evidence that the fact is otherwise Thus by the Statute of Limitation, a simple contract debt, not kept up in certain specified manners, is extinguished after a lapse of certain number of years, nor can it be recovered by proving that the sum due has [illegible] plate the probable [illegible] conclusive, nor m[illegible] "It s an universal [illegible] charged with doin[illegible] injurious, the intention is an infere[illegible] *Rex* v *Dixon*, 3 M & S 15 [illegible]

[illegible] some cases of conclusive [illegible] and to have created an estoppel against himself An estoppel is when a man has done some act which affords a conclusive presumption against himself in respect of the matter at issue Formerly in England all children born in lawful wedlock, if the husband was not impotent, or beyond the four seas during a period exceeding that of gestation, were legitimate, nor could evidence to the contrary be received in a court of law *Co Litt 244 C* The presumption of law was then imperative, whatever might have been the real facts of paternity, and however clearly they might be proved still the husband was considered as the father of his wife's children Since that time, however the rule has been changed in England, and probable evide[illegible] of the child, is admissible *Banbury* [illegible] Marchant, 432 The presumption, theref[illegible] second or more comprehensive kind, v[illegible] presumptions of law —*Presumptions of L*[illegible]

4 effect of such presumptions is to shift the burthen of proof, and to throw the *onus probandi* on him who has to displace a presumption when once it has arisen *Nort Ev* 9 A well known instance of an irrebuttable presumption of law can be found in section 82 of the Indian Penal Code, where it is laid down that nothing is an offence which is done by a child under seven years of age

Rebuttable presumption of law The second or the more comprehensive kind of presumption of law is known by the term "rebuttable presumption of law" or the *Presumptiones juris tantum* of the civilians This kind of presumption arises when presumptions of law are certain assumptions or legal rules defining the amount of evidence requisite to support a particular allegation which facts being proved may be either explained away or rebutted by evidence to the contrary but are conclusive in the absence of such evidence The distinction between the two kinds of legal presumptions is thus clearly stated by *Lord Mansfield* in *Darwin* v *Upton* 2 Saund 175 b, note "The enjoyment of lights with the defendant's acquiescence for twenty years is such decisive presumption of a right by grant or otherwise that unless contradicted or explained the jury ought to believe it but it is impossible that length of time can be said to be an absolute bar, like a Statute of limitation, it is certainly a presumptive bar which ought to go to a jury Legal presumptions of the latter kind (which may be termed disputable or rebuttable presumptions) are definitions of the quantity of evidence or the state of facts sufficient to make out a *prima facie* case, in other words of the circumstances under which the burden of proof lies on the opposite party Of this very extensive class of presumptions a few examples will suffice Thus a man is presumed innocent until he is proved guilty that is if a man is charged with a crime, he is not bound to prove that he did not, but his accuser is bound to prove that he did commit it So also if a child is born in wedlock one who questions his legitimacy must disprove it if a child is born during a divorce *a mensa et thoro* one who maintains his legitimacy must prove it Again the presumption of law is that a man is alive unless nothing has been heard of him for seven years, when the presumption is that he is dead that is to say if it is averred that a man is dead the party must prove his assertion but if nothing has been heard of him for seven years the opposite party must prove that he is alive Waste lands which adjoins a road is presumed to belong to the owner of the adjoining enclosed land whose title is therefore valid, unless some one can show a paramount claim The circumstances which will raise such a legal presumption or in other words, will impose on the other party the necessity of proving that the fact is not so, sometimes differ with regard to the same fact in different issues, that is, evidence which in one issue is sufficient to establish a certain fact in another is not sufficient Thus in settlement cases proof of a long co habitation of two persons who passed as man and wife is sufficient to raise a presumption of marriage, or to compel the other party to prove that there was no marriage But in trials for bigamy and actions for criminal conversation proof of an actual marriage is requisite *Presumptions of Law and Presumptive Evidence*, 6 *Law Magazine* 348

Mixed Presumptions Mixed presumptions of law and fact are chiefly confined to the English law of real property The Indian practitioner need not give them much study, nor is it necessary to pursue the subject further here The Code provides only that a few of the ordinary presumptions recognised by law may or shall be drawn *Nort Ev*

May presume This is a presumption of fact of the English jurists Presumption of fact has a totally different meaning from presumption of law, and refers not to propositions, but to arguments—not to assuming but inferring When evidence is offered which can only be brought to bear on the matter at issue by a process of reasoning the inference is termed a presumption of fact In *Rex* v *Burdett* 4 B & A 161 *Lord Tenterden* said "A presumption of any fact is properly an inferring of that fact from other facts that are known, it is an act of reasoning, and much human knowledge on all subjects is derived from this source A fact must not be inferred without premises to warrant the inference, but if no fact could thus be ascertained by inference in a Court of law very few offenders could be brought to punishment" The statement on which this inference is founded is termed presumptive evidence Our experience of the world, for instance, leads us to infer that a man who is in possession of stolen goods shortly after the theft and can give no account of them is either

the thief or has received the goods knowing them to be stolen Our knowledge of human nature leads us to infer that a man, who does answer a question, could not but answer it in a manner favourable to himself Such inferences are formed, not by virtue of any law, but by the spontaneous operation of the reasoning faculty all that the law does for them is to recognize the propriety

Besides these natural presumptions there are several instances of presumptions as to documents dealt with in sections 86 88, and 90, in which the Court is in like manner, empowered to throw the burden of proof on which party it pleases to presume a fact *Cun Ev 85*, see also *Shafiqunnissa* O C 290=6 Bom L R 750 A he discretion to presume it as prov , as the circum stances require *Raghu Nath* v *Roti Lal* 1 A L J 121 (123) The presumption mentioned in this clause is not a hard and fast presumption incapable of rebuttal, *a presumptio juris et de jure* *Emperor* v *Srinivas* 7 Bom L R 969 (974)=3 Cr L J 32 The be construed in more rigorous of *Muhammad,* 110 P L R 1902, 290; (P C) *Ramien* v *Verappa* 11 M L 1 69

Shall presume In cases in which a Court shall presume a fact the presumption is not conclusive, but rebuttable A W N (1906) 316 (31) Of course there is no option l until evidence is given to must produce such evidence follows (1) Where from is in a high degree probable as for instance, the genuineness of a document purporting to be the Gazette of India or of a duly signed record of evidence, or else (2) when it is as for instance that a document, called for and not produced was duly stamped attested, and executed (section 89), or that circumstances bringing an offence within the exceptions to the Indian Penal Code do not exist Section 105 sections 79—85 make mention of such presumptions *Cun Ev* 85 *The definition of the word shall presume given in the section cannot be* ess legislation to that effect *Per Knox* 33 A 799 (808) F B In the Indian ndicate that the presumption mentioned see also *Haris Ali* v *Parsotam Narain,*

30 years old and purports to come from proper custody *Safiqunnissa* v *Shablan Ali* 7 O C 290, see *Ramien* v *Verappa* 11 M L T 69 (1912), 1 M W N 117 The words shall persume in section 201 of Agra Tenancy Act *have no higher force than similar words contained in the Evidence Act* *Dilkuar* v *Udai Ram,* 29 A 148

Conclusive proof The third class is of those cases in which one fact is conclusive proof of another An artificial probative effect is given by the law to certain facts, and no evidence is allowed to be produced with a view to the combating of that effect These cases generally occur where it is against the policy of Govern open to dispute matters stated th a cession of Britis place (section 113) So also formerly, all children born husband was not impotent, or beyond the four seas during a period exceeding

4 that of gestation were legitimate nor could evidence to the contrary be received in a Court of law *Co Litt* 244 A see also section 112 of the Evidence Act But that presumption strictly speaking is no longer considered as conclusive presumption in England I apprehend said *Lord Redesdale* in the *Banbury Peerage Case* Gardner Peerage by *Le Merchant* 432, 'the law to be that the birth of a child during wedlock raises a presumption (of law) that such child is legitimate that this presumption may be rebutted both by direct and presumptive evidence that under the first head may be classed impotency and non access that is impossibility of access and under the second all those circumstances which can have the effect of raising a presumption that the child is not the issue of the husband As to earlier conclusive proof *vide Manick Chand* v *Corporation of Calcutta* [illegible] 48 (49) The definition of "conclusive proof" given in this section though referring only to the Evidence Act yet it may properly be applied to the expression conclusive proof' in the Oaths Act (X of 1873) *Lathu Gobind* [illegible] 1 M [illegible] 8 Bom L R 19 (22)

Presumptions as rules of law Process of Development Rules of law of this sort were undoubtedly developments They were not always rules The first stage was that of a mere inference permissible to Judge or jury, the second was a mere disposition on the part of the Judge to advice the jury as to the desirability of such an inference the third an instruction that such an inference ought to be drawn and the fourth a rule that the inference was a necessary one, which the jury were bound to draw Take the case of the seven years absence rule The fact that a person is not heard from for a space of seven years by those who would be likely to hear from him if alive is a fact from which the inference may be reasonably drawn that he is dead An absence of six years under the same circumstances would not be quite so strong but an absence of eight years would be stronger The space of seven years however, became fixed in the law as the least period from which death might be inferred Having once fixed the period from which the inference was permissible the Judges were not long in instructing the jury that the inference ought to be drawn, and finally taking it out of the jury's hands entirely and establishing the rule that it must be drawn Such a rule has got nothing to do with the logical inference it matters not whether such inference exists The rule has become one of equivalent i.e that seven years absence under the circumstances mentioned is equivalent to death In such a case it is only a rule of *prima facie* equivalent since evidence may be introduced to show that the inference which the rule requires is not in accordance with the facts It fixes the point at which a *prima facie* case is established and hence directly affects the burden of proceeding *McKelvey's* Ev 83 The conclusive presumption was the result of further development of the same rule of equivalent In the process of development, Judges in some cases went one step further and said that fact No 1 should be equivalent to fact No 2 at all events and no evidence would be permitted to show that is was not *Ibid* p 84

Relation of Presumption to the Law of Evidence What is the relation of presumptions to what we call the law of evidence They are ordinarily regarded as belonging peculiarly to that part of law This appears to be an error, they belong rather to a much larger topic already briefly considered, that of legal reasoning, in its application to particular subjects Presumptions are aids to reasoning and argumentation which assume the truth of certain matters for the purpose of some given enquiry They may be grounded on the general experience, or probability of any kind or merely on policy and convenience On whatever basis they rest they operate in advance of argument or evidence, or irrespective of it, by taking something for granted by assuming its existence When the term is legitimately applied it designates a rule or a proposition which still leaves open to further enquiry the matter thus assumed The exact scope and operation of these *prima facie* assumptions are to cast upon the party against whom they operate, the duty of going forward, in argument or evidence on the particular point to which they relate They are thus closely related to the subject of judicial notice, for they furnish the basis of many of those spontaneous recognitions of particular facts or conditions which make up that doctrine Presumptions are not in themselves either argument or evidence although for the time being they accomplish the result of both Presumption assumption, taking for granted are simply so many names for an act or process

which aids or shortens inquiry and argument These terms relate to the whole field of argument whenever and by whomsoever conducted and also to the whole field of the law in so far as it has been shaped or is being shaped by the process of reasoning real application in the law the persons who apply it ion as already noticed is the Judge and attaching to one evidentiary fact certain procedural consequences as to the duty of production of other evidence by the opponent It is based in policy, upon the probative strength as a matter of reasoning and inference, of the evidentiary fact but the presumption is not the fact itself, nor the inference itself but the legal consequence attached to it But, the legal consequence being removed the inference as a matter of reasoning may still remain and a 'presumption of fact in the loose sense is merely an improper term for the rational potency, or probative value of the evidentiary fact regarded as not having this necessary legal consequence They have no significance so far as affects the duty of one or the other party to produce evidence because there is no rule of law attached to them and the jury may give to them whatever force or evidence So long as the law way of a duty upon the opponen there is no propriety in to such facts however great their probative

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seven years unheard from It is not weighed down with any artificial additional probative effect they may estimate it for just such intrinsic effect as it seems to have under all the circumstances In strictness there cannot be such a thing as a conclusive presumption Wherever from one fact another is conclusively presumed in the sense that the opponent is absolutely precluded from showing by a evidence that the second fact does not exist the rule really provides that where the first fact is shown to exist the second fact's existence is wholly immaterial for the purpose of the proponent's case and to provide this is to

CHAPTER II.

OF THE RELEVANCY OF FACTS.

Relevancy of Facts—meaning of—The words "relevancy of facts" has been used in two distinct [illegible] in this Act. In the title of Part I the word relevancy is used in the sense of admissibility. In the heading of Chapter II of this part relevancy means the having some probative force. *Stokes* [illegible] When a fact is offered as evidence the very offspring of it is an implication that it has some bearing on the proposition at issue,—that it tends naturally to produce a conviction about that proposition. The situation is thus in its elements the same as when the persons engaged are not occupied in a legal controversy. One might suppose that the question would be essentially one of the ordinary law of reasoning, whether it were to be decided, as here, by a Judge or a jury, or by the audience of a lecturer, or by a policeman notified of an alleged misdemeanour in his district, or by a class in rhetoric. But the application of the laws of reasoning is here attended with peculiar consideration not existing for any investigation but a judicial one. [illegible] Stephen defines the word 'relevant' as meaning that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non existence of the other. *Steph Dig Ev Art 1* He also repeats the same thing in substance in his Introduction to the Evidence Act where he states: "The rule therefore that facts may be regarded as relevant which can be shown to stand either in the relation of cause or in the relation of effect to the fact to which they are [illegible] to be relevant may be accepted as true subject to the caution that when inference is to be founded upon the existence of such a connection every step by which the connection is made out must either be proved or be so probable under the circumstances of the case that it may be presumed without proof. Though this mode of describing relevancy might be correct, it would not be readily understood. It is for this reason that relevancy was very fully defined in the Evidence Act (Ss 6-11 both inclusive). These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings." *Introduction pp 70 72* This is a definition of logical relevancy. Logical relevancy plays a certain part in the law of evidence in that no evidence is admissible unless it is logically relevant. It does not follow that all evidence which is logically relevant is admissible and in fact much that is logically relevant is excluded. Certain rules are laid down founded on various considerations by which many matters which are logically relevant are declared inadmissible. *McKelvey's Ev 166* So also in the Indian Evidence Act the word "relevant" means admissible. *Lala Lakmi v Sayed Haider* 3 C W N cclxviii This distinction is made between logical and legal relevancy, because logical reasoning and legal reasoning are not the same.

'The modern system of Evidence,' says *Prof Wigmore* 'rests upon two axioms. These underlie its whole structure. Implicitly but nevertheless actually and positively, recognised in the practice of the Courts and in the utterances of the Judges they were first distinctly formulated by the great master and expounder of the history of our law of Evidence. The first is this. None but facts having rational probative value are admissible. This principle is indeed axiomatic for any system of Evidence purporting to be rational. It assumes no particular doctrine as to the kind of ratiocination implied,—whether practical or scientific, coarse and ready or refined and systematic. It prescribes merely that whatever is presented as evidence shall be presented on the hypothesis that it is calculated according to the prevailing standards of reasoning to effect rational persuasion. The second axiom on which our law of Evidence rests is this. All facts having rational probative value are admissible, unless some specific rule forbids. *Wigmore §§ 9 10*

'There is another precept' says *Professor James Bradley Thayer* 'which it is convenient to lay down as a preliminary one in stating the law of evidence viz, that unless excluded by some rule or principle of law, all that is logically probative is admissible. This general admissibility of what is logically probative is not, like the former precept, a necessary presupposition in a rational system

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of evidence . . . but yet it is important to notice this also as being a fundamental proposition In a historical sense, it has not been the fundamental rule

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of these rules may be extensive in scope—the hearsay rule, for example; or their applicability may in a particular case be so plain, on the face of the offer of evidence that the objector has no burden of proving that this rule of exclusion is applicable Nevertheless, when the rules of Evidence are taken in view as a

mining everything that will contribute to bring the mind to the determination required If we refuse to hear what will in any degree produce this effect, we must determine on imperfect evidence; and in proportion to the imporance of the matter thus refused to be heard, must evidently be the chance of making an incorrect rather than a just determination But as in morals, we are forbidden to do ... in legislation, we should refrain from doing ... produce more than its equivalent in evil ... by the admission of every species of evidence may be more than counterbalanced in some instances by the evil attending it, sometimes, in the shape of inconvenience and expense inseparable from its procurement, sometimes, from the danger of error arising from the deceptive nature of the evidence itself The great art is to weigh these difficulties, and in those cases where they are most likely to prepondonderate, but in no others to exclude the evidence" So "the law (of evidence) with a few exceptions on the ground of public policy now is that all which can ... admitted,—not of course matters of ... eal moral or sensible objection, but all ... ase" *Per Colerdge C J* in *Blake* v ... single condition on which alone the ... depends, and which, in general is ... he fact to be proved should be one in the *res gestae* or relevant in some degree, to the existence of a *res gestae* fact *Modern Law of Evidence* § 1711

Relevancy—Stephen's Theory—Criticism "*Sir James Fitz James Stephen*, justly to be regarded as the protagonist of the modern law of evidence, bases the system on a particular theory of relevancy To him, relevancy furnishes a complete and universal formulary for the determination of all questions as to the admissibility of evidence Wherever a fact is relevant to the issue it is, or should be admissible If a fact tendered be not relevant it is, or should be, inadmissible He goes still further Evidence logically probative which Courts reject is said to be 'deemed' irrelevant Facts of no logical probative force which Courts neve ... 'The previous good ch... can hardly be said ... reputation does n... have committed a ... he did so Still ... is worth In other words, the fact that a man has a good character is treated by the law as a matter which either has or may have something to do with the

S. 4 question of guilt or innocence In other words, it is deemed to be relevant, though it may not actually be relevant On the other hand, a dying confession of murder made by a third person is deemed to be irrelevant though it is actually relevant Such a confession can hardly be false except under extraordinary circumstances It can hardly be caused by anything except a consciousness of guilt and it is impossible to doubt that any one who was guided by common sense alone would wish to know the fact that it had been made when he had to determine upon the guilt of another Rightly or wrongly however evidence of such a confession is by our law excluded The fact that it was made is kept from the Judge and jury It is thus treated as being, or is deemed to be irrelevant *Steph Dig Ev Preface* to 3rd Ed p 21 These simple instances, the one admitting the fact not probatively relevant and the other excluding a fact which is clearly so, illustrate certain the difficulties involved in applying *Stephen's* theory of probative relevancy as sole test and guaranty of admissibility The former fact, that of good character is deliberatively rather than probatively relevant The dying declaration, though highly probative is an unsworn statement by one who is not a party As such it is excluded by a highly characteristic rule of procedure or substantive law *i e* the rule against hearsay So one may seem warranted in doubting as to whether logical relevancy is capable of satisfactorily sustaining so heavy burden as is here imposed upon it More than this, the conviction is forced upon the mind that the law of evidence has by no means reached the stage of its evolution at which the rational element can fairly be said so far to dominate the procedural as the truth of such a theory as that of *Stephen* would denote *Chamberlayne's Modern Law of Evidence* § 1716 "In thus neglecting to give what seems to be a satisfactory weight to the influence of substantive law, in the form of rules of procedure upon the law of evidence *Stephen* has created a serious difficulty which seems to warrant some consideration The only mode of reasoning which is recognized by him is apparently that of inference, proving the unknown from the known *Ibid* § 1717

Stephen's Definition considered The definition of relevancy is an excellent statement of that relation between facts which has hereinbefore been spoken of as probative seems unquestionable Equally obvious is it that as a definition of relevancy in general it is insufficient It takes no account of those important relations of facts to the proper conduct of judicial processes of reasoning which have been denominated constituent or deliberative relevancy In other words, in connection with the processes of proving the *res gestae* Stephen's definition of relevancy seems fairly adequate It may hereafter develop that other features of inference than those outlined by him are permissible and beneficial But for practical objects the definition suffices For all purposes, it is a splendid advance upon the formularies of the law of evidence as *Stephen* found them When however the *res gestae* and constituent facts are established and judicial reasoning takes its next step that from the constituent facts to an assertion as to the existence of a right or liability *Stephen's* definition at once ceases to apply For example let it be assumed that an alleged *res gestae* fact what *Stephen* calls, at times a fact in issue be offered and objectionably be that it is irrelevant to any proposition in issue The previously satisfactory test of relevancy at once breaks down What relevancy if any, exists between the fact offered and a particular legal proposition in issue is not a question which can be answered by applying the definition of relevancy in either of the forms given us by *Stephen* The reason for this is plain No relation of logic or human experience "the common course of events" exists between a right or liability and a *res gestae* fact which is said to assist in constituting it * An entirely different element has entered into the situation The relation between the fact and the proposition is one

*Obvious differences exist between the relevant relation of a *factum probans* in any degree of remoteness in point of causation or other relation to the existence of a *res gestae* fact, on the one hand, and the constituent relevancy between a *res gestae* or constituent fact and the right or liability to which it, separately or in conjunction with others give rise Probative relevancy deals with existences physical or psychological Constituent relevancy is concerned with the application of intellectual proposition to these existences To put the same idea in slightly different words, constituent relevancy deals with the construction of an intellectual proposition, rule of law or the like in the terms of fact

of law It follows that the experience of the community, this common course of events, has no direct operation in such a connection The relevancy involved in the question rr
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Facts in issue—Stephen's definition considered The same confusion between the relevancy of facts in proving the *res gestae* and the relevancy of the *res gestae* themselves to the proposition in issue appears in a statement very fundamental in *Stephen's* treatment of the subject of evidence As defined in the Act, the phrase "facts in issue" would seem to indicate the constituent facts of an inquiry, the *res gestae* or more nearly ultimate facts inferred from the latter by the tribunal Assuming this to be the case, it is suggested by *Stephen* in this connection that an "inference" may be drawn from proof of relevant, or, as we have preferred to call them, probative facts to the existence of the *res gestae* or constituent ones It is at the same time stated by him that a "legal inference" (*Vide p 43 supra*) may be drawn from the *res gestae* or constituent facts, what *Stephen* desires to call "facts in issue" to a right or liability How are these phrases "inference" and
law would be Ir

Evidence § 1718 (a)

law is at all times waiting upon or subservient to the substantive Adjective law may prescribe what steps may be taken, it is for the substantive to decide in what direction these steps shall tend In other words, the ultimate objective towards which logical proof must go is
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fundamental, master rule of evidence stated above that all relevant facts are admissible and no others are to be received is undoubtedly true, correctly understood "Relevant" as used in the rule just

* To the relation between a particular fact and one in the *res gestae* which enables the former, as a matter of human experience, to sustain or advance in some degree a contention that the *res gestae* fact exists, has existed or will exist, the
right or liability arises may fairly be designated legal or constituent Until it is clearly understood in which sense the term "relevant" is being used on any particular occasion, it may fairly be said that the danger of ambiguity is fairly obvious,

4 question of guilt or innocence In other words, it is deemed to be relevant though it may not actually be relevant On the other hand a dying confession of murder made by a third person is deemed to be irrelevant though it is actually relevant Such a confession can hardly be false except under extraordinary circumstances It can hardly be caused by anything except a consciousness of guilt and it is impossible to doubt that any one who was guided by common sense alone would wish to know the fact that it had been made when he had to determine upon the guilt of another Rightly or wrongly however evidence of such a confession is by our law excluded The fact that it was made is kept from the Judge and jury It is thus treated as being or is deemed to be irrelevant' Steph Dig Ev Preface 3rd Ed p 21 These simple instances the one admitting the fact not probatively relevant and the other excluding a fact which is clearly so, illustrate certain of the difficulties involved in applying *Stephen's* theory of probative relevancy as sole test and guaranty of admissibility The former fact, that of good character is deliberatively rather than probatively relevant The dying declaration though highly probative is an unsworn statement by one who is not a party As such it is excluded by a highly characteristic rule of procedure or substantive law i e the rule against hearsay So one may seem warranted in doubting as to whether logical relevancy is capable of satisfactorily sustaining so heavy burden as is here imposed upon it More than this, the conviction is forced upon the mind that the law of evidence has by no means reached the stage of its evolution at which the rational element can fairly be said so far to dominate the procedural as the truth of such a theory as that of *Stephen* would demand *Chamberlayne's Modern Law of Evidence* § 1716 "In thus neglecting to give what seems to be a satisfactory weight to the influence of substantive law, in the form of rules of procedure upon the law of evidence *Stephen* has created a serious difficulty which seems to warrant some consideration The only mode of reasoning which is recognized by him is apparently that of inference, proving the unknown from the known *Ibid* § 1717

Stephen's Definition considered The definition of relevancy as an excellent statement of that relation between facts which has hereinbefore been spoken of as probative seems unquestionable Equally obvious is it that as a definition of relevancy in general it is insufficient It takes no account of the important relations of facts to the proper conduct of judicial processes of reasoning which have been denominated constituent or deliberative relevancy In other words, in connection with the processes of proving the *res gestae Stephen's* definition of relevancy seems fairly adequate It may hereafter develop that other features of inference than those outlined by him are permissible and beneficial But for practical objects the definition suffices For all purposes, it is a splendid advance upon the formularies of the law of evidence as *Stephen* found them When, however the *res gestae* and constituent facts are established and judicial reasoning takes its next step, that from the constituent facts to an assertion as to the existence of a right or liability *Stephen's* definition at once ceases to apply For example let it be assumed that an alleged *res gestae* fact what *Stephen* calls, at times a 'fact in issue' be offered, and objectionably be that it is irrelevant to any proposition in issue The previously satisfactory test of relevancy at once breaks down What relevancy if any, exists between the fact offered and a particular legal proposition in issue is not a question which can be answered by applying the definition of relevancy in either of the forms given us by *Stephen* The reason for this is plain No relation of logic or human experience 'the common course of events' exists between a right or liability and a *res gestae* fact which is said to assist in constituting it * An entirely different element has entered into the situation The relation between the fact and the proposition is one

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the scope of the law of evidence should be determined, it is first necessary that the positive or substantive law should be eliminated from within its boundaries. In the proportion that any definition of the law of evidence fails to do this, it clearly falls short of complete success. How far then does Stephen's definition of "relevancy" meet this test?

In three distinct ways, it will be observed, does the substantive law control the adjective in respect to the law of evidence. (1) Positive law may be about the law of evidence controlling and regulating it. Courts are established by it as part of the framework of government. Laws may be passed determining that certain classes of proof may or may not be received; that land shall pass only by registered deed; that certain contracts must be evidenced by writing, and the like. (2) Substantive law may constitute an important element in that of evidence. Procedural rules may be established by positive law. Definite inferences of fact may be given a prima facie value as evidence; the statements of a party may be used by his adversary under certain conditions, and so forth. Finally, (3) most pervasive among the influences of positive law is that which runs through the law of evidence by prescribing the objective to which alone proof can legally be directed. The most serious criticism of Stephen's theory and definition of "relevancy" would be that in thus failing to distinguish between probative and constituent, logical and legal, relevancy, the boundaries of the law of evidence still remains shot through and through with the rules of the positive law.

Every probative fact must, it is true, in order to be admissible, satisfy a double test of relevancy. The law requires that it should in the first place be logically or probatively relevant in some degree of remoteness to the existence of a fact in the res gestae. Should it have no such tendency to establish such a fact, nothing remains but to reject it. It is not evidence. But the [illegible] will be [illegible] must [illegible] will be constituently relevant to the right or liability asserted in the action. To receive proof, however cogent, of the existence of a fact which could not itself, for any reason, be used as relevant to the proposition in issue, would merely be a waste of time. To reject, for this reason, the initial fact when offered is amply justified. What is not warranted is the inclusion of such a ruling within the field of evidence. Evidence has no concern whatever with it. When the fact tendered was found to be probatively relevant, the law of evidence was satisfied. That judicial administration will not receive it is due to reasons of public policy embodied in the substantive law of the right or liability itself. Unquestionably the rule, characteristic of the branch of adjective law, that only such facts will be admitted as the substantive law can use, may be part of the law of evidence. Clearly, however, evidence is entitled to be relieved of any responsibility for what the substantive law may see fit to ordain in particular instances. All this is matter of positive law and apparently no substantial interest is to be advanced by the confusion which arises from treating it as part of the adjective. As has been said, the most serious criticism of *Stephen's* definition is that by embracing rules of law and propositions of experience within the meaning of a single term his own admirable effort at segregating the field of evidence may not have been completely successful.

In the attempt to use the terms probative relevancy and constituent relevancy in connection with the law of evidence, it becomes at once plain that only with the former—probative relevancy—has this branch of the adjective law any concern whatever. Whether a particular fact is or is not a constit[illegible] of [illegible] law [illegible] any particular proceeding. Constituent relevancy is a matter entirely of substantive law, properly presenting a question for the judge. Proof is [illegible] for the judicial function of the jury; it is a matter dominated by the [illegible] of men and the logical deductions which reason draws from [illegible] establishment of the *res gestae* or constituent facts, i. e., such [illegible] nearly ultimate facts as the jury may infer from the [illegible] province of the jury, and the legitimate scope of the law of [illegible] ends. Anything further is a question of law to [illegible]

branch of the mixed tribunal may, under the law of the forum have the function ... law to the *res gestae, i e* construing the facts *Chamberlayne's Modern Law of*

Distinction between Relevancy and Admissibility Strictly speaking admissibility is a quality standing between relevancy, or probative value on ...

not signify that the particular fact has demonstrated or proved the proposition to be proved but merely that it is received by the tribunal for the purpose of being weighed with other evidence *Wigmore* § 12 But in the Indian Evidence Act the word relevancy is sometimes used in the sense of logical relevancy and sometimes in the sense of admissibility (*Vide Stephen's Introduction* ... *Whitley Stokes* Vol 1 p 849, *Lala Lakhmi* v *Sayed Haider* 3 C W N cclxviii) From section 5—55 of the Indian Evidence Act the word 'relevancy' is used in the sense of admissibility

Rules of Relevancy an... The study of the principles o... falls into two distinct parts ... cerned ... mind to mind counsel ... the mind of the tribuna... devised by the law, ar... ard the tribunal (particularly the jury) against erroneous persuasion Hitherto the latter has loomed largest in our formal studies —has in fact monopolized them while the former virtually ignored has been left to the chances of later acquisition casual and emperic in the course of practice

Here we have been wrong and in two ways

For one thing there is and there must be a probative science—the principles of proof—independent of the artificial rules of procedure hence it can be and should be studied This science to be sure may as yet be imperfectly formulated ... rnest to investigate and develop ... ents the objective in every judicial ... sibility are merely a preliminar... n of the tribunal's mind to a correct conclusion by safe materials This main process is that for which the jury are there and on which the counsel's duty is focused *Principles of Judicial Proof* § 1

5 Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant and of no others

Evidence may be given of facts in issue and relevant fact

Explanation —This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure

Illustrations

(*a*) A is tried for the murder of B by beating him with a club with the intention of causing his death

...

(*b*) A suitor does not bring with him and have in readiness for production at the first hearing of the case, a bond on which he relies This section does not

enable him to produce the bond or prove its contents at a subsequent stage of the proceedings otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure

Principle "Of all rules of evidence the most universal and the most obvious is this,—that evidence adduced should be alike directed and confined to matters which are in dispute or which from the subject of investigation The theoretical propriety of this rule never can be a matter of doubt, whatever difficulties may arise in its application The tribunal is created to determine matters which either are in dispute between contending parties or otherwise require proof, and anything which is neither directly or indirectly relevant to

Scope of the Section Evidence may be given of two sets of facts (1) of facts in issue (2) of facts relevant to the issue Evidence of (1) is generally

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some provisions of Civil Procedure Code is not admitted in evidence even if it be relevant This restriction is put by the explanation at the end of the section

Evidence may be given Evidence may be given of any fact which is relevant under the Act But there are certain limitations to this rule This section should be read subject to Parts II and III of this Act and subject to the the hearsay, character and opinion rules of evidence *Vide Step Dig Ev Intro p 12* This section does not also make evidence admissible which is not admissible under some special
Criminal Procedure Code etc
is that the claimed conclusion
probable hypothesis with
Wigmore § 38 'It is sufficient if the circumstantial evidence be such as may afford a fair and reasonable presumption of the facts to be tried, and if the evidence has that tendency it ought to be received and left to the consideration of the jury to whom alone it belongs to determine upon the precise force and effect of the circumstances proved and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue' *Gibson v Hunter* 2 H Bl 998

Facts in issue The facts in issue ... alleged by one party and denied by the other on the pleadings,
and denied by the plea of "not guilty
either case
are facts in
a question
necessarily
to the determination of the suit Facts must be either relevant or irrelevant and there is no separate third class of facts in issue *Raghubhusana v Vidiavaridhi*, 31 Ind Cas 875 Evidence can be given of a fact in issue or a fact which by that Act is declared to be relevant *Umash v Paresh*, 9 C W N 402 (406)

Facts declared to be relevant The relevant facts are all those facts which
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5. branch of the mixed tribunal may, under the law of the forum, have the function of applying the appropriate rule of law to the *res gestae*, i e construing the rule of law in terms of these particular facts *Chamberlayne's Modern Law of Evidence* §§ 1718 (b) 1718 (i)

Distinction between Relevancy and Admissibility Strictly speaking admissibility is a quality standing between relevancy, or probative value on the one hand, and proof or weight of evidence on the other hand Admissibility signifies that the particular fact is logically relevant and something more,—that it has also satisfied all the auxiliary tests and extrinsic policies Yet it does not signify that the particular fact has demonstrated or proved the proposition to be proved but merely that it is received by the tribunal for the purpose of being weighed with other evidence *Wigmore* § 12 But in the Indian Evidence Act the word relevancy is sometimes used in the sense of logical relevancy and sometimes in the sense of admissibility (*Vide Stephen's Introduction* p 65 *Whitley Stokes* Vol II p 849, *Lala Lakhmi* v *Sayed Haider*, 3 C W N, cclxviii) From section 5—55 of the Indian Evidence Act the word 'relevancy' is used in the sense of admissibility

Rules of Relevancy and Admissibility—Undue importance given to it "The study of the principles of evidence" says *Prof Wigmore* 'for a lawyer, falls into two distinct parts One is Proof in the general sense,—the part concerned with the ratiocinative process of contentious persuasion —mind to mind counsel to Judge or juror each partisan seeking to move the mind of the tribunal The other part is Admissibility,—the procedural rules devised by the law, and based on litigious experience and tradition to guard the tribunal (particularly the jury) against erroneous persuasion Hitherto, the latter has loomed largest in our formal studies,—has in fact monopolized them, while the former, virtually ignored, has been left to the chances of later acquisition casual and empiric in the course of practice

Here we have been wrong and in two ways

For one thing, there is and there must be, a probative science—the principles of proof—independent of the artificial rules of procedure, hence, it can be and should be studied This science, to be sure, may as yet be imperfectly formulated But all the more need is there to begin in earnest to investigate and develop it Further more this process of Proof represents the objective in every judicial investigation The procedural rules for Admissibility are merely a preliminary aid to the main activity, *viz* the persuasion of the tribunal's mind to a correct conclusion by safe materials This main process is that for which the jury are there and on which the counsel's duty is focussed *Principles of Judicial Proof* § 1

5 Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others

Evidence may be given of facts in issue and relevant facts

Explanation —This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure

Illustrations

(*a*) A is tried for the murder of B by beating him with a club with the intention of causing his death

At A's trial the following facts are in issue —
A's beating B with the club
A's causing B's death by such beating,
A's intention to cause B's death

(*b*) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies This section does not

enable him to produce the bond or prove its contents at a subsequent stage of the proceedings otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure

Principle 'Of all rules of evidence the most universal and the most obvious is this,—that evidence adduced should be alike directed and confined to matters which are in dispute, or which from the subject of investigation The theoretical propriety of this rule never can be a matter of doubt, whatever difficulties may arise in its application The tribunal is created to determine matters which either are in dispute between contending parties or otherwise require proof, and anything which is neither directly or indirectly relevant to those [illegible]
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Scope of the Section Evidence may be given of two sets of facts (1) of facts in issue, (2) of facts relevant to the issue Evidence of (1) is generally known as direct evidence, that of (2) as circumstantial evidence *Cockle Cas 56* What are facts in issue are ascertained by the substantive law and the law of procedure What facts are relevant or admissible in evidence is answered by the law of evidence This chapter contains the law of relevancy There is still a further restriction Evidence the production of which is barred by some provisions of Civil Procedure Code is not admitted in evidence even if it be relevant This restriction is put by the explanation at the end of the section

Evidence may be given Evidence may be given of any fact which is relevant under the Act But there are certain limitations to this rule This section should be read subject to Parts II and III of this Act and subject to the the hearsay, character and opinion rules of evidence *Vide Step Dig Ev Intro p 12* This section does not also make evidence admissible which is not [illegible]

[illegible] e be such as [illegible] tried, and if [illegible] the considera tion of the jury to whom alone it belongs to determine upon the precise force and effect of the circumstances proved and whether they are sufficiently satis factory and convincing to warrant them in finding the fact in issue *Gibson* v *Hunter*, 2 H Bl 998

Facts in issue The facts in issue are those which are alleged by one party and denied by the other on the pleadings, in a civil case or alleged in the indictment and denied by the plea of "not guilty in a criminal case so far as they are in either case [illegible] what are facts in [illegible] a question [illegible] necessarily [illegible] to the *determination of the suit* *Facts must be either relevant or irrelevant* and there is no separate third class of facts in issue *Raghubhusana* v *Whatavidhi*, 31 Ind Cas 875 Evidence can be given of a fact in issue or a fact which by that Act is declared to be relevant. *Abinash* v *Paresh*, 9 C W N 402 (406)

Facts declared to be relevant The relevant facts are all those facts which [illegible] he facts in issue that [illegible] w light upon them [illegible] onnection a word [illegible] f course both words [illegible] stricted Common [illegible] nse, or logical relevancy is, as a rule wider than legal relevancy A Judge might, in ordinary transactions take one fact, as evidence of another, and act

upon it himself, when in Cour · And he may exclude facts, althougt to be really material to the issue he law of Evidence is that all facts which are relevant to the issue may be proved *Wright* v *Tatham* 7 A & E 313 384 'The Courts, so far as they can are disposed to receive in evidence whatever can throw any light on the matter in issue *Per Pollock C B* in *Milne* v *Leisler*, 7 H

nature of relevancy under the English law of *Insurance Co*, L R 4 C P D at p 94 said exceptions on the ground of public policy now is that all which can throw light on the disputed transaction is admitted —not of course matters of mere prejudice nor anything open to real moral or sensible objection but all things which fairly throw light on the case *Sir James Stephen in the Introduction to his Digest of Evidence* said The great bulk of the law of Evidence consists of negative rules declaring what as the expression runs is not evidence The doctrine that all facts in issue and relevant to the issue and no others may be proved is the unexpressed principle which forms the centre of and gives unity to all these express negative rules'

But the framers of the Indian Evidence Act have departed from the above mode of treatment of the law of relevancy Facts which are relevant are fully defined in ss 6—11 of the Indian Evidence Act These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings They are designedly wor overlap each other Thus a motive for 7) Subsequent conduct influenced by levant under s 11 would, in most cases be relevant under other sections The object of drawing up the Act in this manner was the general ground on wh relevant might be stated in as many and as popular forms relevancy may be easily ascertained as they are the most original part of th what facts may be proved, whereas and merely declares negatively that c *Introduction* Ev p 75 That the

regards section 11 doubt, expressed in terms so tiocination, be brought into connection with another so as to have a bearing upon a point in issue may

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as the inquiry proceeded That such an extensive meaning was not in the mind of the Legislature seems to be shown by several indications in the Act itself

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ing and examining evidence that is to say, hearing and examining everything that will contribute to bring the mind to the determination required If we refuse to hear what will in any degree produce this effect we must determine on imperfect evidence, and in proportion to the importance of the matter thus refused to be heard, must evidently be the chance of making an incorrect rather

S.

The great art is to weigh these difficulties, and in these cases where they are most likely to preponderate, but in no others, to exclude the evidence "So generally speaking, whatever has a tendency to prove a material part of the issue is admissible. *People* v *Arnold*, 15 Cal 481 'People were formerly frightened out of ... bout ... the

In *Johnson* v *State*, 14 Ga 61 and in *Haynes* v *State*, 17 Ga 454, *Lumpkin J* ...

shut out any fact from the jury, however remotely relevant or from whatever source ...
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And of no others ... is not covered by ... *The Collector* of ... *Hearsay* v *Iva*, 12 ... *Empress* v *Abdullha*, 7 A 385, (F... onclusion, I feel that although wh... by the Evidence Act,—i e the ... ded which the Act does not ex... to the admissibility of evidence, matters which may be essential for expression once used by *Mr Justice* ... I think that the law of Evidence would not be worthy of its name if it made possible any such result" See also *Emperor* v *Panchu Das*, 24 C W N 50 So one who w... is admissible under ... *Chandra*, v *Paresh N*... The words "and of ... evidence of irrelevant facts, irrespective of objection by the parties' *Whitley Stokes* ... the second proviso to sectio... Court is bound to adhere ... *ide People* v *Farrel*, 31 Cal (Am) 584 Even when there is a moral conviction of guilt the rules of evidence can not be separated from *Birindra* v *R*, 37 C 91 *R* v *Brojo*, 25 W R Cr 43 *R* v *Sorob Roy* 5 W R Cr 28, *R* v *Olly*, 5 Cox C C 210 (213) Though a document may not be legal evidence of a fact—within the provisions of the Evidence Act yet it may be a document which is to prove that fact by consent of parties *Oriental Government Security* v *Sarat Chandra*, 20 B 99 (103)

... **Admissibility Relevancy, Auxiliary probative** ... The rules of admissibility may be classified ... ling with the probative value of specific facts ... which do not profess to define probative value but yet aim at increasing or safeguarding it and the third covering all those rules which rest on extrinsic policies irrespective of probative value

The first group of rules attempts to define for legal purposes the probative value which suffices to entitle a fact to be regarded as evidential Here the law is concerned with the rules of ... and inference as applied in practical

S. 5 experience i e with relevancy Circumstantial testimonial, and real evidence are the three great classes, and each has its special problems

The second group of rules lays down auxiliary test and safeguards usually for particular kinds of facts, over and above the required minimum probative value The hearsay rule the rules of quantity, the rule of the oath, and a dozen others belong here These two groups together are rules of *Probative Policy*

The third group of rules invokes *for the exclusion of certain kinds of fact* extrinsic policies which override the policy of ascertaining the truth by all available means These rules concede that the evidence in question has all the probative value that can be required and yet exclude it because its admission would injure some other cause more than it would help the cause of truth and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth Most of these rules consist in giving certain kinds of persons an option—i e a Privilege—to withhold the evidential fact. This third group as contrasted with the first and second, represents rules of *Extrinsic Policy* *Wigmore* § 11

Multiple Admissibility—Evidence applicable to more than one purpose It constantly happens that a fact which is inadmissible for one purpose is admissible for other purposes, while *on the* other hand, a fact which is entirely admissible *so far* as some rules are concerned is excluded because it fails to satisfy some other rule An evidentiary fact in order to become admissible must not only be relevant but also satisfy the Auxiliary rules and the rules of Privilege Now the peculiarity of the Auxiliary rules and the rules of Extrinsic policy which mainly consist in rules of Pri[illegible] that almost all of them are [illegible] their application, for example [illegible] applies only [illegible] (vide s [illegible] ly

a testimonial staten[illegible] and so on (vide s [illegible] ing is inadmissible under the hearsay rule who ought to have been called to [illegible] nd though had it passed the hearsay rule and it must remain excluded, even though had it passed the hearsay rule it could have satisfied the rule for producing the original and the rule of authentication In other words, so far as an evidentiary fact is offered for a particular purpose, as being material to a certain issue and relevant to a certain proposition it must satisfy all the rules applicable to it in that capacity But if the letter above referred to, be offered as an admission of the defendant, because shown to him and assented to, it may be admitted without calling for the writer of it because it is no longer offered as the writer s testimony but as the defendant s admission In other words when an evidentiary fact is offered for one purpose and becomes admissible by satisfying all the rules applicable to it in that capacity it is not inadmissible because [illegible] not satisfy the rules applicable to it in some other capacity and because [illegible] it in the latter capacity *Wigmore* § 13 So necessary [illegible] ertain evidence be admissible or not it is intended to establish for it may be admissible for which it is produced, and the point it is another *Taylor* v *Williams* 2 B & Ad 845 (855) *Per Lord Tenterden C J* Evidence properly admitted for one purpose must be admissible for all purposes *Bank of Bombay* v *Nandlal* 17 C W N 358 (368)=37 B 122 P C The rule is thus lucidly explained by *Park J* in *Willis* v *Bernard* 8 Bing 376, at p 383 where he said "I agree that it is more desirable that such part of the evidence as does not apply to the point to be proved should be withdrawn altogether from the consideration of the jury But in many cases that is im[illegible] as in *Manning* v *Clement* where the plaintiff alleged that the carried [illegible] the trade of a manufacturer of bitters and [illegible] that the bitters were [illegible]; it was held, that trade was illegal althou[illegible] ice that the plaintiff's been condemned in the Court of Exchequer and [illegible] that his bitters had [illegible] was true So in the case of prisoners whose confessions are given in evidence which unavoidably involve the mention of others besides the party confessing But the jury are always cautioned to exclude the statement as against any but the party confessing They also received a proper caution in this case, and, subject to that the letter was properly admitted

Admissibility of evidence The Judge in each case is to decide the admissibility of evidence (*vide* s 136) Questions as to the admissibility of evidence should be decided as they arise and should not be reserved until judgment in the case is given *Abdul Razack*, v *Ma U*, U B R (1897—1901) Vol II, 376, *Basir* v *Girija Nath*, 13 C L J 18; *Lajan* v *E*, 86 Ind Cas 817; *Kapur* v *Emperor*, 50 Ind Cas 481, *Abdul* v *Gunendra*, 82 Ind Cas 974 J Diary, 224; *Gora Chand* v *Ram Narain*, 9 W R 587, *Rama Karam Singh* v *Mangal Das*, 1 A L J Diary, 224 In *Ramjiban* v *Oghur*, 2 C W N 188, at p 190, *Sale J* said "It was suggested on the part of the defendant that the more convenient, if not the right course would be to admit the evidence in the first instance reserving the question of law as to its admissibility [illegible] irse had advantage and [illegible] but having regard to the o[illegible] v *Bhubotaran Nundy*, [illegible] I do not think that course is open to me in the present instance , but see *Ramanuj* v *Dalhinesuar*, 30 C W N 259 (262) The principle of the Evidence Act differs from the English Law in that it defines the evidence which may be given, so that in order to produce any particular evidence it must be shown to be admissible under some particular section of this Act, whereas the principle of the English Law is to assume that everything is admissible subject to certain exceptions *Field Ev* 6 Ed p 69 But where a Judge is in doubt as to the admissibility of a particular piece of evidence he should declare in favour of admissibility rather than of non admissibility The *Collector of Gorakhpur* v *Palakdhari*, 12 A 1, *Madhab* v *Denak*, 21 B 698, *Moriarty* v *London C & D Ry Co* L R 5 Q B, 314 In the last mentioned case *Lush J* said at p 323, 'I also think on further consideration that the evidence was receivable I had formed no definite opinion on the subject at the trial It was a new point and I adopted what I considered to be the usual and the safer course, where evidence is, pressed by one party, and objected to by the other, receiving the evidence at the peril of the party presenting it" Under the Evidence Act admissibility is the rule and exclusion the exception *R* v *Monapuna*, 16 B 661, 668, see also *R* v *Uttam Chand*, 11 B H C R 121, *Gopee Nath* v *Anund Moyee*, 8 W R 169; *Mason* v *Golam* 15 W R 490; but see *R* v *Portbudas*, 11 B H C R 93, *R* v *Ram Chandra Govind*, 19 B 755, *Gujju Lal* v *Fatteh Lall*, 6 C at p 193, *Hareehur* v *Charu Majhee*, 22 W R 355, 356 357 The admission of hearsay evidence is prohibited *Queen* v *Kali*, 7 W R Cr 2 *R* v *Pittambur*, 7 W R Cr 25, *Aman Ali* v *K E*, 13 O C 309=8 Ind Cas 379 *Lulleemonee* v *Shunkuree*, 2 W R 252, *Queen* v *Sheik Mogon* 5 W R Cr , *Queen* v *Ramgopal* 10 W R Cr 75, *Queen* v *Chander Koomar*, 21 W R Cr 77, *Atkia Beggam Muhammad*, 21 C W N 315 (P C)

Objection In England the initiative in excluding evidence is left entirely to the opponent —so far at least as concerns his right to appeal on that ground to another tribunal The Judge may, of his own motion deal with offered evidence, but for all subsequent purposes it must appear that the opponent invoked some rule of Evidence A rule of Evidence which is not invoked is waived *Diaz* v *U S*, 223 U S 450, *Sawyer* v *French* 235 S W 126 But in India it has already been stated that the Court is bound to exclude evidence of irrelevant facts irrespective of objection by the parties *Whitely Stokes* Vol II p 854 see also *Amlar Ali* v *Lutfe Ali* 21 C W N 996 *Narahari* v *Ambabai* 44 B 192 *Sumitra* v *Ramkuar*, 57 Ind Cas 561 *Damodar* v *Jadunath*, 91 Ind Cas 449, *Luchiram* v *Radhacharan* 31 C L J 107 It is perfectly true said *Mr Justice Mookerjee*, in *Ambar Ali* v *Lutfe Ali*, 21 C W N 996 at p 1001 ' as pointed out by *Sir Richard Couch* in *Miller* v *Madho Das*, L R 23 I A 106 that an erroneous omission to object to evidence which is irrelevant and consequently inadmissible under any circumstances, does not make it admissible, See also *Harak* v *Bishnu*, 8 C W N 101 The moment a witness commences giving evidence which is inadmissible, he should be stopped by the Court *R* v *Pitambur* 7 W R Cr 25, see also *R* v *Chander Kumar*, 24 W R Cr 77 *Lulleee* v *Shunkuree*, 2 W R 252, *R* v *Kallychurn* 7 W R Cr 2, *Re Kedar Nath* 18 W R Cr 16, *R* v *Ramgopal* 10 W R Cr 75, *Petumbar* v. *Rutten*, W R (1864) 213 It seems that this rule is applicable to civil cases as well

5 **Time of objection** The general principle governing the time of the objection is that it must be made as soon as the applicability of it is known to the opponent *Wigmore* § 18, *Kissen Kamini* v *Ram Chandra* 12 W R 13, *Sheetal Pershad* v *Jummejoy*, 12 W R 241 For evidence contained in a specific question the objection must ordinarily be made as soon as the question is stated, and before the answer is given, unless the admissibility was due, not to the subject of the question but to some feature of the answer *Wigmore* § 18 In *Bulley* v *Buttler*, 2 B & C 431 443, *Holroyd, J* said "If the objection was known *a priori* it should have been made before the evidence was given When an irrelevant document is tendered, an objection should be made at that time objection as to the mode of proof of a particular document should be taken when it is tendered in evidence" *Abdul Sattel* v *Gunendra* 82 Ind Cas 974 (976) see also *Sundari* v *Gaganendra*, 9 C W N 111 So when such objection is not taken in time it is considered to be waived *Kalulananda* v *Shivanand* 63 Ind Cas 625 So when rent receipts were admitted in evidence without objection in the Court of first instance no objection could be taken in the Appellate Court that they were not properly proved *Rajeswari* v *Prilin Behary* 25 C W N 881 = 62 Ind Cas 647, see also *Gunendra* v *Rajendra* 1 C W N 530, *Prannath* v *Durgatarini*, 14 C L J 578 In fact this proposition rest upon a well known principle with regard to the rule of evidence and that is this Where an objection has got to be taken as to the mode of proof of a particular document, such objection must be taken at the time when the document is tendered for admission, for any *lacunae* in the mode of proof may then be at once supplied by the party who produces the document and wants to have it proved *Per Mookerjee J* in *Abdul Sattar* v *Gunendra* 82 Ind Cas 974 at p 976 see also *Chooni* v *Nilmadhub* 41 C L J 374 *Manmatha* v *Prolodh* 43 C L J 274 = 99 Ind Cas 279 But irrelevant document does not become relevant for want of objection *Sumitra* v *Ramkuar*, 57 Ind Cas 571 = 5 Pat L J 410

Grounds of objections In *Bain* v *Whitehearen & I R Co*, 3 H L C 1, 16, *Lord Brougham* said "Now it is necessary that when a party excepts to the reception of evidence to the rejection of evidence or to the direction of the Judge given to the jury whatever is the subject matter of this exception, he must state the ground of his exception, otherwise he cannot except If he objects to the reception of A's evidence he must show why it should not be received, as by stating that A is an incompetent witness If on the other hand he objects to the rejection of A's evidence, he must show why it should not be rejected, as for instance that A is a competent witness, and that his evidence is admissible, and that the rejection of his evidence is contrary to law In all these cases the ground of objection must be clearly stated, and beyond the ground of objection thus stated the court is not at all bound to look

Waiver of objection An objection may of course be expressly waived Of implied waivers, the usual instance is that of failure to make objection at the proper time The question whether a party is bound by his consent that the examination of witnesses before a Judge should be dispensed with and another method substituted for the Judge's taking cognizance of oral testimony is regulated partly by the Evidence Act and partly by the law and practice relating to the Civil and Criminal Procedures and in the absence of any such law by the discretion of the Court What is regarded by such procedure is not the law relating to the relevancy of evidence but the law under which the evidence shall be taken as contained in O XVIII, r 4 of the Civil Procedure Code The parties have a right to waive such rules of procedure as are intended to protect a personal interest and are not based on public policy So where the lower Court admitted in evidence on the consent of parties evidence as to the death of a person which could not be admitted in evidence under s 33 it is nonetheless binding upon the parties *Krishna Reddy* v *Sundara Reddy*, (1914) M W N 931

When the opponent fails to object to the admission of the document, this is, of course, on general principles a waiver as to the need of any evidence authenticating its genuineness, and this waiver is commonly held to extend to the fact of authority of an agent purporting to sign the document for a principal but not as the legal sufficiency of the instrument for any purpose *Wigmore* § 2132 It is a familiar principle that, if testimony is offered which is relevant

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but repugnant to some rule of evidence, it must be objected to at once; otherwise the objection will be considered waived *Barton Coal Co* v *Cox*, 39 M. 1; 14 M I [illegible]

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have so consented they cannot afterwards object *Gonnabathula* v *G. Cheimaya*, 22 L W. 756 The question of the mode of proof is a question of procedure and is capable of being waived by a party *Mt Bibi Kaniz Zainab* v. *Syed Mobarak*, 72 Ind Cas 748

Where the genuineness of a document relied on by a party was not disputed by the opposite party, and the only question was as to its binding character, the opposite party must be deemed to have tacitly waived its proof by consenting to its admission in t [illegible] admissibility for the [illegible] 10 M L J 242 S[illegible]

[illegible] not competent to the admissibility. *Ikchint* [illegible] *ddin*, 72 Ind Cas 985= [illegible] d; " We may here point [illegible] *Miller, Official Assignee* [illegible] neous omission in the trial Court to object to an admission which was irrelevant did not make it relevant and admissible in evidence; still as explained in *Girindra Chandra* v. *Rajendra Nath*, 1 C W N 530, an objection that a document, which *per se* is not admissible in evidence, has been improperly admitted in evidence, cannot be entertained in the Court of Appeal, when, if the objection had been taken in the trial Court it might have been met and the proceeding regularised" See also *Manmatha* v *Probodh*, 43 C L J 274 When a document was produced and marked in the presence of the opposite party who took no objection there but an objection was taken in appeal *Held* that under those circumstances the Court, may take it until the contrary is shown that the formal proof of the document was waived by consent of parties *Collector of Gunjam* v. *Bhimayya*, 24 L W 677

The absence of an objection [illegible] *per se* irrelevant or inadmissible [illegible] taken as to the mode of proof. [illegible] 1929 Pat 739; *Kumaon Ry Co* v [illegible] 63 Ind Cas 625; *Sumitra* v *K*[illegible] advocate cannot so alter the character of the testimony as to convert into corroborative evidence that which the law regards as merely fit for rejection as hearsay *Limyam Hong* v *Lal Choom & Co*, 47 C L J 288=30 Bom L R 757=A I R 1928 P C 127; *Jagadish* v *Harihar*, 40 C L J 39=78 Ind Cas 219

When documents are admitted in evidence with or without formal proof in the first Court it is [illegible]

[illegible] was raised does not make it [illegible] 449; *Ma Sit* v. *Annamalai* [illegible] 881; *Behrai* v *Amir Chand*, [illegible]

6.

6 Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places

Relevancy of facts forming part of same transaction

Illustrations

(*a*) A is accused of the murder of B by beating him Whatever was said or done by A or B or the by standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact

(*b*) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and goals are broken open The occurrence of these facts is relevant as forming part of the general transaction, though A may not have been present at all of them

(*c*) A sues B for a libel contained in a letter forming part of a correspondence Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained are

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Scope of sections 6 to 55 The Evidence Act lays down in ss 6 to 55
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hypothesis, while the first class of rules refers to the use to be mad f the materials, that is, the inference to be drawn from the hypothesis To prove relevant facts parties have unrestricted power to make admissions But in regard to the logical conclusions to be deduced from the existence of the facts proved or admitted, the parties have no power to alter the directions given to the Courts by the legislature or to empower the Courts to act in a manner declared by the legislature to be illogical *Krishna Reddy* v *Sundar Reddy* (1914) M W N 931

Scope of the section Acts, declarations, and circumstances which constitute, or accompany and explain, the fact or transaction in issue, are admissible, for or against either party, as forming parts of *res gestae* *Phip Ev* 54 13 *Halsbury* § 585 All facts which are parts of the same transaction are relevant to each other so that, when one of such facts is in issue, the others are admissible Such facts which are thus parts of the transaction in issue are generally known as *res gestae* *R.* v *Ellis* 6 B & C 154, *Carmarthen and Cardigan Rail Co* v *Manchester Rail Co*, (1873) L R 8 C P 685 But in admitting facts as part of *res gestae* care should be taken that facts which are *res inter alios actae*, are not proved *Hyde* v *Palmer*, 32 L J Q B 126 *Wright* v *Tatham*, 5 Cl & Fin 760 H L, *Agassiz* v *London Tramway Co*, 21 W R 179 (Eng) Relevant facts are usually those which are either the cause or the effect of a relevant fact or a fact in issue (*vide* s 7) But where the interference is wider it may also be drawn from facts which either accompany or explain the transaction in issue *Rouch* v *Great Western Rail Co*, (1841) 1 Q B 51

Ordinarily the facts of strangers to a transaction,—*res inter alios actae*,—as they are called, that is things transacted by others, are excluded from admission Thus what others did or said about a particular matter would *prima facie* be
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whatever surrounding circumstances may be necessary to explain the nature of the prominent or principal fact in a case, are received as original evidence. *Goodeve Ev 427* These facts when the nature and quality of the fact are in question, are either to be regarded as part of the act itself, or as the best and most approximate evidence of the nature and quality of the act, their connection with the act either sanctions them as direct evidence, or constitutes them indirect evidence, from which the real motive of the actor may be duly estimated *Starkie on Evidence*, p 87.

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plural of the English equivalent—facts, transactions—as the details or particulars of which a single fact or transaction might be composed It would seem that either form was quite legitimately used as meaning what we should express by the singular form,—an occurrence, a transaction" *Prof Bradley Thayer—in 15 American Law Review 5, 81* The term was used for the first time in 1637, in

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6. **6** Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places

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arose, and forming part of the correspondence in which it is contained relevant facts, though they do not contain the libel itself

(d) The question is, whether certain goods ordered from B were delivered to A The goods were delivered to several intermediate persons successively Each delivery is a relevant fact.

Scope of sections 6 to 55 The Evidence Act lays down in ss 6 to 55 certain rules [illegible] the Court is t[illegible] levance or logical bear[illegible] ished from rules laying [illegible] ed to base its conclusi[illegible] ught to the [illegible] hese rules [illegible] for the [illegible] of the materials that is, the inference to be drawn from the hypothesis To prove relevant facts parties have unrestricted power to make admissions But in regard to the logical conclusions to be deduced from the existence of the facts proved or admitted the parties have no power to alter the directions given to the Courts by the legislature or to empower the Courts to act in a manner declared by the legislature to be illogical *Krishna Reddy* v *Sundar Reddy* (1914) M W N 931

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6. subject of enquiry" *Hyde* v *Palmer, supra* While the language of the decisions is by no means uniform, constant advantage being taken of the convenient obscurity of the phrase to cover loose thinking, a tendency is distinctly visible

942. In a marked degree, this is true of the criminal liability of an accused ... into being, if at ... to place before the ... their occurrence ... which circum ... *gestae* themselves provided that an act takes place within the time, space and causal limits allotted to the *res gestae*, the person by whom a particular act was done is not regarded as a material circumstance The thought of *action* something done or carried on implied in the phrase is not, however by any means confined to action by any special one of the parties or by either of them So far as anything in the *res gestae* is done, it may be done by any one How far, in time, space or causation the *res gestae* in any given case may properly extend is evidently a question of administration No arbitrary line can be drawn on the subject Each Case is to be decided upon its own circumstances *Chamberlayne's Modern Law of Evidence* § 2582 *Lord Cockburn* in *R* v *Bedingfield*, 14 Cox Cr C 341, said "Looking to the law as it exist ... *res gestae*, as applied to a criminal case? To ... tever act, or series of acts, constitute, ... and terminate in, the principal act charged as an offence against the accused, from its inception to its consummation or final compilation, or its prevention or abandonment,—whether on the part of the agent or wrong doer, in order to its performance, or on that of the patient or party wronged, in order to its prevention —and whatever ... continuance of the tra ... the suffering ... of the actio ... it or applications for assistance,—form part of the ... and may be given in evidence as part ... n the other hand, statements made ... the part of the wrong doer, actua ... letion of the principal act or other ... ndonment by the wrongdoer—such as, e.g statements made with a view to the apprehension of the offender,—do not form part of the *res gestae*, and should be excluded"

The term *res gestae* though generally applied to the fact or transaction in issue may, as will be seen, be used in the present sense of any relevant act, i e, to indicate the admissibility of such act, and as a part of it, its accompanying declarations This does not, of course, mean that such subordinate acts and declarations are to be regarded as forming part of any main act or *res gesta* *Phip Ev* 55

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attempting to lay down general principles as a rule discuss each case on its merits" *Report of the Select Committee* (1922) In this connection it may also be stated that before accepting any definition not given in the Act, the Court should remember the following warning given in the *Solicitors' Journal* (Vol 20, [illegible] great Jurist as *Prof James Bradley* [illegible] Evidence at p 190. 'A definition is the [illegible] greater probability of a correct use of [illegible]
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action" *Per Cumming J* in *F*[illegible]
Banga Chandra v *Anando*, 35 [illegible]
957, *Emperor* v. *Madhab Laxm*[illegible]
Mallik v *Emperor*, 50 C 10[illegible]
Lukman, 21 S L R 107 So no comprehensive formula of universal application can be stated to determine whether two or more acts constitute the same transaction *Amrita Lal* v *King Emperor*, 42 C 957 In *Reg* v *Sherufalli*, 27 B 131 at p 138 *Chandravarkar J* observed "Here, again, the occasions when the two offences were committed were different, but there was continuity and community of purpose The real and substantial test, then, for determining whether general offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose, or *as cause and effect or as principal and subsidiary acts*, as to constitute one continuous action A mere interval of time between the commission of one offence and another does not itself necessarily import want of continuity, though the length of the interval may be an important element in determining the question of connection between the two For instance, in *Queen Empress* v *Vajiram* (16 B. 411) proximity of time, combined with the case as to intention and

6. subject of enquiry" *Hyde* v *Palmer, supra.* While the language of the decisions is by *no* means uniform, constant advantage being taken of the convenient obscurity of the phrase to cover loose thinking, a tendency is distinctly vi ible *to limit the* expression to the acts or ev
consideration of the tribunal, those out of
parties or the right of another is said to
however, as was said by the Court of Appeals in *Virginia,* ' Facts which con
the *res gestae* must be such, as are so connected with the very transaction or fact *under* investigation as to constitute a part of it" *Haynes* v *Com,* 28 Gratt (Va) 942. In a marked degree, this is true of the criminal liability of an accused The *obligation* of the criminal to respond to society must come into being, if at all by virtue of certain *res gestae* which the prosecution seeks to place before the jury either by the testimony of the eye witnesses who observed their occurrence
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special *one of the* parties *or* by either of them So far as anything in the *res gestae* is done, it may be done by any one How far, in time, space or cau ation the *res gestae* in any given case may properly extend is evidently a question of *administration* No arbitrary line can be drawn on the subject Each Case is to be decided upon its own circumstances *Chamberlayne's Modern Law of Evidence* § 2582 *Lord Cockburn* in *R* v *Beding field,* 14 Cox Cr C 341, said "Looking to the
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terminate in, the principal act charged as an offence against the accused, from its inception to its consummation or final compilation, or its prevention or abandonment,—whether *on the* part of the agent or wrong-doer, in order to its performance, or on that of the
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The term *res gestae,* though generally applied to the fact or transaction in issue may, as will be seen, be used in the present sense of any relevant act, i e, to indicate the admissibility of such act, and, as a part of it, its accompanying declarations This does not, of course, mean that such subordinate acts and declarations are to be regarded as forming part of any main act or *res gesta* *Phip Ev* 55

Phrase inexact and indefinite. "This phrase, as conceded on all hands, is inexact and indefinite
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more can be said for it than that it has been much used in the course of the development of some important aspects of two of these doctrines" *Wigmore Ev.* § *1767.* In the first edition of *Phillip's Evidence,* the phrase occurs but in his fourth edition, he substituted for it the English word *transaction.* **S.**

Transaction, meaning of The word "transaction" is not defined in this Act But a definition of the word is given in *Stephen's Digest of Evidence* There the author says "A transaction is a group of facts connected together to be referred to by a single legal name, as a crime, a contract, a wrong or any other subject of enquiry which may be in issue Every fact which is part of the same transaction as the facts in issue is deemed to be relevant to the facts in issue, although it may not be actually in issue and although if it were not part of the same transaction it might be excluded as hearsay Whether any particular fact is or is not part of the same transaction as the facts in issue is a question of law upor [illegible] ity and on which single Judges [illegible] *Ev Art* 3 This definition has rece[illegible] *Emperor,* 11 C W N 266 (270), *Je*[illegible] Ind Cas. 664=16 Cr L J 184 But this d[illegible] ous definition" *Stoke's Anglo In*[illegible] occurs also in Criminal Procedu[illegible] 235 of Cr Pro Code, the Joint [illegible] e dangerous, if not impossible, to a[illegible] transaction'. An [illegible] altered, the Courts [illegible] a long series of rul[illegible] pronounced conflict of opinion, the reason being that the Courts, instead of attempting to lay down general principles, as a rule discuss each case on its merits" *Report of the Select Committee* (1922) In this connection it may also be stated that before accepting any definition not given in the Act, the Court should remember the following warning given in the *Solicitors' Journal* (Vol 20, 869) [illegible] *of James Bradley* 'A definition is the [illegible] a correct use of [illegible] necessary to define it is also dangerous because one incorrect definition will confound the correct use; etc" The word transaction is used in a limited sense in illustration (a) of this section and in more general sense in the remaining illustrations of the section *Queen Empress* v *Fakirappa,* 15 B 491 (496)

Transaction, meaning of the word in ss 235 and 239 of Criminal Procedure Code "What does or does not form part of the same transaction may be considered to be question of fact in each particular case Certain tests have been laid down in various cases by which it may be determined whether certain acts do or do not form part of the same transaction In some cases it has been held that acts may be considered to form part of the same transaction if there are between these [illegible] ntion and continuity of action" *Per C*[illegible] C W N 327, see also *Binga Chandr*[illegible] v *King Emperor* 42 C 957; *Emperor* [illegible] L R 607, *Khusai Mallik* v *Emp*[illegible] L R 73, *Emperor* v *Lukman,* 21 S L R 107 So no comprehensive formula of universal application can be stated to determine whether two or more acts constitute the same transaction *Amrita Lal* v *King Emperor,* 42 C 957 In *Reg* v *Sherufalli,* 27 B 134 at p 138 *Chandravarkar J* observed "Here, again, the occasions when the two offences were committed were different, but there was continuity and community of purpose The real and substantial test, then, for determining whether general offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose, or as cause and effect or [illegible] nuous action A mere [illegible] and another does not [illegible] length of the interval m[illegible] of connection between [illegible] (16 B. 411) proximity [illegible]

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the *res gestae* must be such as are so connected with the very transaction or fact under investigation as to constitute a part of it" *Haynes* v *Com*, 28 Gratt. (Va) 942 In a marked degree, this is true of the criminal liability of an accused. The obligation of the criminal to respond to society must come into being, if at all by virtue of certain *res gestae* which the prosecution seeks to place before the ... who observed their occurrence ... proof of facts which circum... ... of the *res gestae* themselves ... space and causal limits allotted to the *res gestae*, the person by whom a particular act was done is not regarded as a material circumstance The thought of *action* something done or carried on implied in the phrase is not, however by any means confined to action by any special one of the parties or by either of them So far as anything in the *res gestae* is done, it may be done by any one How far, in time, space or causation ... of the *res gestae* in ... administration ... to be decided ... *Evidence* § 2582 ...

"Looking to the ... applied to a crimi... act, or series of ... terminate in, the principal act charged as an offence against the accused, ... its inception to its consummation or final compilation, or its prevention or abandonment,—whether on the part of the agent or wrong-doer, in order to its performance, or on ... to its prevention,—and whatev... of the transaction, ... suffering party, though in the absence of the accused, during the continu... the action of the latter, actual or constructive,—as e g, in the case of flight or applications for assistance,—form part of the principal transaction, and may be given in evidence as part of the *res gestae*, or particulars of it; while, on the other hand, statements made by the complaining party, after all action on the part of the wrong doer, actual or constructive, has ceased, through the completion of the principal act or other determination of it by its prevention or its abandonment by the wrongdoer—such as, e g statements made with a view to the apprehension of the offender,—do not form part of the *res gestae*, and should be excluded"

... transaction is ... relevant act, i e, issue ... to ind ... accompanying declarations This does not, of course, mean that such subordinate acts and declarations are to be regarded as forming part of any main act or *res gestae* *Phip Ev* 55

Phrase inexact and indefinite "This phrase, as conceded on all hands, is inexact and indefinite in its scope, and is ambiguous in its suggestion of reasons for the doctrine If it were possible to say that it is properly applicable in etymology or in usage, to any particular doctrine, it would be simple enough to ... meaning ... Evidence, ... ttributable ... o preserve ... phrase has ... ious u es, ... to which ... cognized ... rase No

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is or is not part of the same transaction as the facts in issue is a question of law upon which no principle has been stated by authority and on which single Judges *Art* 3 This definition has re *mperor* 11 C W N 266 (270), nd Cas. 664=16 Cr L J 184 'is a curious definition" *Stoke s* transaction" occurs also in Criminal Procedure Code, ss 235 and 239 In connection with s 235 of Cr Pro Code the Joint Committee of 1922 said "We think it would be dangerous, if not impossible, to attempt any definition of the phrase 'in the course of the same transaction' An exhaustive definition is not feasible and if the phraseology is altered, the Courts would be deprived of the guidance which they now have from a long series of rulings on the point We do not find that there has been any pronounced conflict of opinion the reason being that the Courts, instead of attempting to lay down general principles, as a rule discuss each case on its merits" *Report of the Select Committee* (1922) In this connection it may also be stated that before accepting any definition not given in the Act, the Court should remember the following warning given in the *Solicitors Journal* (Vol 20,
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Transaction, meaning of the word in ss 235 and 239 of Criminal Procedure Code ' What does or does not form part of the same transaction may be considered to be question of fact in each particular case Certain tests have been laid down in various cases by which it may be determined whether certain acts do or do not form part of the same transaction In some cases it has been held that acts may be considered to form part of the same transaction if there are between these acts proximity of time, comm of action' *Per Cumming J* in *Tamez Khan* v lso *Banga Chandra* v *Anando* 35 C L J 327, C 957, *Emperor* v *Madhab Laxman* 43 B 1 *sa* *Mallik* v *Emperor*, 50 C 1004 *Crown* v *Ghulam* 1 S L R 73 *Emperor* v *Lukman* 21 S L R 107 So no comprehensive formula of universal application can be stated to determine whether two or more acts constitute the same transaction *Amrita Lal* v *King Emperor*, 42 C 957 In *Reg* v *Sherufalli*, 27 B 131 at p 138 *Chandravarkar J* observed "Here again, the occasions when the
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Transaction, meaning ... is not defined in the Act But a definition of the ... the author says 'A transa... referred to by a single legal name, as a crime, a contract, a wrong or any other subject of enquiry which may be in issue Every fact which is part of the same transaction as the facts in issue is deemed to be relevant to the facts in issue, althou... not part of the same ... particular fact is or ... is a question of law upon which no principle has been stated by authority and on which single Judges have given different decisions" *Steph Dig Ev Art* 3 This definition has received judicial recognition in *Chain Mahto* v *Emperor*, 11 C W. N. 266 (270), *Jawala Sahai* v *Emperor* 34 P R 1914 Cr = 27 Ind Cas. 664 = 16 Cr L J 184 But this definition in ... finition" *Stoke's Anglo Indian Code* ... rs also in Criminal Procedure Code, as ... Cr Pro Code, the Joint Committee ... gerous, if not impossib... transaction' altered, the C... a long series pronounced ... attempting to lay down general principles, as a rule discuss each case on its merits" *Report of the Select Committee* (1922) In this connection it may also be stated that before accepting any definition not given in the Act, the Court should remember the following warning given in the *Solicitors' Journal* (Vol. 20, ... of *James Bradley* ... 'A definition is the ... a correct use of ... it is also dangero... use; etc" The ... this section and ... section *Queen Er*...

... 235 and 239 of Criminal Procedure Code ... he same transaction may be considere... cular case Certain tests have been laid down in various cases by which it may be determined whether certain acts do or do not form part of the same transaction. In some cases it has been held that acts may be considered to form part of the same transaction if there are between these ... y of action" *Per C*... lso *Banga Chandr*... C 957, *Emperor* ... sai *Mallik* v *Emp*... v. *Lukman*, 21 S L R 107 So no comprehensive formula of universal application ... to constitute the same tran... *rufalli*, 27 B ... ns when the ... and commu... ing whether general offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose, or as cause and effect ... nuous action A me... and another does n... length of the interval ... of connection betwe... (16 B. 411) proximity of time, combined with the case as to intention and

6. similarity of action and result, was held to bring several offences as to several fraudulent transfers of property within the meaning of the words 'same transaction' in section 235 of the Code of Criminal Procedure" The word "transaction" suggests ... continuity of action and purpose ... committed, all ... a distinct inte ... or progressive ... 147 = 4 Cr L J 4.0 The words 'the same transaction' ... of Criminal Procedure cannot embrace the examination of all the witnesses ... to the examination of each witness as ... *Shue So*, 3 L B R 231 = 4 Cr L J 489 ... the proceeds would be parts of the same ... me between two acts does not necessarily ... able interval of time ... ing ... ary ... few ... ude, ... ity ... and purpose and ... nts or an accessory ... ute, in the opinion ... be charged with and tried ... series of acts *Crown* v ... *np*, 18 S L R 190 = 27 Cr ... = 27 Cr L J 456; *Emperor* v *Nga Lu*, 19 Cr L J 34 (Bur), *Sanuman* v *Emp*, 19 A L J 391 = 22 Cr L J 641; *Krishna Ayar* v *Emperor*, 8 L W 295 = 1918 M W N 525, *Gunwant* v *Emperor*, 13 N L R 35, *In re Choragudi Venkatadri*, 33 M 502; *Virupana* v *Emperor*, 28 M L J 397, *Rau Subheg* v *King Emperor*, 19 C W N 972, *In re Lockley* 43 M 411; *Emperor* v *Datto Hanmant*, 30 B 49, *Tepanidhi* v *King Emperor*, 5 P L J 11; *Son Daik* v *Crown* 1 L B R 361, *Mga Tha* v *Emperor*, 5 Bur L T 101 = 13 Cr L J 485; *Kushai* v *Emperor*, 50 C 1004, *Pahlad* v *Emperor*, 1 Lah 562 = 21 Cr L J 676; *In re Gam Mallu* 49 M 74 = 48 M L J 308 = 26 Cr L J 1513; *Paut Paban* v *Emperor*, 26 Cr L J 369 "According to its etymological and dictionary meaning the word 'transaction' means 'carrying through' and suggests, we think, not necessarily proximity in time—so much as continuity of action or purpose The same metaphor implied by that word is continued in the illustrations where the phrase used is 'in the course of transaction' *Emperor* v *Datto*, 30 B 49, see also *Emperor* v *Ganesh Narain*, 14 Bom L R 922 = 13 Cr L 833 Acts done in pursuance of a conspiracy must be deemed to be parts of the same transaction *King Emperor* v *Maung Aung*, 1 Rang 604 = 2 Bur L J 224 The transaction of making a series of false entries so as to attribute another cause for the death was in continuation of and pursuance to the same transaction of voluntarily causing grievous hurt with the view of extorting confession *Emperor* v *Balwant*, 14 Bom L R 41 = 13 Ind Cas 825 = 13 Cr L J 137 Theft of a cart from one house and theft of two bullocks from another house in order to remove the cart are parts of the same transaction *Emperor* v *Hari Raoji*, ... ount for the ... v *Jogatram*, ... n the course ... v *Emperor*, ... of trust and ... e transaction ... eror v *Jiban Krishna*, 40 C 318 (criminal misappropriation and falsification of accounts in ... C W N 626; ... 1 C W N 715, ... 61 Where the ... ing and shooting the deceased and frightening any one who tried to prevent them, *held* that the whole affair from the formation to the disruption of the assembly formed one

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transaction *In re Ramaraju Thevan*, 53 M 937 = 32 Cr L J. 30 = A I. R 1930 Mad 857 = 59 M L. J 945 But a transaction of abduction for which two persons have been convicted cannot be said to part of the same transaction when a third person not alleged to have taken part in the abduction proceeds to ... who buys the ... ime *Mongha* ... and receiving of stolen property are not parts of the same transaction *Sultan* v *Emperor*, 29 Cr L J 1030 The expression "in the course of the same transaction" must be understood as including both the immediate cause and effect of an act or ... the other necessary ... of time, ... *Ring*, 53 ... n rule of ...

... 1938 Pat 52, *Abdur* v *Emperor*, A I R 1931 Pat 102 Same transaction is to be interpreted according to facts of each case Knowing the general idea of the words "the same transaction" it is to be determined whether these words do or do not apply to the particular facts of a particular case *Dubri* v *Emperor*, A I R 1931 Oudh 86 The circumstances which must bear on its determination in each individual case are proximity of time, unity or proximity of place, continuity of action and community of purpose or design *Amrit Lal Hazra* v *Emperor*, 42 C 957, see also *Superintendent* v *Monmohan*, 19 C W N 672, *Emperor* v *Jethalal*, 29 B 449, *Emperor* v *Datta*, 30 B 49

Transaction—what facts form parts of A transaction consists both of the ... acts, whether spoken ... done or any other ... parts of transaction ...

Thompson v *Tre*...

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L C J said "It is not so clear that her declarations made at the time would not be evidence under any circumstances If she declared at the time that she fled from immedia...

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... departing ... tinuance." the realm is a continuing act, and these ... In the same case *Park J* observed. "I am satisfied that declarations made during departure and absence are admissible in *evidence* to show the motive of the

departure It is impossible to tie down to time the rule as to the declarations we must judge from all the circumstances of the case, we need not go the length of saying that a declaration made a month after the act would of itself be

letters So where the questions were whether a person who had remained abroad for some years had acqu
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tion *Doucet* v *Geoghegan* 9 Ch D 455 But declarations and statements are admitted in evidence as parts of *res gestae* or transaction under two distinct principles Or
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rule but defines those classes to which the rule is in its nature not applicable *Vide Wigmore* § 1745 One depends for its admission on the principle of spontaneous declaration and the other as part of the *res gestae* on the principle of verbal act doctrine But acts are not parts of the same transaction unless they were done substantially at the same time although they are similar in other respects *R* v *Bridseye* 4 C & P 386 In that case the prisoner was charged with stealing pickled pork a bowl some knives and a loaf of bread He went to

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lative instances or because the similar facts have occurred in such close connection in point of time or place, or other parti ... one continuous transaction *Phip Ev* 47, see al
C A cited in *Ibid*, *Apothecaries* v. *Jones* 17
B 458, *Clark* v *R* 14 Q B D 92 *cited in Phi*

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streets there is an unexpected collision between two men, entire strangers to each other, then the res gestae of the collision is confined within the few moments it occupies. When again there is a social feud in which two religious factions, as in the case of the Lord George Gordon disturbances or of the Philadelphia riots of 1844, are arrayed against each other for weeks, and are so much absorbed in the collision as to be conscious of little else, then all that such parties do or say under such circumstances is as much part of the res gestae as the blows given in homicides for which particular prosecutions may be brought. 1 Whart. Ev. § 259; Lebeck v. Herrick, 49 Ohio St 25; Lank Fechtner, 104 Mo App 368 (two years); Smith v. Williams, 87 Ga [illegible]

In Pool v. Hunt, 2 Bing., 101, Lord Wensleydale, said: "It is impossible to tie down to time the rules as to the declarations." It must be always borne in mind, however that it is the connection with, or illustration of, the main fact which constitutes the admissibility of this species of evidence." The point is also well illustrated by Mr. Starkie when he says: "If, for the sake of illustration, the question for wha [illegible] B were material to the issue, what A [illegible] ant, it may be conclusive [illegible], and the fact of payment were not material to the issue, then although A at the time of [illegible]

[illegible]

not aware of any case, where the act done is, in its own nature, irrelevant to the issue, and where the declaration per se is inadmissible, in which it has been held that the union of the two has rendered them admissible."

The ex[illegible] means the complete criminal transact[illegible] the act of the accused until the end [illegible] the res gestae under which it is [illegible] wholly on the character of the crime ar[illegible] Foley, 113 La. 52 = 104 Am. St. 493 [illegible] circumstances must be resorted to for the purpose of proving the commission of the particular offence charged, the proof of those circumstances involves the proof of other acts, either criminal or apparently innocent. In such cases it is proper that the chain of evidence should be unbroken. If one or more links of [illegible] soner has [illegible] he Court [illegible] ted and [illegible] why the [illegible] shall explain them

[illegible]

ment belonged to another man; that it was taken from the house the night preceding the murder; that the prisoner was there on that night and that the pistol was seen in his possession on the day of the murder, just before the fatal act, is [illegible] cy to prove the prisoner [illegible] a part of the transaction, [illegible] or involve guilt, makes [illegible]

[illegible]

Time, space and causation. No uniformity exists in the length of time over which the res gestae shall properly be held to extend. For example, in case [illegible] lar interview the [illegible] tes [illegible] ten

6. years the time covered by the most direct proof of the *res gestae* will be extended to the same limits *Chamberlayne's Evidence* § 2582 Note 2

Territorial limits No limitation has been imposed as to the territorial boundaries within which the *res gestae* facts must occur Those of a sudden quarrel, a shooting and immediate surrender to justice may, for example, occur in the limited space of a hotel bar ... breadth of a continent, or even extend ... v *Ellis* (1899) 1 Q B 230; *R* v *Oliphant*, ... 6 Cr App R 64 The relative complexity between the causal relations of any two cases may well reveal marked differences Causal sequences between the parts of the *res gestae* may be clear They may, on the contrary, present a baffling problem, when conduct seems almost without motive, so deeply hidden live the springs of action *Chamberlayne's Evidence* § 2582 Notes

Written declarations as part of res gestae In *Tustin* v *Arnold*, 84 L J ... itten admission of negligence by ... *gestae, Bailhache J* said: "There is ... whether a given statement is part of a *res gestae* This difficulty arises from the fact that the nature of *res gestae* varies so greatly Sometimes the *res gestae* are acts only, sometimes acts and words combined, sometimes words only, and sometimes a whole transaction which may include letters and memoranda In this case the *res gestae* was a single act—namely, the collision with the motor car In such a case words, even spoken words, do not ... ne and are natural ... fact of collision, so ... vill of the speaker, ... be strictly germane to the collision Spoken words are not relied on here, but if I have correctly described the characteristics which words must have in order to form part of the *res gestae* of a collision, it follows that a written statement can never do so It lacks all those characteristics except two—namely, that it was made at the time and germane to the collision This would be true even if this particular memorandum had been written by the driver of the traction engine; it is *a fortiori* so when, as in this case, the driver of the motor car wrote the memorandum of ... ion engine to sign, and the driver ...

collision But *Mr Phipson* is of opinion ... According to him it is immaterial whether the declarations accompanying and explaining an act are oral or written *Phip Ev 58*

... ircum- ... other ... the prolific parent of others; and each during its existence has its inseparable attributes, and its kindred facts materially affecting its character and essential to be known in order to a right understanding of its nature *1 Greenl Ev § 108* ... are the undesigned ... sible when illustrative ... by a lapse of time ... of any one concerned ... as ... ld be ... part ... uced ... diate ... itary ... thus ... dents ... f the ... nces do not consist of declarations and statements they are introduced as a matter of course, proved by either side without question unless, indeed they get too far away from the main fact, when under rules having no relation to the subject of hearsay, they are excluded It is when they comprise statements, exclamations,

answers to questions, and other verbal utterances by the participants in the act or event, that they occupy the attention of the Courts. If it had been possible to treat verbal utterances made under such conditions *purely as acts, and not in any sense as evidence of the things stated* (*vide infra*), the subject of *res gestae* would not have belonged under the head of exceptions to the Hearsay rule. But declarations of this sort were urged upon the Courts most strongly when they were wanted and needed as evidence of facts to which they referred, and the Courts received them as evidence and thus created another exception to the rule against Hearsay. *Insurance Co* v *Mosley*, 8 Wall U S 397; *Waldele* v *New York*, 47 Am Rep 41. The ground of reliability upon which such declarations are received is their spontaneity. They are the extempore utterances of the mind under circumstances and at times when there has been no sufficient opportunity to plan false and misleading statements; they exhibit the mind's impression of immediate events and are not narratives of past happenings; they are uttered while the mind is under the influence of the activity of the surroundings. *McKelvey's Evidence pp* 311, 315. "The principle of admission is that the declarations are *parcel of the res gestae*." *Per Lord Denman* in *Rouch* v. *G. W. Ry Co* 1 Q B D 51 (60). In this section these facts are treated as relevant facts. *Mr Gulson* however points out that the components of a principal fact are not properly speaking, circumstantial evidence, which term is applicable to those extrinsic facts from which the principal fact, with all or some of its details or components, are inferred or deduced. *Gulson* § 200; *Phip. Ev* 54.

Facts forming part of the same transaction, classification of. The facts mentioned in this section may be considered under the following heads, namely: —(1) Constituent facts, consisting of (a) the facts in issue *per se*, (b) Constituent incidents, (c) Cumulative and continuous transactions and (d) documentary transactions, and (2) accompanying facts, comprising (a) incidents other than declarations, and (b) declarations accompanying acts. *Vide Phipson Ev Chapter VI*

CONSTITUENT FACTS—(a) Facts in issue per se. Facts whether in issue or relevant, are not always admissible in evidence in the sense of being the subject of direct assertion or denial, for they may involve inference of law or fact which is for the Court or jury and not for the witnesses to draw. *Phip Ev* 55. Suppose A sues [illegible] may te[illegible] fact ir[illegible] out [illegible] in a case of infringement of trade-mark, whether the defendant's trade-mark [illegible] to deceive. *North Cheshire Co* v. [illegible] (1901) A C 208 (311) [illegible] 2. [illegible] A is charged with [illegible] testify, to direc[illegible] and his mere[illegible] he might, if the[illegible] to testify that A[illegible] these are infere[illegible] such facts are of a simple nature, or can only be expressed by a direct statement they will necessarily be r[illegible] doubtful the proper course [illegible] constituting or amounting [illegible] 55; *Gulson* § § 122 7.

(b) Constituent Incidents. Constituent incidents may comprise things done, or omitted, either by the principal, or his agents or partly by one and partly by the other. *R* v *Mean*, 69 J P 27; *Phip Ev* 55.

(c) Cumulative and continuous transactions. To prove the stealing of [illegible] by means of a pipe inserted [illegible] years by the same [illegible] v *Firth*, 38 L [illegible] mine for several

S. years the time covered by the most direct proof of the *res gestae* will be extended to the same limits *Chamberlayne's Evidence* § 2582 Note 2

Territorial limits No limitation has been imposed as to the territorial boundaries within which the *res gestae* facts must occur Those of a sudden quarrel, a shooting and immediate surrender to justice may, for example, occur in the limited space of a hotel bar They may on the other hand cover the breadth of a continent, or even extend from one hemisphere to the other *R* v *Ellis*, (1899) 1 Q B 230; *R* v *Oliphant*, (1905) 2 K B. 67; *R* v *Mackenzie*, 6 Cr App R 64 The relative complexity be ... f any two cases may well reveal marked differences ... the *res gestae* may be clear They may ... problem, when conduct seems almost withou... springs of action *Chamberlayne's Evidence* § 2582 Notes

Written declarations as part of res gestae In *Tustin* v *Arnold*, 84 L J ... er written admission of negligence by ... a *res gestae*, *Bailhache J* said. "There is ... case whether a given statement is part of a *res gestae* This difficulty arises from the fact that the nature of *res gestae* varies so greatly Sometimes the *res gestae* are acts only, sometimes acts and words combined, sometimes words only, and sometimes a whole transaction which may include letters and memoranda In this case the *res gestae* was a single act—namely the collision with the motor car In such a case words, even spoken words, do not become part of the *res gestae*, unless they were made at the time and are natural consequence of the collision—words which spring out of the fact of collision so to speak—inevitably and almost without the exercise of the will of the speaker, and are at any rate, spontaneous The word... to the collision Spoken words are not ... described the characteristics which words mu... *res gestae* of a collision, it follows that a ... lacks all those characteristics except two—namely, that it was made at the ... and germane to the collision This would be true even if this particular memorandum had been written by the driver of the traction engine, it is *a fortiori* so when as in this case, the driver of the motor car wrote the memorandum of ... ion engine to sign, and the driver ... he driver's mate signed the driver's ... was no part of the *res gestae* of the collision But *Mr Phipson* is of opinion that the *dictum* is not maintainable According to him it is immaterial whether the declarations accompanying and explaining an act are oral or written *Phip Ev* 58

Basis of the theory The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others; and each during its existence has its inseparable attributes and its kindred facts materially affecting its character and essential to be known in order to a right understanding of its nature *1 Greenl Ev* § 108 ... are the undesigned ... sible when illustrative ... by a lapse of time more or l... concerned whether pa... ndone as well as th... should be necessary ... are part ... not produced ... mmediate ... ntary ... thus ... h incidents ... cter of the ... cumstances ... matter of ... get too far ... subject of ... clamations,

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[illegible] and using threatening language Upon questions of bankruptcy, where the intentions of the alleged bankrupt are often material to be enquired into, it is usual to give evidence of declarations, as furnishing an explanation of transactions in their nature equivocal Thus it has been held, that a declaration accompanying a purchase of goods is admissible evidence, to show whether a person sought is living by buying and selling *Gale v Halfkin*, 1 Stark C 68

"In a case in which murder and robbery have been shown to form parts of one transaction, it has been held that recent and unexplained possession of the stolen property while it would be presumptive evidence against a prisoner on a charge of robbery would similarly be evidence against him on a charge of murder" *Queen Empress v Sami*, 13 M 426 (432)

(a) Incidents other than declarations Questions of evidence in this connection usually arise with regard to declarations, since with other incidents there is less danger of the jury being misled, and the present principle consequently is less often invoked *Phip Ev* [illegible]

(b) Declarations accompanying acts Declarations which accompany a fact in issue or relevant facts become admissible under this section, if they form part of the same transaction *Wright v Tatham*, 5 C & F 670, *R v Bliss*, 5 C & P 5[illegible], *Hyde v Palmer*, 32 L J Q B 126, *Greenan v Manning* Ir. R. [illegible] Cl 125 "Where an act done is evidence *per se*, a declaration accompanying that act may well be evidence if it reflects light upon or qualifies that act" *Coltman J.* in *Wright v Tatham*, 5 Cl & F 6[illegible] = 7 A & E [illegible], 19 Law Quar Rept. 492 In the same case at page [illegible] of 6 Cl & F. *Coleridge J* observed: "The act itself being admissible, whatever accompanies it and serves to explain its character is relevant and admissible also" So when the act of a party may be given in evidence, his declaration made at the time, and calculated to elucidate and expl[illegible]
tute [illegible]
in e[illegible]
the [illegible]
mem[illegible]
through a police cordon is evidence of *res gestae* and is admissible to prove their intention *Maung Tok v Emperor*, 3 Rang 352 = 90 Ind Cas 918 = A I. R. 1925 Rang 351

The act must be in issue or relevant and the declarations must relate thereto The declarations are not admissible simply because they accompany an act, the act must be in issue or relevant *Wright v Tatham*, 5 C & F 670 (689), *Hyde v Palmer*, 32 L J Q B 126 So a statement made by a woman immediately af[illegible]
and is inadmiss[illegible]
1931 Mad 233 = [illegible]
Judgment obser[illegible]
[illegible]

[illegible] mother in law P W 2, made [illegible] cused from her bed on 26th [illegible] statement could only be [illegible] as to form part of the same tr[illegible] ers as the be[illegible] fairly be cons[illegible] down that a mere narrative of a past occurrence cannot explain an act The leading case u[illegible] *Peacock v Tallman*, (1896) 2 Q B 167 [illegible] a statement is no par[illegible] 2, *R v Christie*, (1914) [illegible] v *Meath*, 43 Ir. L T J [illegible] *ld*, 14 Cox 341; *R* v [illegible] 202, *Pokhor Singh* [illegible] 1925 Lah 578; *Khajir* [illegible] 1926 Cal 139, *Srecha*[illegible]*r*, A I R 1930 Lah 3[illegible] *Dhabini*, 10 C 302, th[illegible] luntarily caused

grievous hurt was a statement, made in the presence of a prisoner, by the person injured to a third person, immediately after the commission of the offence The prisoner did not when the statement was made, deny that she had done the act complained of

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submitted by the Sessions Judge that the statement made by the girl was made in the presence of the prisoner and almost immediately after the infliction of the injuries by the tongs I think, therefore, that it falls within the purview of s 6 [see illustration (a)] of the Evidence Act"

In *Chain Mahto and ors* v *Emperor*, 11 C W N 266, the Chowkidar deposed that one *Gopal* ran up to him and stated that he had seen the accused persons murder his m stress whom h had met by assignation and that he had run away from the pla ... What interval of time passed between the ... ent did not appear In declaring this evidence as in admissible *Holmwood* and *Miller JJ* said "We are also of opinion that the statements of *Gopal* are not admissible against the accused Hearsay evidence is ordinarily inadmissible and the exceptions are to be found in the Indian Evidence Act Other exceptions could not and should not be added The learned Sessions Judge has relied on section 6 of the Evidence Act and illustration (a) to it and also *Surat Dhobini's Case*, 10 C 302 The facts of the case of *Surat Dhobini* are very clearly distinguishable There the person who made the statement was dead, and she was the victim ... The

... l on the facts

In order to

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a bystander, it must have been made, as contemplated by section 6 and illustration (a) to it, at the time the transaction was taking place or so shortly before or after it as to form part of the transaction If the transaction has terminated and the statement is made, the statement is irrelevant The admissibility is dependant on continuity The statement to be relevant must be made when the transaction is in progress When the transaction is concluded, the statement of a bystander is clearly inadmissible under the section In the present case Gopal, if he made any statement, made it after the transaction was over We

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that immediately after, on hearing the deceased groan, he went up to him and asked him what was the matter It was objected that what the deceased said in ... not receivable

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murder, a girl heard a cry and then found the deceased weak and injured, and

he made a statement immediately on her coming up to him *Chief Justice* S. *Mohan* admitted it as a part of the *res gestae* In *Hutchins* v *Railroad Co*, 128 Iowa, 279 the plaintiff fell from a street car, by reason of negligence in failure to let down step As she fell she exclaimed, "yes, let down the step after I fall" The declaration was admitted as part of *res gestae* In *R* v *North Cott*, (1916) 1 K B 347, which [illegible]
to an imperative ques[illegible]
stone testimony of [illegible]
pointing to the prisor[illegible]
who threw the stone [illegible]
18 Q B D 537, see also *Reg* v *Wainwright*, 13 Cox C C. 171; *R* v *Pook*, 13 Cox C C 172n

On a charge of treasonable conspiracy, declarations made out of Court by the prisoner that 'when he planned a certain convention, he had not intended to destroy the King and the Government' are inadmissible *R* v *Hardy*, 24 How St Tr 1094 The reason for rejection is thus stated by *Eyre C J* 'Since, if it were otherwise, every man, if he were in difficulty, or in view of one, might make declarations to suit his own case" *Phip Ev 3rd Ed 67.* Where a person was charged with having received illegal gratification under s 161 of the Penal Code, on three specific occasions, in a certain year, from a firm, [illegible]

Conduct [illegible]
in the case [illegible]
the act may [illegible]
I am not aware of any case where the act done is in its own nature irrelevant to the issue and where the declaration *per se* is inadmissible, in which it has been held that the union of the two has rendered them admissible" *Per Coltman J* in *Wright* v. *Tatham*, 7 A & E 361; see also *Patten* v *Ferguson*, 18 N H. 528; *Pinney* v *Jones*, 64 Conn 545

Conduct must be equivocal The utterances are admitted merely to assist in completing or giving legal significance to the conduct Hence the conduct must be equivocal or incomplete as a legal act, before the utterances can be admissible *Wigmore* § 1774; *R* v *Bliss*, 5 Cl & F. 550; *R* v *Wainwright*, 13 Cox 171 "Many acts are in themselves of an equivocal nature, and the effect of them depends upon the intention or disposition from which they proceed which is in general best determined by the expression accompanying them Wherever, therefore, the demeanour of a person at a given time becomes the object of inquiry, expressions, as constituting a part of that demeanour, and as indicating his present intent and disposition, cannot properly be rejected in [illegible]

[illegible] It is not the law that any and all conversation which happened to be going on at the time of an act can be proved if the act can be [illegible] in with the [illegible]omes merely [illegible]ng v *Page*, 4 [illegible] *Rawson* v. [illegible]nted himself [illegible]ten by him [illegible] during his absence were put in evidence *Best C J* in admitting the letters [illegible] an act is [illegible]" But in [illegible] he act in [illegible] *Wright* v. *Tatham*, 7 A & E 361; *Lend* v *Tyngsborough*, 9 Cush 42 But declarations are not admitted to explain previous or subsequent facts *Agassiz* v *London Tram Co*, 21 W R (Eng) 199; *Hyde* v *Palmer*, 32 L J Q B 126

Words must merely aid in completing the conduct—It follows also as a necessary deduction, that the utterances must be such as to serve the assumed

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purpose, namely, give more definite significance to the equivocal or indefinite conduct, by adding a missing part They must be such as do merely this, and not more *Wigmore* § 1775 "The common phraseology," said the learned author "however is, here so loose and inclusive that utterences may be held admissible which do not merely complete and define the very act by serving as a part of it but make assertions about its proceeding facts, and are in effect given credit as hearsay testimony of any other matter that may happen to be connected with the act in time and place *Ibid* So in *Lund* v *Tynesborough* 9 Cush 42, *Fletcher J* said If declaration has its force by itself, as an abstract statement detached from any particular fact in question, depending for its effect on the credit of the person making it, it is not admissible in evidence But when the act of a party may be given in evidence, his declarations made at time, and calculated to elucidate and explain the character and quality of the act so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence . Such declarations derive credit and importance as forming part of the transaction itself Similarly in *Enos* v *Tuttle*, 3 Conn 250 the reason for the admission of such declaration is thus stated "[They were] well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction" See also *Insurance Co* v *Mosely*, 8 Wall 411

'These phrases about 'unfolding', 'elucidating', and 'explaining' the nature of the act,' says *Prof Wigmore* "while not inaccurate in themselves, have served, in the hand of many later Judges, as an open seasame for utterances used purely in an assertive or testimonial way 'Elucidation' and 'explanation', taken literally, are broad enough to include mere narrations of preceding matters, and such has been the service to which these classical terms have frequently been put It must be noted that this application of them is unsound on principle" *Wigmore* § 1775

Words must accompany the conduct in time The declarations must be substantially contemporaneous with the fact—i e, made either during, or immediately before or after, its occurrence—but not at such an interval from it as to allow of fabrication, or to reduce them to the narrative of a past event *Phip Ev 49* citing *Thompson* v *Trevanion* Skin 402 "The question of contemporaneousness says *Mr Phipson* has given rise to much discussion In *R* v *Bedingfield*, 14 Cox Cr 341, it has generally been thought that *Cockburn C J* applied the rule too strictly, that case, however was quoted without disapproval in *R* v *Christie*, (1914) A C 545 On the other hand the dictum of *Denham C J* in *Rouch* v *G W R* 1 Q B 60, a bankruptcy case adopted by *Mr Taylor* (s 588), that 'concurrence of time, though material is not essential seems to err in the opposite direction, substantial though not literal, a concurrence being indispensable (*Lees* v *Morton*, 1 M & R 210, *Agassiz* v *Lond Tram Co*, 21 W R 199, *R* v *Goddard*, 15 Cox 7)' *Phip Ev 57* 'It was at one time thought necessary" says *Mr Taylor* 'that they should be contemporaneous with it; but this doctrine has of late years been rejected, and it seems now to be decided, that, although concurrence of time must always be considered as material evidence to show the connection, it is by no means essential" But in America the old doctrine still obtains Thus in *Enos* v *Tuttle*, 3 Conn R 250, *Hosmer C J* observed, that declarations, to become part of the *res gestae* "must have been made at the time of the act done, which they are supposed to characterise and have been well calculated to unfold the nature and quality of the facts they are intended to explain, and so harmonise with them as obviously to constitute one transaction In *R.* v *Bedingfield*, 14 Cox Cr 341, in which the rule was [illegible] fact was as follows The prisoner had relations with the [illegible] [illegible]tened to kill her by cutting her throat She [illegible] s, with two women as assistants, the prisoner carried [illegible] living a little dista[illegible] They were together in a room in her house sometime He went out, and she was found by one of the assistants lying senseless on the floor, her head resting on a foot stool He went to a spirit shop and bought some spirits, which he took to the house, and went again into the room were she was, both the assistants being at that time in the yard In a minute or two the deceased came suddenly out of the house towards the women with her throat cut, and on meeting one of them she said something

pointing backwards towards the house In a few minutes she was dead In the course of the opening speech on the part of the prosecution it was proposed to state what she said It was objected to on the part of the prisoner that it was not admissible, and *Cockburn C J* said He had carefully considered the question and was clear that it could not be admitted . . Could it be admissible, having been made in the absence of the prisoner, as part of *res gestae*? But it was not so admissible, for it was not part of
something was being done, but something
not as if, while being in the room,
said something which was heard When the witness was called.....
She was first asked as to the circumstances, and stated that the deceased came out of the house bleeding very much at the throat, and seeming very much frightened and then said something, and died in ten minutes It was then proposed to prove what she said, but *Cockburn C J* said it was not admissible. Anything he said, uttered by the deceased at the time the act was being done would be admissible, as for instance if she had been heard to say something, as 'Don't, Harry' But here it was something stated by her after it was all over, whatever it was, and after the act was completed' The propriety of this decision was the subject of two pamphlets, one, by *W Pitt Taylor*, who denied, the other by the *Lord Chief Justice* who maintained, it *Steph Dig Ev p 5* This decision is thus explained by *Prof Wigmore* —Of this ruling it may be said: (1) From the Verbal act point of view, the declarations did not accompany the fatal deed, was not contemporaneous and therefore was rightly excluded, from the same *point of view, moreover, a declaration by one person about the deed of another* could not possibly be received; (2) as involving a question under the exceptions for Spontaneous Exclamations (*vide infra*) the ruling in *Bedingfield's Case* is plainly erroneous, and would almost certainly not be followed in this country, the facts of the case, in respect to the controlling influence of the woman's situation and the recency of the shock, make it one of the strongest in judicial annals The arguments on the ensuing controversy between *Chief Justice Cockburn* and *Mr Taylor* dealt indiscriminately with the Verbal Act precedents, as well as with others more germane
merits of these arguments it is s
England up to that time—the

Mahto v *Emperor*, 11 C W N 266) and under section 32, clause (a) as well as under clause (3) of section 21

Whether declarations and act must be by the same person In *Home* v *Malkin*, 27 W R 340 (Eng), it was ruled that where acts and declarations were by different persons it could not be admitted But though such declarations are often the only ones natural, the rule is by no means so strictly confined It is an every day practice the victim,
or the like,
defendants,
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unless some

nor agents should be rejected (*R* v *Pet*
cannot be taken as invariable, for the
sometimes be both relevant and admissible
Steph Dig art 3, illus(a); *Milne* v *Leistler*, 7 H & N
Cartwright, 5 B & S 1, *Stanley* v *White*, 14 East 339; The *Schwalbe*, Swab 521; *Phip Ev* 58, *Whart. Crim Ev*, 259

Application of Verbal Act doctrine in cases of sale "The declarations of a party when they tend to explain the fact and are necessary for that purpose

6 might be given in evidence As in the case of tender, the declaration of the party of the purpose for which the money is offered is a part of the 'res gestae and must be proved otherwise the transaction cannot be understood" *Sutf's Ev 130* So a declaration accompanying a delivery of money becomes admissible where it shows the nature of the transaction because it helps "to ascertain with what motive an act was done *Clouser* v *Samuel*, 15 N Br 58, *Strange* v *Donohue* 4 Ind 328 To identify land sold declarations by a deceased vendor at the time of the sale, pointing out the parcels, are admissible as part of *res gestae*, i e, the delivery of the deed *Parrott* v *Watts*, 37 L T 755, see also *Jarvey* v *Styring* 29 L T 817 Extrajudicial Statements, being part of the true *res gestae* may constitute or assist to constitute, a sale *Chamberlayne, Ev* § 2623.

Possessor's declaration in cases of adverse possession The declarations of persons in possession of personal property are often received as verbal acts characterizing and explaining the nature of such possession, that is, as part of the *res gestae* Possession unexplained is *prima facie* evidence of ownership in the possessor But such possession is entirely consistent with ownership in another and therefore, the conduct and declarations of the possessor may be material to show the nature of his possession whether as owner, part owner or agent *Burr Jones* § 351 So also in cases of adverse possession by a person all declarations by the occupant importing a claim of title in himself, are admissible as verbal parts of his act of occupation, serving to give it an adverse colour *Wigmore* § 1778 In *McBride* v *Thompson*, 8 Ala 650 653, *Collier C J* said ' It is not to be understood that such declarations are admissible to every conceivable extent True, the affirmation of the party in possession that he held it in his own right or under another is proper evidence as part of *res gestae* which *res gestae* is his continuous possession But his declarations beyond this are no part of the subject matter or thing done and cannot be received as such While it is allowable to prove statements of one in possession as explanatory thereof, it is not permissible to show everything that may have been said by him in respect to the title as, that it was acquired by him *bona fide* and for a valuable consideration was paid for by the money of a third person or his own etc This, we have seen instead of being a part of the *res gestae*, would be something beyond and independent of it' But declarations to show the adverse character of the possession are quite as much in the nature of facts as in the nature of a medium of proof *Webb* v *Richardson* 42 Vt 465 (472) It is the intent to possess, with which the acts are done that gives them their character So declarations which are made at the time of the act done and which are calculated to unfold its nature and quality are admissible in evidence *Stephen* v *McKlay* 36 I A 661 ' The limitation of this doctrine must, however, be observed It assumes that adverse possession is in some way material under the issues of the case (forcible entry, prescriptive title, or otherwise) and that the declarations were made when in possession and that they were not offered except as colouring the occupation Subject to these limitations the use of such declarations for this purpose is never disputed *Wigmore* § 1778 Where the occupier is the lessee of the person claiming adversely his declarations to the effect that he holds the land as a tenant of the person who holds the land in adverse possession are also admissible *Holloway* v *Rakes*, cited in 2 T R 55 The reason for such admission is that the ' possession of the tenant was connected with that of the landlord, which was adverse' *Doe* v *Williams*, Cowp. 21, see also *Davies* v *Pierce*, 2 T R 53, *Peaceable* v *Watson* 4 Taunt 16 *Doe* v *Green* Gow 228, *Carne* v *Nicoll*, 1 Bing N C 430 The relevancy of such declarations may often be regarded as constituent of the right alleged to exist and they may be re[illegible]ved in evidence in behalf of the party asserting As evidence of the facts a[illegible] [illegible] judicial statements of adverse claim are objectionable as h[illegible] *Chamberlayne's Ev* § 2600

[illegible] which a testator [illegible] their nature [illegible] al, of various [illegible] done by the [illegible] of the testator [illegible] *mo revocandi* [illegible] D 212 So

[illegible] light of the circu[illegible] with which it may have been [illegible] it is no revocation' *Per Wilde J*, in *Powell* v [illegible]

declarations of the testator in such cases are evidence where they show the *quo animo* *Dan* v *Brown* 4 Cow 190 Such declarations tend to establish the existence, of a psychological fact i e, the *animus revocandi* *Chamberlayne's Ev* 2622

Statement by agents Under the rule of substantive law enabling one with delegated authority to bind his principal, the extra-judicial statements which are part of the *res gestae* of a contract may be those of an agent. In other words, his unsworn declaration in and of itself may constitute and establish rather than prove the result at which it arrives *Chamberlayne's Ev* 2616

Demand A demand may be constituted by an extra-judicial statement That the statement is in part at least self serving, is not necessarily fatal to admissibility especially where the declarant's position has been fully covered by a reply made by the adverse interest In like manner, a refusal may be so constituted *Chamberlayne's Ev* § 2618

Libel and Slander One whose purpose is to prove that certain statements of a defamatory nature were made, is clearly entitled to show as part of the true *res gestae* the making of such extra judicial declarations These statements are constituently relevant independent of their truth or falsity Should the statement be one for which the defendant under the rules of substantive law, is in no way responsible constituent relevancy is not shown and the declaration is rejected not being as is said, any part of the *res gestae* Extra judicial statements of a third person made to defendant that facts published were true, when ... not hearsay A ... previous libellous

Declarations of a bankrupt. On this principle the declarations of bankrupts on going from and returning home have been received for the purpose of showing the motive and cause of absence, although a considerable time had elapsed *Bateman* v *Bailey*, 5 Term Rep 512 In *Rawson* v *Haigh*, 2 Bing 99 the question was whether a man had absented himself from the realm "with the intent to ... Act" Letters ... admissible in ... "When these ... would not the ... If so, there ... second and third letters, having been written subsequently to the act of departing from the realm, were not admissible in evidence I am clearly of opinion that they were admissible ... and where an act is equivocal, ... admitted In ninety-nine cases o... declarations of the party himself The declarations, in order to be admissible, must be made, or letters written, at the time of the act in question, but it is sufficient if ...

rupt is part of the *res ge*... thereby constitute an act of ... *Ridley* v *Gyde*, 9 Bing 349, *Rawson* ... ne an equivocal ... plain his ... done either ... *Rouch* v *R*... were both ... departure from home, that is continuance of that act shows *Carter* v *Gregory*, 8 Pick 168

was given by way of fraudulent preference, the d clarations of the bankrupt must be admitted, not so much as declarations but as part of his con luct from which inference is to be drawn that the security was given without pressure *Per Bosanquet J* in *Ridley* v *Gyde* 9 Bing 349

Since the declaration ' says *Prof Wigmore* ' is received as a verbal part of the act, it must of course be *contemporaneous with the alleged act of bankruptcy* Any hing said before or after that conduct could have a purely assertive force only and could not be receivable on the present principle This limitation has caused some apparent judicial uncertainty —for example, in cases where the declaration was made after the debtor has absconded and while he was staying in a foreign country There is however, no difficulty of principle in receiving such declarations, the difficulty is merely one of fact in determining the durat on of the conduct constituting the alleged act of bankruptcy The limitation is strict and inflexible, that the declaration must be contemporaneous with the alleged act But as the conduct constituting the alleged act of bankruptcy may extend over a considerable period of time—as where a debtor absconds and stays abroad and then returns—there may be a considerable interval between the mere beginning of the conduct, i e the original departure or closing of the, house and the actual time of the declaration Thus, though the declarations, as always under the present principle must be contemporaneous with the alleged act of bankruptcy the conduct constituting that act may allow for them a wide range of time *Wigmore* § 1783, see also *Thayer's Cases on Evidence* (2nd Ed) 646, 649, *Phip Ev* 75 Commenting on *Bateman* v *Bailey* 5 T R 512, *Mr Christian* said ' If the Court intended to say that what he declared after his return was complete, and when he was doing no act connected with it (is admissible) it is presumed the decision cannot be supported Whilst he is preparing to go, or in the act of going, and during his absence from home, and whilst he is returning or unpacking his portmanteau, etc what he says is part of the act of bankruptcy but when he is only meditating a future act, or speak ing of a past one completely finished, his words surely can have no legal operation than those of any other man See also *Lees* v *Marston* 1 M & R 210, *Peacock* v *Harris* 5 A & E 449, *Bickhouse* v *Jones* 6 Being N. C 65

Declarations as to Domicile If the questions were, whether a person who had remained abroad for some years had acquired a domicile in the country of his residence, *letters* written by him during such residence showing his intention to remain there permanently or otherwise, would doubtless be admissible, as part of the transaction *Doucet* v *Geoghegan*, 9 Ch D 455, *Cockle Cas* 69, *Cruckenden* v *Fuller* 1 Sw & Tr 441; *Platt* v *Att Gen* 3 App Cas 336 *Re Grove*, 40 Ch D 229 237, *Bordie* v *B* 4 L T N S 307, *Spurway* v *S*, (1894) 1 Ir R 385 397 That such declarations says *Prof Wigmore*, ' in the ordinary case that is when made not prior to removal, but during removal or settling, cannot conceivably be governed by the Verbal Act doctrine is more than ought to be asserted But having regard to the element of intent as treated in the law of domicile, it may better be regarded as a separate and independent element material for its own sake and not merely as appurtenant to an act, and therefore may be shown by declarations admissible under the exception for statements of a mental condition *Wigmore* § 1784

Knowledge, belief, good faith etc *A person s knowledge of a given fact* may be shown either by his own declarations or those of others conveying notice or information to him provided that the existence of the fact be first proved aliunde *Thomas* v *Connel* 4 M & W 267 *Vacher* v *Cocks* M & M 353 *Phip Ev* 63 see also *Fabrigas* v *Mostyn* 20 How St Tr 137 Such statements need not, of course be made contemporaneously with the happening of the fact, nor even at the precise time when the existence of the knowledge is in issue, since previous knowledge may be evidence of subsequent knowledge though not *vice versa* *R* v *Gunnell* 16 Cox 154 *R* v *Kaye*, 16 Cox 292, 293 N, *Phip Ev 63*

"Where the question is whether a party has acted prudently, wisely, or in good faith, the information on which he acted, whether true or false is original and material evidence, and not hearsay *Friend* v *Hamill*, 34 Md 298

Statements as regards state of health and bodily feelings In *Aveson* v *Kinnaird* 6 East, 188 the action was upon a policy of insurance on the life of the wife of the plaintiff The only question to be decided in that case was

whether the statement of the insured's good health, given at the time of effecting the policy was false The Court in that case admitted evidence of a friend to whom the deceased stated that she was in a bad state of health *Lord Ellenborough* in delivering the judgment observed · "The question being, what was the state of her own health at a certain period, a witness has been received to relate that which has always been received from patients to explain, her own account of the cause of her being found in bed at an unreasonable hour with the appearance of being ill She was questioned as to her bodily infirmity She said it was of some duration, several days · What were the complaints, what the symptoms what the conduct of the parties themselves at the time, are ... to from ... was that ... examined by the surgeon and certified to be in good health, down to the day when the conversation took place, and ... the witness, and in that view I think ... ee also *R* v *Nicholas*, 2 C & K 246, *h* ... declarations are evidence of contempora ... Le March, 169—179, *Gilbey* v *G* ... v *Barton*, (1912) 1 K B 40 C A It is usually said that such declarations are receivable though they form the only proof of the given condition (*Tay* § *580*), but this has been doubted and it has been suggested that the manifested condition and not the sickness itself, is the true *res gesta* to be explained (*Thayer, 15 Am L R 98 101*) So, when the terms upon which husband and wife have lived are material, their letters to each other (*Trelawney* v *Coleman*, 1 B & Ald 90), or to third persons (*Wills* v *Bernard*, 8 Bing 376), are admissible evidence of that fact, though not of the truth of all the matters stated *Phip Ev p 61* Where the attempt is made to use the independently relevant statement in a probative capacity *e g*, as showing some relevant mental condition or state, it cannot properly be classified as part of the *res gestae* The existence of mental condition or state ... and may as such, be properly deduced ... *gestae* Being however, psychological fac... tion, the extra judicial declarations or ... cannot well be part, of the *res gestae* prop ...

Declaration by accused found with stolen goods On a charge of larceny, when the accused is found in possession of the stolen goods, and this circumstance is offered against him, the accused's use of his own declaration in exoneration, may be treated from the point of view of several principles *Wigmore* § 1781. In *R* v *Abraham*, 3 Cox Cr 430, which was a case of burglary, the defendant had said, before suspicion existed, that he found them in a field *Alderson B* ... ssion of the stolen property ... arch made, he had not the ... *rouhurst*, 1 C & K 370, ... 70; *R* v *Wilson*, 2 F & F

Other declarations Statements made by the guardian of a minor, when borrowing money on behalf of the minor are admissible as *res gestae* *Hanooman* v *Musst Babooee*, 13 M I A 393 at p 419 Where a person's opinions at a given time are material, *per se* and irrespective of any act, expression thereof, made at such time, are receivable *R* v *Hardy*, 24 How St Tr 1066 These expressions of recognition by the spectators were admitted, to prove that a caricature resemb... object has been co... and explain, so ... explanatory of act ...

Declarations under this section, whether an exception to the Hearsay Rule The theory of the Hearsay rule is that, when a human utterance is offered as evidence of the truth of the fact asserted in it the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination If, therefore, an extra judicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted,

S. the Hearsay rule does not apply The utterance is then merely not obnoxious to that rule It may or may not be received according as it has any relevancy in the case, but if it is not received, this in no way due to the Hearsay rule For example in a prosecution against a defaulting embezzler *Doe,* it is desired to show that after leaving his employment, he concealed himself and passed under a false name here his statement 'My name is *Roe* is not offered to evidence that his name was in truth *Roe*, on the contrary, it will be shown that his name was *Doe*, and the statement is not used as hearsay Or, on an issue of insanity, it is offered to show that the party said, "I am the Emperor of Africa here the utterance is not offered as evidence that he was in truth the Emperor but, on the contrary, as circumstantially indicating his mental aberration Again, in an action upon a warranty of a horse, it is offered to show that the defendant at the time of the bargain asserted that the horse was only four years old here the plain ... prove that the horse is nevertheless twelve ... defendant's statement with any view to using ... with just the contrary ... damages in an action for battery ... just before the assault provoked ..., here the defendant by no means desires the jury to take this utterance as evidence of the truth of the fact asserted he would be much disappointed if they should accept it in that aspect, his purpose is merely by this utterance to evidence the anger which he naturally felt upon hearing it The prohibition of the Hearsay rule, then, does not apply to all words or utterances merely as such The Hearsay rule excludes extra judicial utterances only when offered for a special purpose, namely as assertions to evidence the truth of the matter asserted *Wigmore* § 1766, *Vide also* S 60 *of the Evidence Act*

When a declaration accompanies an act or conduct it is admissible under this section if it explains the act or conduct *Hyde* v *Palmer* 30 L J Q B 126 *Graham Hotel* v *Manning* I R 1 C L 125, *Agassiz* v *London Tram Co*, 21 W R 199 *Phip Ev 3rd Ed* 48 Such declarations attach to the act or conduct some legal effect The conduct or act standing alone has no definite significance or at best is equivocal, and its whole legal purport or tenor is to be ascertained precisely by considering the words accompanying it These declarations are not assertions to evidence the truth of the matters asserted So they do not fall within the rule of Hearsay evidence These utterances are admitted in evidence not in violation of section 69 of the Evidence Act but as verbal part of the Act or in the common phrase as verbal acts *Vide Wigmore* § 1772 Declarations of a party said *Clifford J* in *Insurance Co* v *Mosley* 8 Wall 411, to a transaction though he was not under oath, if they were made at the time any act was done which is material as evidence in any issue before the Court, and if they were made to explain the act or to unfold its nature and quality, and were of a character to have that effect, are treated, in the law of evidence, as verbal acts and, as such, are not hearsay but may be introduced with the principal act which they accompany and to which they relate as original evidence because they are regarded as a part of the principal act, and their introduction in evidence is deemed necessary to define that act and unfold its nature

... ence of ... 47 49 ... P 653 ... ylesford ..., 6 App ... admis... ,70 In ... ir from ... because it is a statement That a given declaration was made is simply a fact which should be allowed to give rise to any relevant inference which may properly be drawn from its existence ... within the range of the *res gestae* ... under may be admitted in evide... state ments may constitute the u... mong the principal facts to be ... ner so

i e, unconditional by evidence of any other fact, and are covered by the paramount right of every litigant to establish the *res gestae* of his case by the best evidence which it is practically in his power to produce It will not be forgotton, however, that the relevancy of such statements when thus employed is, like that of other *res gestae* facts, constituent rather than probative *Chamberlayne* § 2593, *Whart Cr Ev* § 266

[illegible] proved when they are constituent [illegible] question can well be raised In [illegible] *per se* The relation which such facts sustain to the existence of the right or liability asserted in the action has been denominated as constituent facts The effect of unsworn statements when thus used on an issue of right or liability present to the tribunal a question of substantive law Thus, on an indictment for perjury the fact that the defendant spoke the words now said to be false has no proper connection with the rule against hearsay It is simply a verbal act which assists, with other facts, to constitute the liability with which the accused is charged As such, evidence of this character is admissible as a matter of course, a *res gestae* or constituent fact So in a trial of a civil action on an oral contract any material extra judicial statement made by either of the parties during the period of negotiation in which an agreement is said to have been reached is merely a *res gestae* or constituent f[illegible]

[illegible] of practical consequence except for purposes of clearness The fact to be proved may in any case be established equally well circumstantially or directly It is for example, in the case assumed of an oral contract, by no means essential to admissibility that the unsworn statements of the parties should embody or constitute in and of themselves by a formal offer and acceptance, the precise and entire agreement Much may be left to the interpretation of circumstances surrounding the transaction. Statements of the parties, however, still perform [illegible] to the contract of the parties

[illegible] The evidence furnished by the independently relevant *res gestae* declaration is primary Where the extra judicial unsworn statement is used as evidence of the facts asserted, a superior grade of evidence is possible, i e, the testimony of the original declarant on the subject. No better or more convincing evidence of the existence of a statement can be *given than the testimony of the reporting witness who says that he heard it made* In other words, while the reporting witness, in both cases testifies directly to the declaration itself, he states a fact when the unsworn statement is to be used as hearsay which tends to establish the truth of the facts asserted only in a circumstantial way Superior to this, is the direct testimony of the original observer whose statement is reported to the tribunal *The fact, however, that the* statement was made is provable by the primary evidence of any person who heard it A statement which is irrelevant is to be excluded, not because it is a statement, but for the reason that under the fundamental rule it is not evidence, because not relevant Should such relevancy appear, on the other hand, it is not objectionable that the declaration is self serving Nor need the relevancy, provided it exists, rest upon any particular ground, such as contemporaneous incorporation with a principal fact On an enquiry as to what was actually said, however, the subjective mental condition of the declarant, the extent of his knowledge or his motive to misrepresent, are naturally immaterial So long, therefore, as relevancy is preserved the unsworn declaration may precede or follow, even by considerable interval, a principal fact with which it is logically connected.

The making of the independently unsworn statements must be proved by proper evidence Hearsay, for example extra-judicial statements used in their assertive capacity, will be rejected when offered for the purpose Instances of the independently relevant use of unsworn statements as constituently relevant

6. are very numerous On close parallel lines with this employment are found examples of the probative use of such declarations A particular statement may be regarded as employed in either capacity, according as the specific words themselves effect the legal result which they contemplate, in which case the relevancy is constituent, or, on the other hand, tend to prove the existence of a relevant mental state, in which event their relevancy is probative *Chamberlayne's Ev* § 2596

Should the unsworn statement in and of itself, logically tend to establish the actuality of the fact in support of which it is adduced, judicial administration is satisfied Nothing further need be shown We are not asked to believe that the declaration states the truth We are merely made to know that it exists How much the maker of the unsworn statement knew about the matter or what was his motive, if any, to misstate the truth need not be inquired It is not surprising to find that self serving declarations are perfectly admissible, although statements in derogation of title are equally competent under proper circumstances *Chamberlayne's Ev* § 2605

Declarations by by standers The independently relevant statement may be that of a by stander "Courts, so far as they can, are disposed to receive in evidence whatever can throw any light on the matter in issue, and advance the search after truth No doubt, for that reason, in the case of an exclamation by any one in a crowd when an accident occurs and the conduct of a particular person is in question, it may be asked whether some one did not call out 'shame'', for it is part of the *res gestae*" *Per Pollock C B* in *Milne* v *Leisler*, 7 H & N 786 Wherever it can fairly be inferred that the declarations of such a person affected the action of the participants themselves in some essential particular, or promoted the doing of some important act, the evidence will be received The facts that the declaration offered was made while the *res gestae* was going on is not sufficient ground for admitting the statement So the relation of causation is deemed essential According to judicial custom in the United States, evidence of the extra judicial statement any legitimate purpose connected with part of the *res gestae* *Chamberlayne Ev* x 79, where it was held that unless some common object be proved the declarations of the participants if neither parties nor agents, should be rejected ' But this limitation" says *Phipson* "cannot be taken as invariable, for the excl — a be both relevant and admissible" *R* cright 5 B & S 1, *Stanley* v *White*,

The same administrative course is adopted where the exclamation of one standing near is felt to be necessary or expedient for connecting other facts into the narrative of significant events These declarations of by standers are not offered in their assertive capacity, i e. as evidence of the facts stated *Chamberlayne's Ev* § 2597

Proof of such declarations not subject to limitations of Hearsay Rule These declarations can be proved whether the declarant be called as a witness or not (*Dysart Peerage*, 6 App Cas 516); or even though he would be incompetent if so called (*Bateman* v *Bailey*, 5 T R 012; *Aveson* v *Kinnaird*, 6 East 188, *Aylesfrod Peerage*, 1 App Cas 1) Nor is it material whether the declarant be alive or dead at the date of the trial (*Dysart Peerage, supra*) *Phip Ev p 59.*

Verbal Act doctrine—Strict interpretation of—much valuable evidence is left out From the illustrative cases given above it is clear that much valuable evidence cannot be admitted if the Verbal act doctrine be too 'strictly' followed as in *R* v *Bedingfield*, 14 Cox 311 This case was the subject matter ... Justice ... rule on ... its Law ... company ... it either ... matters ... tempora ... respect"

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[illegible] of the transaction, is a relevant fact In *Chain Mahto* v *Emperor*, 11 C W N 266 at p 270 the Court said . "We are also of opinion that the statements of *Gopal* are not admissible against the accused They are hearsay and proved only by those who heard them They were not made in the presence of the accused Hearsay evidence is ordinarily inadmissible and the exceptions are to be found in the Indian Evidence Act Other exceptions cannot and should not be added" Then it adds at p 271 "In order to make the statement of a by-stander admissible, and *Gopal* must be supposed to be a by stander, it must have been made, as contemplated by section 6 and illustration (*a*) to it, at the time the transaction was taking place or so shortly before or after it as to form part of [illegible] and then the statement is [illegible] the first part of their [illegible] same judgment In the [illegible] olates the Rule against [illegible] But in the latter part it is hinted that had the statement been made during the continuance of the transaction it would have been admissible under this section So illustration [illegible] admit declarations which do not violate the [illegible]

§ 1772

Declarations falling under Verbal Act doctrine must not be confused with Spontaneous Exclamations Certain kinds of statements are admissible, by universal concession, but which do not fall within the Verbal Act doctrine The typical case presented is a statement or exclamation, by a participant, imme-[illegible]

[illegible] v *State*, 83 Ala 289 These exclamations differ from declarations falling under the Verbal Act [illegible] the latter class [illegible] they clearly do involve the testimonial use of the assertion to prove the truth of the fact asserted,—for example, when the injured person declares who assaulted [illegible] whether the by stander at an [illegible] § 17[illegible] Some of these [illegible] under the Indian Evidence [illegible] v *Troyanes* [illegible] *Sarat* [illegible] 19 C 302, *Chain Mahto* v *Emperor*, 11 C W N 26[illegible] In the last mentioned case the facts of which are stated at p 102 the Court observed "In the present case

Gopal if he had made any statement, made it after the transaction was over We do not exactly know what the interval between the murder of Lily and Gopal's statement to the Chowkidar was Gopal was not then in such condition

of his fabricating evidence or his being
e out his state of mind to be such as the
He was perfectly in his senses at the

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admitted in evidence had the other requirements been fulfilled But those

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res gestae or as being made in the same transaction Similarly it has been held that section 11 is controlled by section 32 of the Act *Bela Rani* v *Mohabir*, 34 A 341=9 A L J 351=14 Ind Cas 116, see also *P D Sethna* v *Mirza Mahomed*, 9 Bom L R 1047 dealt elaborately under section 11

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excitement n es their
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response to the actual sensations and perceptions already produced by the external shock Since this utterance is made under the immediate and uncontrolled
of period when considerations of
to bear by reasoned reflection, the
or at least, as lacking the
usu essing the real tenor of
the m, and may therefore be
rec *State* v *McLaghlin*, 138
La which was an action for
assault and battery upon the wife of the plaintiff, *Lord Holt J* "allowed that what the wife said immediately upon the hurt received, and before she had time to devise or contrive anything for her own advantage, might be given in evidence" In *Aveson* v *Kinnaird*, 6 East 193, counsel for the plaintiff contended that
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editation, and for that reason
explanatory of the mind and purpose of the actor as it is involved in that fact, they are presumed to be as veritable, as reliable, as the fact itself, and would

guarded "in its practical application, there is no principle in the law of evidence more safe in its results In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, when uncontradicted, as conclusive Their probative force would not be questioned" *Insurance Co.* v *Mosley*, 8 Wall 397; *Brownell* v *R. Co*, 47 Mo 246; *Harriman* v. *Stoe*, 57 Mo 93

The reason for their reception is thus forcefully stated by *Brown J* in *State*

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giving any weight to such statements made by a declarant, the Court must be
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Reason for accepting such statements In order to admit evidence of such statements, death, absence, etc, need not be shown This kind of statement is

*When a person receives a sudden injury, it is natural for him, if in the possession of his faculties, to state at once how it happened Metaphorically, it may be said, the act speaks through him and discloses its character" *Murray* v *Boston & M. B* Co, 72 N. H. 32, 37.

6. not admitted, as an exception to the [illegible]

be obtained from the same person
for resorting to it" *Wigmore* § 1[illegible]
out the party's only defence"
Because "it is impossible for a witness to convey such scenes to the mind and their effect and influence upon it," so this kind of evidence is more convincing than the testimony of the persons themselves sometime after the occurrence *Mobile & M R Co* v *Ashcraft*, 48 Ala 31 "We merely say that, whatever force is given to dying declarations as the utterances of those who on account of their peculiar situation may be relied on to tell the exact truth as it appears to them must needs be accorded also to the exclamations of mental terror caused by a deadly assault To reject the evidence afforded by the agonized entreaties of one standing face to face with death in the person of a murderer with an upl[illegible]
by
by
bad sample of the perfection of human reason *Per Barrows J* in [illegible] *Wagner*, 61 Me 195

Requisites for admitting such evidence (1) *Nature of the occasion*—There must be some shock [illegible] excitement and

Thompson v *Trevanion* Skin 402
(2) *Time of the utterance* The utterance must have been before there has been time to contrive and misrepresent, i e while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance It is to be [illegible] the exciting [illegible] for the exc[illegible] 700 In *Mel*[illegible] this Court has said, that the
a question] which must
the rule is founded [illegible]

[illegible] So ther[illegible] hours and a few days or a few [illegible] of a party are [illegible] Unless such

said that the declarations must be contemporaneous with the main fact, no rule can be formulated by which to determine how near, in point of time they

[illegible] ations [illegible] of the [illegible]

element for consideration; that being close in point of time is not, however, all the basis for receiving such evidence, and that the ultimate test is spontaneity or instructiveness and logical relation to the main event, that the tendency of [illegible] reception of such testimony". In a [illegible] the defendant steamer was backing [illegible] steamer, who was on the bridge, [illegible] helm is still a starboard" *The Schwalbe*, Swab 521 In *R* v *Lundy*, 6 Cox Cr 477 the deceased's statements on the arrival of [illegible] on the 21st Ma[illegible] herself was exclu[illegible] was whether A c[illegible] B when running out of the room in which h[illegible] it had been, was not allowed to be proved by [illegible] *field*, 14 Cox Cr 341

In *Hutcheis* v *Railroad Co*, 128 Iowa, 279 the plaintiff fell from a street car, by reason of negligence in failure to let down a folding step As she fell she exclaimed, "Yes, let down the step after I fall" The declaration was a typical instance of *re*[illegible] and having [illegible] the plaintiff [illegible] with the even[illegible] so near in point of time to the fact which is the subject of proof In *Rothrock* v *City Cedar Rapids* 128 Iowa, 25?, the declarations which referred to the manner and place in which plaintiff had sustained injuries, but were made on the arrival home, [illegible] that s[illegible] where [illegible] hour a[illegible] that th[illegible] [illegible] end, rather than to [illegible] er the grounds which [illegible] *Jack* v *Life Asso-*[illegible]

[illegible] statements are spontaneous, whether there was an opportunity for fabrication or a likelihood of it; the lapse of time between the act and the declaration relating to it, the attendant excitement; the mental and physical condition of the declarant [illegible] worthines[illegible] jury' *I*[illegible]

(3) [illegible] of the o[illegible] logically [illegible] person ex[illegible] him, the [illegible] any other [illegible] to some [illegible] there is not the same necessity for employing them It seems clear on precedents, that utterances thus relating to some distinct prior circumstance would not be received *Wigmore* § 1750, see *Khyiruddin* v *Emperor*, 92 Ind Cas 442 = 43 C 372

Know[illegible] of testimo[illegible] that the de[illegible] which he [illegible] speaker.

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neither infamy by conviction of crime Neely v State, 56 S W 625 The disqualification of insanity should probably be treated for the present purpose like that of infancy *Wilson State*, 49 Tex Cr 50, *Wigmore* § 1751

... m the **Verbal Act** doctrine
... cts are admissible in evidence
... principal act, relevant under
... made definite; (2) The words
... ct, (3) The words must be by
... 4) the words must be precisely
contemporaneous with the act Now all four c...
peculiar to the Verbal Act doctrine, have be...
present exception for spontaneous exception ...
... testimonial use of words, whi...
... *gmore* § 1752 So in *Gresham*
... "The act which they (declara...
... be evidence in the cause without
... 12 Cox Cr 230 This form
of expression is frequent enough But such a limitation has no place in this Exception What is required here is merely that there shall be some startling occurrence calculated to produce nervous excitement and spontaneous utterance *Wigmore* § 1753

As regards the second limitation, ordinarily declarations which do not in some way or other elucidate or explain the occurrence, are not given in evidence So from this ... K nnard
6 East 193, in ...
with miscondu...
should not admit it, if it were a collateral declaration of some matter ... happened at another time' So also in *Ajassiz* v *Tramway Co*, 21 W R 199
... the driver "has been off the
... "The conductor's remark
... referred to the conduct of the

... the declaration
... hat limitation
... murder of B
... *by standers* at
the beating or so shortly before or after it as to form part of the transaction, is a relevant fact *Vide illustration* (a) So also in *Milne* v *Leisler*, 7 H N 786 796, *Pollock C B* said: 'Courts so far as they can are disposed to receive in evidence whatever can throw light on the matter in issue and advance the search after truth No doubt, for that reason, in the case of an exclamation by any one in a crowd, when an accid... ... son is in question, it may be asked ... it is ... which part of the *res gestae*' ... going past,
... one went in
... 's utterance
... therwise it
... testimonial
assertion of a past act But under the present exception an utterance is, by ... only

Wigmore § *1756* The case of *R* v *Beding field*, 14 Cox Cr 341 fully reported at p 104 is an example n the evidence is clearly erroneous The facts of of the woman's situation and the recency of the shock, make it one of the strongest in judicial annals Of course from the Verbal Act point of view, as the declaration did not accompany the fatal deed, is was not contemporaneous, and therefore was rightly excluded *Vide Wigmore* § *1756*

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p
M :
police that M was not present at the riot and that he had made no charge against him He stated that the report was written by one J Subsequently M prosecuted J and P for an offence under section 211 of the Penal Code *Held* that the statement made by P to the po'
as part of a confession or as part of the
section 6 *Jalpa* v *Emperor*, 50 Ind Cas

Facts which are the occasion, cause or effect of facts in issue

7. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations.

(*a*) The question is, whether A robbed B

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it or mentioned the fact that he had it, to third persons, are relevant.

(*b*) The question is, whether A murdered B

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts

(*c*) The question is, whether A poisoned B

The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts

objective inference as to the existence of a fact still more complex in its nature,

of men consist, it owes it origin to those which have preceded it, it is intimately connected with all others which concur at the same time and place, and often with those of remote regions, and, in its turn, it gives birth to a thousand others which succeed" *Stark Ev. Vol I, 496* Such relations make it possible, when the existence of one fact in the chain of causation is asserted, to test the truth of the assertion by an inquiry as to the existence of those facts with which, had

ns to Hearsay Rule, the declarant
qualifications that would be required
1751 But infancy is not such a
, *Beal Doyle* v *Carr*, 85 Ark 479),
neither infamy by conviction of crime *Neely* v *State*, 56 S W 625 The disqualification of insanity should probably be treated for the present purpose like that of infancy. *Wilson State*, 49 Tex Cr 50, *Wigmore* § 1751.

Certain Spurious Limitations borrowed from the Verbal Act doctrine Under certain conditions only verbal parts of acts are admissible in evidence They are as follows (1) There must be a main or principal act, relevant under
ade definite; (2) The words
(3) The words must be by
the words must be precisely
contemporaneous with the act Now all four of these limitations, though entirely peculiar to the Verbal Act doctrine, have been misapplied in some cases to the present exception for spontaneous exception That it is a case of misapplication is clear; for here the concern is with a hearsay or testimonial use of words, while there no such function is attributed to them *Wigmore* § 1752 So in *Gresham* v. *Manning*, Ir R 1 C L 125, *O'Brien J*, said "The act which they (declarations) accompany should be one that would be evidence in the cause without any such declarations" But see *R* v *Edwards*, 12 Cox Cr 230 This form of expression is frequent enough But such a limitation has no place in this Exception What is required here is merely that there shall be some startling occurrence calculated to produce nervous excitement and spontaneous utterance *Wigmore* § 1753

As regards the second limitation, ordinarily declarations which do not in some way or other elucidate or explain the occurrence, are not given in evidence So from this aspect the limitation becomes a real one In *Aveson* v *Kinnaird* 6 East 193, in which declarations of wife upon elopement, charging the husband with misconduct causing it, were admitted *Lord Ellenborough* observed, 'I should not admit it, if it were a collateral declaration of some matter which
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Wigmore § *1756* The case of *R* v *Bedingfield*, 14 Cox Cr 341 fully reported at p 104 is an example of this As an exception to Spontaneous Exclamation the evidence is clearly admissible and the ruling of *Cockburn C J* is plainly erroneous The facts of the case, in r woman's situation and the recency judicial annals Of course from the did not accompany the fatal deed, is was not contemporaneous and therefore was rightly excluded *Vide Wigmore* § *1756*

Statement made to the police by one of the accused One P came to a police station and handed in a written rep persons had committed the offence M The report was read out to police that M was not present at the riot and that he had made no charge against him He stated that the report was written by one J Subsequently M prosecuted J and P for an offence under section 211 of the Penal Code *Held* that the statement made by P to the police was not admissible against J either as part of a confession or as part of the transaction under investigation under section 6 *Jalpa* v *Emperor*, 50 Ind Cas 487=17 A L J 760

Facts which are the occasion, cause or effect of facts in issue

7 Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations

(*a*) The question is whether A robbed B

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it or mentioned the fact that he had it, to third persons are relevant

(*b*) The question is whether A murdered B

Marks on the ground produced by a struggle at or near the place where the murder was committed, are relevant facts

(*c*) The question is, whether A poisoned B

The state of B's health before the symptoms ascribed to poison and habits of B, known to A, which afforded an opportunity for the administration of poison are relevant facts

Principle The principle contained in this section has a logical foundation

objective inference as to the existence of a fact still more complex in its nature and so on in many degrees of involution The necessary method of drawing

of men consist, it owes it origin to those which have preceded it, it is intimately connected with all others which concur at the same time and place, and often with those of remote regions and in its turn, it gives birth to a thousand others which succeed' *Stark Ev Vol I, 196* Such relations make it possible when the existence of one fact in the chain of causation is asserted, to test the truth of the assertion by an inquiry as to the existence of those facts with which, had

it existe l it would ... own exi tence neces sary or at least ... § 1784 "There is a principle implied in ..., an assumpt on with ... and the order of the universe, namely, that there ... parallel cases that what happened once, will un ler ... of circumstances, happen again, and not only again but as often as the same circumstances recur This, I say, is an assumption involved in every case of induction And if we consult the actual course of nature, we find that the assumption is warranted The univer e so far a known to us is so constitute l, that whatever is true in any one ca e is true of all cases of certain de cription *the onl y difficult y is to find what descrip tion*" *Mill s System of Logic* Book III Chap III § 1 *Chamberla yne s Ev* § 3150

In order that an alleged actor shoul l have been capable of doing a specific a t which requires his bodily presence at the locus of its being done, it is necessary where the evidence is circumstantial to establish that he was present at the time at that place This may be shown by his actions on a previous occasion His other acts at about the same time as the act in question and near the scene of the act te l to show the ...

chief value is that it prevents the accused from denying his presence *But the* frequent difficulty here is that the ev lentiary fact is not that the accuse l was present at the exact time and place of the act, but that he was near enough to have been able to be there at the exact time and place *Ibi l*

Scope of the sectior ... by ties more or less close ... a fact can or cannot be ... meaning of section 6 S ... of facts Leaving the t ... classes of facts which the ... yet connected with it in particular mo les an l so are relevant when the trans tion itself is under enq ... the occasion or cause ... for its occurrence, (4) as ... ned They are in truth different aspects of causation ... sion of facts of this nature is that if you want ... not almost the first natural step is to ... calc lated to prod ...

... rder moreover, properly to apprecia ... things in which it occurred For all ... *Cunningha n, p 91*

Causation "As the ...

Logic p 199

...

what acceptation of the words is his expression a cause or effect of the act of stab bing? Or consi ler the case of the White Chapel murder in London *Upon the*

issue, Did Wainwright murder Harriet Lane? It is offered in evidence that the body before the Court is that of a woman who never bore children How is this a cause or effect of the fact in issue? The widest acceptation of the words 'cause' and 'effect' will not include such facts as these And if we give them the meaning necessary to make true the statement that relevancy means the ... statement it self becomes of

... no question that relevancy and ... two is recognizable by an ... hing expressible in ordinary language

"The definition that relevancy means the connection of events as cause and effect, leaves us then, in this difficulty that if we take the words in any, even the widest con... which we know from ... transcendent meanin... gone together to make up the state of things existing at any time, and that no fact could ever have existed without the co existence of every other fact that did exist at the same time, then the definition includes everything, and so ceases to be a definition

"Thus the statement that relevancy means the connection of events as cause and effect, requires some addition, if the words are used in any ordinary sense, and some limitation, if they are given a transcendent sense" *Woodroffe Ev p 80*

Limit of the rule The rule, therefore, that facts may be regarded as relevant which can be shown to stand either in the relation of cause or in relation of effect to the fact to which they are said to be relevant, may be accepted as true, subject to the caution that, when an inference is to be founded upon the existence of such a connection, every step by which the connection is made out must either be proved, or be so probable under the circumstances of the case that it may be presumed without proof *Stephen's Introduction p 70*

Occasion, Cause and Effect An event may be evidenced circumstantially by a cause or by an effect This mode of inference is available in three forms, namely prospectant, retrospectant, and concomitant For example, the sinking ... the ... its ... of ... 121.

... the falling barometer ... eruled car ... —these are ... Such inferences, however, rarely raise evidential questions in practice Thus, in the illustration above used, the destruction of the herbage is evidently relevant, without question, as indicating the same destructive influence of atmosphere, soil, or the like, but in the further process of fixing on the fumes in question as the precise cause ... through an expert witness

of fact. Thus, in general, the inference from an effect to the existence or operation of a cause is usually so proper as to be unquestionable, or else leads to a new controversy as to whether the supposed cause has any causing tendency of the alleged sort, and this new controversy involves a different sort of inference — *Wigmore* § 436

Concomitant Events as the basis of inference An event cannot be inferred from its concomitant event except on the assumption that they have a common cause, or unless the inference is really not one of concomitancy but of cause and effect An example of the latter sort is the inference of fire from smoke i e, it is really the inference of fire as a cause from smoke as the effect An example of the former sort is the inference of revolving wheels from the motion of the car i e there is really an inference, first from the motion to the motive power as a cause and next from the motive power to the revolution of the wheels as a common effect of the same cause In some instances, however, for practical purposes this latter analysis may be neglected and the inference treated as a single one *Wigmore* § 436

Real meaning of cause or effect It must be noted from the remarks stated above that, that which is the main or first apparent inference offered is upon analysis to be resolved into an [illegible] h the proposition to be evidenced is a ten[illegible] , the inference is from specific instanc[illegible] istra *tions to the supposed tendency,* [illegible] *This* inference from effects to capacity or tendency to produce those effects furnishes the general form to wh[illegible] For example the question at issue may [illegible] a conceded injury in a [illegible] former is the cause [illegible] the argument is obviously confined to those things which have a tendency or capacity to produce such effects Thus while one of the ultimate issues for the Court still remains the question whether the factory caused the injury, yet the subsidiary proposition to which the evidence has to be directed is whether the factory has such a tendency or capacity In short when it is desired to show broadly the or[illegible] usually resolve[illegible] something to [illegible] and, secondly that something else is evidence of such a capacity or tendency, and it is the second of these inferences which in practice raises evidential questions *Wigmore* § 441

Principle of probative value—General Rule There is presented as the [illegible] fect *B* [illegible] e intro- [illegible] ncy or capacity in X is not an abstract and absolute one but a limited and specific one, namely a capacity under the circumstances in which B occurred, to be followed by B What X's capacity or tendency under other circumstances might be is immaterial, the single question is wheth[illegible] tendency under the circumstances in hand [illegible] , evidence this specific capacity or tendency by c[illegible] here, the [illegible] the case in [illegible] nying X [illegible] X, unless [illegible] other [illegible] is have a tendency to injure other adjacent houses *B*, [illegible] e an old house and B'' were a wooden house, while it was a new brick house, *the case B* would at most indicate a tendency in X to injure an old house not a new house B, and the case B would at most indicate a tendency in X to injure a wooden house, not a brick house B *The general logical requirement is then that when a thing's capacity or tendency to produce an effect of a given sort is to be evidenced by instances*

of the same effect found attending the same thing elsewhere these other instances have probative value—i e are relevant—to show such a tendency or capacity only if the conditions or circumstances in the other instances are similar to those in the case in hand But this similarity need not be precise in every detail It need include only those circumstances or conditions which might conceivably have some influence in affecting the result in question *Wigmore* § 44? So in evidencing a quality tendency capacity etc by instances of its effects or exhibitions or operations on other occasions the natural and logical limitation is that the evidential instances should have occurred under substantially the same circumstances or conditions as at the time in question because otherwise they might well be attributed to the influence of some other element introduced by the differing circumstances *Greenl Ev* § 14 (v)

Illustrative cases—Admissible evidence In *Hunt* v *Lowell Gaslight Co* 8 All 169 171, the question was whether the illness of the plaintiffs was caused by gas leaking from the defendant s pipes In that case ' the plaintiffs were permitted to offer evidence that A H and his family had been in perfect health upto the time when the gas began to escape into their house and that immediately or soon after every member of the family became seriously ill The sickness of the persons is admissible merely for the purpose of showing the nature of the gas which came into the house to the influence of which all the inmates were subjected alike Evidence that inmates of another house were

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Per Chapman J

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Illustrative cases—Inadmissible evidence In *Emerson* v *Lowell Gashlight Co* 3 All 410 417 the question was whether the illness of the plaintiff was caused by gas leaking from the defendant s pipe Evidence was offered by the plaintiff that whenever the gas which escaped from the fracture in the defen

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of fact Thus, in general, the inference from an effect to the existence or operation of a cause is usually so proper as to be unquestionable, or else leads to a new [illegible] of the [illegible] nce—

Concomitant Events, as the basis of inference An event cannot be inferred from its concomitant event except or [illegible] a common cause, or unless the inference is [illegible] but of cause and effect An example of the latter [illegible] from smoke *i e*, it is really the inference of fire as a cause from smoke as the effect An example of the former sort is the inference of revolving wheels from the motion of the car, *i e*, there is really an inference, first from the motion to the motive power as a cause, and next, from the motive power to the revolution of the wheels as a common effect of the same cause In some instances, however, for practical purposes, this latter analysis may be neglected and the inference treated as a single one *Wigmore* § 436

Real meaning of cause or effe[illegible] above that, that which is the main [illegible] analysis to be resolved into an [illegible] proposition [illegible] al, the inference i[illegible] illustrations, to th[illegible] This inference from effects to capacity or tendency to produce those effects furnishes the general form to which all such processes are reducible For example, the question at issue may be whether the vibrations of factory-machinery have caused a conceded injury in an adjacent house The main controversy is whether the former is the cause of the latter but, in searching among the probable causes, the argument is obviously confined to those things which have a tendency or capacity to produce such effects Thus while one of the ultimate issues for the Court still remains the question whether the factory caused the injury, yet the subsidiary proposition to which the evidence has to be directed is whether the factory has such a tendency or capacity In short, when it is desired to show broadly the oc[illegible] usually resolve[illegible] something to [illegible] and, secondly that something else is evidence of such a capacity or tendency; and it is the second of these inferences which in practice raises evidential questions *Wigmore* § 441

Principle of probative value—General Rule There is presented, as the [illegible] effect B [illegible] the intro[illegible] ndency or [illegible] a limited and specific one, [illegible] occurred, to be followed [illegible] other circumstances might be is immaterial, the single question is whether there was such a capacity or tendency under the circumstances in hand In looking elsewhere, therefore, to evidence this specific capacity or tendency by observing the same effect elsewhere, the [illegible] the case in [illegible] anying X, [illegible] X, unless [illegible] ause other [illegible]

Thus, if the proposition is that X factory's vibrations have a tendency to injure an adjacent building B, the falling of timbers in other adjacent houses B, and B might not evidence such a tendency if B were an old house and B″ were a wooden house, while B was a new brick house, the case B′ would at most indicate a tendency in X to injure an old house, not a new house B; and the case B would at most indicate a tendency in X to injure a wooden house, not a brick house B *The general logical requirement is, then, that when a thing's capacity or tendency to produce an effect of a given sort is to be evidenced by instances*

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90, *Ashburner J* in excluding such evidence observed ' This class of testimony was incompetent because calculated to surprise and take undue advantage of defendant at the trial Ordinarily he could not be prepared to meet and contest the merits of each particular case of loss from unknown cause introduced To deprive him of this privilege would be the denial of the legal right, and to admit them would overwhelm the case with collateral issues of fact and distract judicial investigation,'
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Classification of such facts The arrangement of the various precedents is a matter of much difficulty, but having regard to the kind of fact offered in

illness produced by a poisonous substance, injury caused by a defect in a highway etc), and (3) psychological or moral effects, i e effects on human conduct (e g efforts to escape danger, time required for work, cautions taken out of a dangerous place etc) *Greenl Ev* § 14v; *Wigmore* § 450

Material effects Under this head may be noted the use of similar instances as evidence of the character of a place, building factory, alleged to be a nuisance, in particular a railroad, of the injurious effect of water by flowage, etc, of the injurious qualities of gases on trees, paint, etc, of the tendency of the machines to operate defectively or otherwise, as shown by the other instances of the action of the same machine or of a similar machine; and of sundry other things *Greenleaf Ev* § 14v.

Illustrative cases—admissible evidence In *Tenant* v *Hamilton*, 5 Cl & F. 122, the question was whether A's land was injured by noxious discharge from B' works *Lord Cottenham* admitted evidence on both sides as to the condition of land similarly circumstanced to those of the party complaining "for ascertaining what the effect was of the smoke and vapour emitted by this manufactory" See also *R* v *Neville*, 1 Pea N P C 91, *R* v *Fairie*, 8 E & B 480 486, 488

In *Border* v *Saillard*, 2 Ch D 692, which was an action to restrain a noise nuisance

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7. In *Doybe* v *R. Co*, 128 N Y 488, the question was whether damage was caused to plaintiff's building by the operation of an elevated railroad Evidence of the effect upon premises similary situated and not too distant was received The Court in receiving the evidence observed "The Court may undoubtedly in such cases, in the exercise of its discretion, limit the number of witnesses to be called, and may confine the examination of the witnesses to premises in the vicinity, giving a reasonable range"

The tendency or quality of tools, weapons, vehicles, acids, and other materials can be proved by their effects upon similar substances under similar, conditions *R* v *Heseltine*, 12 Cox Cr C 404

The question being whether A's premises were ignited by sparks escaping from a railway engine,—proof (1) that the same engine, and other engines of similar construction belonging to the same company, have previously caused fires along the same line is admissible *Aldridge* v *G W Ry*, 3 M & Gr 5?2, *Piggot* v *E C Ry*, 3 C B 229, *Phip Ev* 133 In *Piggot* v *E C Ry*, Co 3 C B 229, *Maule J* in admitting the evidence observed "The evidence objected to was that other engines used on the defendant's line, of the same description as that which was said to have caused the injury here had on various other occasions been seen to throw particles of ignited matter to a distance from the line as great or greater than the spot in question The matter in issue was whether or not the plaintiff's property had been destroyed by fire proceeding from the defendant's engine, and involved in that issue, was the question whether or not the fire could have been so caused The evidence was offered for the purpose of showing that it could, and for that purpose it was clearly material and admissible"

Illustrative cases—Inadmissible evidence The question being whether an obstruction to a harbour was caused by the erection of a sea wall in its vicinity evidence that similar obstructions occurred at some other harbours on the same coast which were in the vicinity of the sea walls, was held inadmissible, as an attempt *litem lite resolvers* *Phip Ev 133* But in *Folkes* v *Chadd*, 3 Doug 857 *Lord Mansfield, C J* admitted evidence of the state of other harbours along the same coast where no embankment existed, to show that no such change had occurred as at the harbour in question where an embankment existed

In *Attorney General* v *Nottingham Corporation* (1904) 1 Ch 673, where the question also was whether small pox hospital was a nuisance, experience of other similar hospitals as to the risk of infection, was admitted by consent following *Hill* v *Metropolitan Asylum (Supra)* But *Farwell J*, in writing the opinion observed "As I understand that this case is likely to go to the House of Lords, I desire to add an observation as to the evidence in the hope of obtaining some direction from a superior tribunal Both parties concurred in asking to accept evidence in chief of what had happened with other hospitals and I acceded to the request in deference to the opinion expressed in *Hill* v *Metropolitan Asylum District*, and also because the same evidence of the same cases (with the same result) appears to have been admitted in the other reported cases relating to small pox hospitals The result is that the case has taken a week to try, and I venture to suggest that the admission of such evidence in chief is wrong in principle, as raising a number of side-issues on which it is impossible for the Court to adjudicate without injury to absent parties *e g* how can I rely on the case without injustice to them?"

In *Hukes* v *General Electricit F L & P Co*, 107 Ky 485, which was also a case of nuisance of smoke etc, effects of smoke in other dwellings were excluded

In *Lacolse* v *Mfg Co* 9 All Mass 181 which was a case of destroying meadow crops by poisoning of a stream by copper acids, the evidence of similar effects produced upon other meadows along the river, was excluded for reasons of confusion of issues and of the slight probative value So also where the question was whether the removal of certain stones from a river had caused the latter to wash away the plaintiff's land, evidence that the removal of stones from another part of the river had the same effect was rejected as tending to mislead the jury, no satisfactory proof being given that the conditions of the two occurrences were the same *Hawkes* v *Charlement*, 110 Mass 110, *Comm* v *Piper*, 120 Mass 115 cited in *Phip Ev 3rd Ed* 133

In *Clark* v *Water Power Company*, 52 Me 75, which ... caused to plaintiff's mills for diverting a str... evidence of injuries to other mill-owners was reje...

were no elements of comparison offered which could afford any safe or reliable data for the judgment of the jury."

Under this head may be noted experiment) of the tendency of

of issues as explained above have been thought to have an especial bearing here The other instances of the injuries thus offered in evidence may concern defects in high way, or defects in railroad tracks, machines, premises, and the like *Greenl Ev* § *14v*

Illustrative cases—Admissible evidence In *Spencer Cowper's Trial*, 13 How St Tr 1162, which was a case for murder, the body of the deceased was found in the river; the question was whether she had committed suicide or had been killed and thrown into the water The prosecution advanced the proposi t

The fact that two other persons had acquired the itch at the defendant's shop, was held admissible, as showing the unclean condition of the razors etc In *Crofter* v *R Co L R* 1 C P 300, which was an action for injury on a defective staircase, evidence from defendant was admitted without question that about 43 000 persons had passed over it without injury during the previous year, in which alone it had been used In *District of Columbia* v *Armes*, 107 U S 519, 524, which was an action for damage caused by a fall on a defective side walk, *evidence was admitted to show that other persons had fallen at the* same place

, 24 Or, 295 l found on *In Schlaff* ridge were milar falls at the same place about the same time, e g a month before or after was admitted; but evidence of falls at other times or at times unspecified was excluded

Effects on Human conduct—Instances of mental and moral effects, as evidence The tendency or nature of a material object may often be ascertainable by [illegible] seems proper to place here a number of [illegible] not usual to perceive such a process of [illegible] ns at once to embrace the various kin[illegible] which their admission depends It [illegible] the con[illegible] sertions

whistle, a pile of stones, a flag, a rail road car etc,—as evidence of its tendency to cause fright in horses Closely analogous to this is the use, on an issue whether a person s fright and jumping from a train, etc, was natural of the alarmed conduct of other persons in the same situation On the same general principle—i e the use of mental impressions as indicating the nature of a material object—the impressions of other persons (usually obtained by experiment) as to whether a thing co[illegible]

or custom under t[illegible]
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standard or test of liability or excuse *Greenl Ev 14v*

Illustrative cases—Admissible evidence In *Brown* v *R Co* 22 Q B D 391 the question was whether a heap of refuse and earth in a highway, has the dangerous tendency to frighten horses To prove its tendency to frighten horses the fact was received of the shying of various other horses than the plaintiff s in passing the heap The[illegible]
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Illustrative cases—inadmissible evidence In *Walkie* v *Chehalis Co L & I Co* 55 Wash 324 one instance of another horse being frightened at fresh meat, was excluded In *Bloor* v *Town of Delafield* 56 Wis 223 the evidence that numerous other horses [illegible] excluded The question being [illegible] ngers — evidence that (1) it b[illegible] April 10 1897) or (2) had [illegible] 896, 2 Q B 109) is irrelevant *Phip Ev* 3rd 132

State of things under which they happened Often the physical conditions under which the main fact happened or any other matter intimately connected therewith must be placed before the jury in order to make the incident intelligible to them Under such circumstances such facts may be relevant *Vide R* v *Bond*, (1909) 2 K B 309, *Phip Ev* 6th Ed 57

Opportunity Proof of opportunity possessed by the accused to commit the crime may raise an inference that he is the criminal *Lawson Pre Ev P* [illegible] When an act is done, and a particul[illegible] it is obvious that his physical presence [illegible] one step on the way to the belie[illegible]

[illegible] not too [illegible] xclusive [illegible] the very [illegible] person [illegible] persons [illegible] a number who re in a [illegible] ty alone, and not exclusive [illegible] *Wigmore* § 131, see also [illegible] indicted for poisoning B [illegible] and had opportunities for [illegible] *Jones Ev* 350 It is [illegible] ling his money The fact [illegible] showing an opportunity

In *Reg* v *Graham* [illegible] [illegible] ther the person [illegible] administer [illegible]

he had not the poison, the having the opportunity becomes unimportant ' So without opportunity of committing the imputed act, neither existence of motives nor the manifestation of criminal intention by threats or otherwise, followed even by preparations for its commission, can be of any weight *Wills Cir Ev* p 52 The opportunity is in fact the 'state of things" under which an occurence took place Without an opportunity no deed can be perpetrated Hence opportunity must be [illegible] *[illegible] Cir Ev* 10 On the indictm [illegible] tracts, it may be shown that the accus [illegible] the offence was committed by evidence that he placed other obstructions or the rails at about the same time *State* v *Wentworth*, 37 N. H 196 So, too, on the trial of a homicide case, where the accused claims that he was not in the vicinity of the place where the crime was committed at the time of its commission, the Government may show his presence shortly before the homicide near the scene of the crime, though when seen by some of the witnesses he was committing another offence *People* v *Jennings*, 252 Ill 531; *Chamberlayne's Ev* § 3259

Opportunity—Explanation The accused may explain away his presence by any fact of his behaviour consistent with his presence other than doing the act alleged, *e g* he may have been a mere spectator, he may have come [illegible]

Explaining away; equal opportunity for others If a person is shown to have been in a building, at the time when a murder was committed he immediately [illegible] the de[illegible] that the [illegible] doing [illegible] possible with that charged against him Such is the principle of explaining away opportunity *Wigmore* § 132. When it is proved that another person had a better opportunity than even the accused, the presumption is further weakened *Lawson's Pre Ev* 587

[illegible] In the morning the wife is [illegible] was not guilty See also [illegible]

Exclusive opportunity Exclusive opportunity proves conclusively that the deed was committed by the person having such an opportunity *People* v *Van Horn*, 119 Cal 323=51 Pac 538, *Miller* v *People*, 39 Ill 566 But it is not always safe to convict a person solely relying on exclusive opportunity of committing the crime in question The statement will be fully illustrated by the following two cases: (1) A female servant was charged with having murdered her mistress No persons were in the house but the deceased and the prisoner, and t[illegible] secured as usual The prisoner was co[illegible] presumption that no one else could [illegible] by means of a [illegible] house to an [illegible]ng committed the murder, they retreated the same way, leaving no traces behind them *Starkie Ev 4th Ed* 865 *cited in Best* § 453

(2) One Sunday morning when the whole of a household except T, a female servant, was absent at Church, the house was robbed and a small cabinet

containing jewels and gold coin to a very large amount taken and carried away T maintained that no one had entered or gone out of the house during the time of the family's absence T was convicted of the robbery Many years after as T, having served out her sentence, was going through the market, a butcher tapped her on the shoulder and said in a half whisper and ironical tone of voice "Ah!

he had made that
was arrested He
having forgotten to
take some minced veal home on Saturday evening, as he should have done, he carried it in a large basket on Sunday morning The family had gone to Church, T was upstairs, and settin
out and to shut the door
off his shoes crept softly
T presently came up to change her clothes, and unconscious that any human being was near her being entirely undressed and contemplating her naked figure uttered the exclamation above, which being plainly over heard by the butcher he immediately went through the house and took what he wanted, escaping by the back door before T was through her toilet *Taantje's Case, Phil, Cvc Ev, XXXVIII cited in Lawsons Pre Ev, p 588*

Alibi The theory of an *alibi* is that the fact of presence elsewhere is essentially inconsistent w
fore with personal parti
is universally perceived
among these defences" sa
the Government show, I
present at the place where his act was done and at the time when he is said to have done it The defendant may properly attempt to show that he was some where else at the time,—not for the purpose, primarily, of establishing that he was at the special place at that particular time but with the object of throwing doubt upon the truth of the Government's conten
been in order to have committed the offence
the nature of an argumentative traverse
which the defendent has assumed the bur
jurisdictions, the correct rule is adopted,—that it is a necessary part of the Government's case to show, when disputed that the defendant was present at the scene of the doing

ary element of its
jury as to whether
crime at the time
when he must have been there in order to have committed it he is entitled to an acquittal

"Other Courts confusing the burden of proof with the burden of evidence treat *alibi* as if it were an affirmative defence in a civil action on which he has the burden of proof and require that, in order that the defence should succeed the defendant should establish affirmatively by a fair preponderance of the evidence, the fact that it was impossible for him to have reached the scene of the crime at the time when it must have been committed Naturally, in any case,
to the weakness of the mere
crime home to the accused'

ing from
128 Ind

s relevant as giving
) of facts constitut
Cunningham Ev

Motive preparation and previous or subsequent conduct

8 Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto

Explanation 1 — The word 'conduct' in this section does not include statements, unless those statements accompany and explain acts other than statements but this explanation is not to affect the relevancy of statements under any other section of this Act

Explanation 2 When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant

Illustrations

(*a*) A is tried for the murder of B
The facts that A murdered C that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant

(*b*) A sues B upon a bond for the payment of money B denies the making of the bond
The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant

(*c*) A is tried for the murder of B by poison
The fact that, before the death of B, A procured poison similar to that which was administered to B is relevant.

[illegible]

inte [illegible]
vil [illegible]
be [illegible]

(*e*) A is accused of a crime
The facts that either before or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses or suborned persons to give false evidence respecting it, are relevant

(*f*) The question is whether A robbed B
The facts that, after B was robbed, C said in A's presence—"the police are coming to look for the man who robbed B," and that immediately afterwards A ran away, are relevant

(*g*) The question is whether A owes B rupees 10,000
The f [illegible]
presence an [illegible]
and that A [illegible]

(*i*) A is accused of a crime [illegible] he absconded, or [illegible] ured by the crime, [illegible] used in committing [illegible] it, are relevant

(j) The question is whether A was ravished

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant

The fact that, without making a complaint, she said that she had been
though it may be relevant
as corroborative evident

under section 157

(k) The question is, whether A was robbed

The fact that, soon after the alleged robbery, he made a complaint relating to the offence the circumstances under which, and the terms in which the complaint was made are relevant

The fact ... is not relevant, ... declaration ... section 157

Motive—meaning of Motive is that which moves a man to do a particular act *Ganga v Rex*, 62 Ind Cas 515 When we infer an act from a motive, there are two distinct evidential steps We may argue, first, that since a specific emotion or passion is likely to lead to the doing of the appropriate act—for example, desire for money to theft or robbery, or angry hostility to an act of violence—the presence of such emotion in the person in question is likely to lead to the deed in question In this step of the argument we assume the emotion as a fact proved somehow or other Just as a specific sort of disposition, of habit of plan, is ... emotion or passion has ... nce is the living, impe... it motive in the sense of ... two sorts of circumst...) by events about that p... effect and expression ... about him, shows proba... t is some times termed as motive But strictly speaking that which has value to show the ... inward emotion, passion, feeling, of the ... This use of the word "motive" thus tends ... involved, for when it is said that B's suit ... "motive' for A's burning, we are apt to ... from the act (as the evidentiary fact) to ... are two steps ... act It ought ... is the ... the ... self ... what ... that ... elief ... state ... is true or false the motive remains the same ... nga v ... with ... ve ex... nan" would supply ... nalyse the statement ... ng, impelling or an ... outlet by getting rid ... e homicide, but it ... to cause the murder ... a crime does not ... 'outweighed by other... ate, by a knowledge of the existence and operation of motives in the average man, what is probable in the mental economy of an average man, but such a course of induction is a rough and ready process and liable to error in its application Men are not all of

average hue or constitution, and it does not follow that because there is something shown which would lead to crime in one man, or many men, that it would necessarily lead to crime in the case under consideration Many a murder has been committed for the sake of a very few pounds and yet there are hosts of people to whom millions would not offer the slightest inducement to anything of the kind; and we must be careful not to forget that when we have found a motive which might lead to crime it by no means follows that we have found one which did lead to as well as towards the crime *Wills' Cr Ev pp 56, 58*

Motive -Judicial Proof of In judicial proof three aspects of the above motive analysis have greatest importance, the first two of which receive little emphasis from the psychologist (A) External stimulus; (B) Expression; (C) Opposition of Impulses

External stimulus Whether an emotion was excited at all is the first great question For this purpose, the facts constituting the supposed stimulus are offered, e g lack of money as evidencing desire to obtain it

Expression On the same question, the existence of an emotion may be evidenced by conduct or words alleged to express it Whether they do express it may become an important issue

Opposition of Impulses Assuming that the emotion is established, and that from its existence is to be inferred a consequent act, still this evidence may be explained away by the cessation or counteraction of the emotion, e g by fear or by lapse of time This is the other most frequent aspect in judicial proceedings —*Wigmore's Principles of Judicial Proof* § 70

Principle admitting motive as evidence The laws regulating the action of the human mind, in its more obvious manifestations, are known to the Court The common operations of the mind in men or animals are as fully within the knowledge of the jury as that of a skilled witness The orderly processes of reason- [illegible]

What motives influence [illegible] instinct for self preserv[illegible] gain something when a r[illegible] Judge's experience and the common knowledge of the community It is known that persons do not borrow property of no value It will be known that the desire for gain is so general that men do not gamble except in the hope of gaining property of some value, and do not hunt for an object which is worthless *Chamberlayne's Ev* § 769

Motive is relevant In *Palmer's Case*, 1856, Wills 931, *Lord Campbell C J* said "It is of great importance to see whether there was a motive for committing such a crime, or whether there was not" *Lord Alverstone C J* also took the same view in *Bennett's Case* reported in Times (1901) Feb 25, Wills 467, see also *R* v [illegible] 13 Cox 203 [illegible] 8 Cox 509 (510); *R* v *Westcot*, 25 T L [illegible] *Clewes*, 4 C & P 221, *Roupel* v *Haws*, 3 [illegible] Y 245, 254, *Woodroff J* said "It is always a just argument on behalf of the accused that there is no apparent motive to the perpetration of the crime Men do not act wholly without motive On the other hand proof of motive [illegible] in some degree to render the act so far [illegible] *[illegible]borate evidence of* [illegible]ted, it is not an [illegible] was a motive for t[illegible] [illegible]ntitled to a verdict But when the evidence is circumstantial only, and the guilt of the prisoner is only inferential and is not proved as a matter of fact by the evidence of witnesses who [illegible] the question of motive becomes of vital imp[illegible] or even made reasonably doul[illegible] *[illegible]lex* v *Monson* (Not Trial) citec[illegible] *[illegible]reen*, 1 Park C C 32, the jury was told "Where a murder is charged and the evidence is wholly circumstantial then it is peculiarly proper to look at the motive And in all cases you will naturally seek for the motive And where the proof is circumstantial, and there be doubt about the circumstances, then it becomes

8 important to examine into the motive If however, the evidence of murder by design be direct and positive, then the guilt is established without looking further And in all these cases a question as to the adequacy of motive almost always arises It is claimed generally that the motive was inadequate, that it is not sufficient to induce the commission of murder But all this must depend on the peculiar circumstances of the case and the peculiar character of the accused There is no motive which, to the mind of an honest man, can be adequate to the commission of a crime and just in proportion as the mind is debased and immoral, to that extent the motive may be less which induces the criminal act Hence, there can be no one rule for all cases as regards adequacy of motive it must depend on the moral character of the person accused in each case The worse it is the less the motive which will tempt to the commission of crime"

Whether motive [illegible]
Prof Wigmore that [illegible]
show a possible m[illegible]
118 So a motive f[illegible]
point on a trial for r[illegible]
motive becomes le[illegible]
rent in very many [illegible]
arises at or near the time of the act *Ilke v People*, 1 Parl C C 80 In *Pointer v U S* 151 U S 39, 413 *Harlan J* observed "The law does not require impossibilities The law recognises that the cause of the killing is somtimes so hidden in the mind and breast of the party who killed that it cannot be [illegible] does not require the jury t[illegible] item of evidence in the cas[illegible] item of evidence going to show whether a particular party may have committed an act, and sometimes going to show the characteristics of that act It is not indispensable to conviction that the particular motive for taking the life of a human being shall be established by proof to the satisfaction of the jury The absence of evidence suggesting a motive for the commission of the crime charged is a circumstance in favour of the accused to be given such weight as the jury claims proper but [illegible] *Clerk* [illegible] great

crime is a thr[illegible] great crime Still th[illegible] some evil passi[illegible] of half frenzy d[illegible] and intelligible incentives to crime But [illegible] prisoner's counsel there is no motive for [illegible] no more than that the motive has not been [illegible] committed there must have been a motive or incentive, and yet we may never discover what it was The motives of human action as we know from history and experience, are often inscrutable When any person committed a heinous crime, it is usual and natural, to look whether there existed any adequate motive [illegible]

Adequacy of motive In *Reg v Palmer* Wills Cir Ev 63, *Cockle Cas* [illegible] *Lord Chief Justice Campbell* obser[illegible] of great importance to see whether [illegible] crime, or whether there was not [illegible]

[illegible] small

Absence of proof of motive when material "Motive to commit crime, if shown may in many cases be sufficient alone, almost to induce a belief of guilt Upon the other hand where no motive for the commission of a crime can be

shown it is almost impossible to convince the mind of the guilt Men do not ordinarily commit grave crimes unless there is in their minds a motive strong enough to overcome the natural repugnance against crime, and the fear of punishment which usually follows detection This view of this question is so universally recognized as being true that it has become incorporated into the law, and in almost all cases where the guilt of a defendant depends upon the facts and circumstances in proof in the case the Court instructs the jury to consider the motive or lack of motive which the proof shows may or may not exist in the mind of a defendant on trial charged with a crime" *Per Dale C J* in *Son v Terr*, 5 Okl 526; see also *R v Ball*, (1911) A C 17 (68); *R v Ellwood*, 1 Cr. App *R* 181; *R v Abramovitch*, 7 Cr App 145 (147); *R v Grant*, 4 F & F 322; ... 391 So in cases

s of vital importance

motive becomes also

oner's guilt. *Queen* v *Sorob*, 5 W. R ... *Gobordhon*, 9 A. 528 (568); *Queen v Babar* ... *Sheikh Mustaffa*, 1 W. R Cr 19; *Fatema* ... *lauan v Emperor*, 25 Ind Cas 634; *Moyla v E* ... *v Reg*, 31 C 686 In *People v Kelser* 3 Wheel Cr Cas 40, where *Kelser* was charged with poisoning his wife, the Court said "The motive which induces the commission of the highest offences, and especially of the crime of murder, is always required to be ascertained" In *People v Hendrickson*, 1 Park C C 115, where the accused was similarly charged the Court observed "The defendant was charged

anything from which a jury might infer a desire to be free from the burden of one who was no longer the object of regard, was competent ... So any conduct or declaration evinc... in their character as evidence, defendant's feelings towards of ins...

...ce it is unnec... see also *Hava*... is not necessary to sustain a conviction for murder in a case where a person is coolly and barbarously put to death *Queen* v *Jaichand*, 7 W R Cr 60 The mere ... which ... cy can ... 905=2 ... prove the motive of the accused ... proof of motive is not in itself s... which otherwise is reliable *Cro*... 38=11 Cr L J 498, see also *Cro*... *Abdul Hossain* v *Emperor*, 9 N L... *nperor* v *Balaram las*, 49 C 358 ... ime is shown, the presumption of the innocence of the suspected person is strengthened ... ng to the ... it, and is a ... *Lawson's* ... he want of

evidence *Rannun* v *Emperor*, 94 Ind Cas 904

Circumstances ... *Johnson* v *State*, 17 Ala 627, *Parsons J* said ... which a motive may be inferred, we may r... limit them in num... question of motive ... to be inferred from facts and circumstances

S. 8. any facts or circumstances which tend, even in the slightest degree, to show motive ... therefore be properly excluded unless the Court ... that no rational presumption can be drawn from it ...) 376 There is but one limitation that can be thought of as necessary and universal, namely, the circumstance said to have excited the emotion must be shown to have probably become known to the person; because otherwise it would not have affected his emotions *Wigmore* § 389. In *Son v. Terr*, 5 Okl 526 *Dale C J* said "A motive cannot operate to influence ... The facts upon which a motive is ... are known by the party against w... n should contemplate and undertake a great wrong against another,—such a wrong as would induce in the mind of the person against whom it was directed a motive to kill,—and yet such contemplated wrong was unknown to the party, it cannot be justly said that a motive to kill could exist, because the party wronged had no knowledge of the facts which would be necessary to create the motive" But the evidence as to the motives which led a prisoner to commit a crime, must be of the strictest kind *Queen v. Zahir*, 10 W R Cr 11

A motive is generally proved by showing the desire of gain, the gratification of passion, or the preservation of reputation accomplished or attempted or able to be accomplished by the perpetration of the crime charged *Lawson's Presumptive Ev* p 177 But strictly speaking the circumstances that may serve as motives for other deeds are innumerable In many cases several passions may lead to a desire to kill *Vide Mrs Maybrick's Case*, Notable Trial Series, where adulterous intrigue with another man was held to be a sufficient motive by *Stephen J* for getting rid of her husband So also in *Pritchard's Case* (Not Tr) the crown suggested that the prisoner's motive for poisoning his wife was to make way for a second marriage, see also *Reg v. Stauntons* (1876) Notable Trials, *Crippen's Case* (Not Tr) So a man who courts his neighbour's wife has a motive for desiring the death of his neighbour *State v. Reed* 53 Kan 767 Sometimes murder is committed in order to prevent the discovery of a former crime or of evading an arrest or ...
See also illustration (a) ...
previously employed H ...
relevant *R v. Clewes*, 4 ...
and former parish, had ...
appears at R's house, dem...
to his room and cuts her t...
See also *R v. Richardson*, Burr Cr Ev 243

"In several ways the pecuniary circumstances, of one or another person or trying may tend to show the excitement of a motive in some person It will be convenient to distinguish the situation according as the evidence deals with (1) *the pecuniary conditi*... condition of A as exciting ... as exciting a motive to ... dry aspects," *Wigmore* § ... ard with B who keeps ... ess

... the Court observed "The motive for crime is not far to seek The appellant was in very poor circumstances" But the practical result of ... on under so much unfair suspicion an... reasons of fairness this argument ... the graver ... *gelow C J* ... rue that in a large ... a party accused of ... The reason for the ... certain or known ... conclusion which is ... a man is destitute

or defraud because he was in embarrassed circumstances, but for the purpose of showing the natural and necessary consequences of his act which the law presumes he intended .. ... If at the time of the transaction he was deeply insolvent, and was cognizant of his condition, the necessary consequence of his act was to deprive the vendor of his property without recompense or the chance of payment, and leads to the just and almost unavoidable inference that it was done with an intent to defraud" *Vide Wigmore* § 392, but see *Tawell's Trial*, Woodall's Celebrated Trials, I, 188 On the other hand the fact that a person was in possession of money tends to negative his desire to obtain money by crime or borrowing So in *R* v *Grant*, 4 F & F 322, where the indictment was for ... der to obtain the insurance, evidence of ... dmitted In that case *Pollock C B* said ... circumstances were such as not to raise any temptation to the act So 'where the motive is a pecuniary one, the wealth of the offender is no unimportant consideration" *Peel C J* in *R* v *Hedger* cited in *Woodroffe 8th Ed p 112*

Motive, how to be ... 1931 Mad 689=61 M L ... can be proved by direc ... Act ... me ... the ... n 8, ... vant ... itted ... =85 ... used was financially embarrassed and had attempted to cheat on other occasions In ... tion or design is of the essence of the ... e defendant did other acts similar to those ... *Halsbury* Vol IX p 380; see also *R* v ... 16 Cox 387, *R* v *Flanagan*, 1 Cox Cr 40; *R* v *Debendra*, 36 C 573; but see *Emperor* v *Panchudas*, 47 C 671=24 C W N 501.

Conduct proves motive Motive in the sense of emotion is often proved by conduct of a person In *Com* v *Webster*, 5 Cush 295 (316), *Shaw C J* said. "The ordinary feelings, passions, and propensities under which parties act, are facts known by observation and experience, and they are so uniform in their operation that a conclusion may be safely drawn that, if a party acts in a particular manner, he does so under the influence of a particular motive

Feelings at other times Where an emotion of hostility is to be proved the existence of the same emotion at another time is clearly admissible *R* v *Law*, ...

tends to show ... doesnot render it inadmissible if it is relevant t ... A I R 1927 Sind 28, *Mah* ... 9 C W. N. 483 It is mat ... the purpose

of gain do resort to the nefarious system of entering into a transaction unauthorisedly in the expectation of its subsequent ratification, but it is a far cry that because an agent had been shown to be guilty of shady practice once, his evidence as to the circumstances under which the contract in suit was entered into should be entirely discarded *TyebaliyAbdul* v *Mrs James*, 1924 Sind 105 = 80 Ind Cas [illegible] So also where certain persons are charged with murder it is not open to [illegible] evidence to show that on two previous occasions the [illegible] but had falsely charged [illegible] Such evidence is irrelevant because the [illegible] en committed by the accused does not constitute under section 8 of [illegible] Act, a motive or preparation for the subsequent murder *Gangaram* v *Imperator*, 62 Ind Cas 745 = 22 Cr L J 629 see also *Emperor* v *Gangaram* 22 Bom L R 1271

Preparation Preparations on the part of the accused to accomplish the crime charged or to prevent its discovery, or to aid his escape, or to avert suspicion from himself are likewise relevant on the question of his guilt *Lawson's Presumptive Evidence* p 590 For preparation as a part of a design or system, vide notes under s 15, under the head "Theory of evidencing Design or System" Premeditated crime" says *Sir Alfred Wills* "must necessarily be preceded not only by impelling motives, but by appropriate preparations Possession of the instruments or means of crime, under circumstances of suspicion—as of poison, coining instruments combustible matters, picklocks, house breaking instruments dark lanterns, [illegible] criminal or suspicious weapons, materials or instruments, [illegible] on—are important facts in the judicial [illegible] had in his possession a large quantity of counter[illegible] for, and there was no evidence that he was the marker, it was held to raise a presumption that he had procured it with intent to alter it *Rex* v *Fuller*, R & R 308 But the personal character for probity and the civil station of the party, are highly material in connection with facts of this kind A medical man for instance, in the ordinary course of his profession, has legitimate occasion for the possession of poisons a lock smith for the use of picklocks. Facts of the kind referred to become more powerful indication of guilty purpose if false reasons are assigned to account for them as in the case of possessing poison that it was procured to destroy vermin, which is the excuse commonly resorted to in such cases" *Wills' Cir Ev* pp 79 80

Pre[illegible] to accomplish the crime charged or other act Evidence tending [illegible] preparation to commit the crime is always admissib[illegible] only evidences a design [illegible] The presence [illegible] or not to do a given act has [illegible] fact was done or not done. A plan is not [illegible] The existence [illegible] rence to the act planned There is [illegible] of such evidence *Wigmore* § 102 The bare possession of the [illegible] ne, or mere acts of preparation are not in general of great weight without more conclusive evidence, because the intended guilt may not have been consummated; and until that takes place there is the *locus pœnitentiæ* *Wills' Cir Ev* p 80

In *State* v *Adams*, 20 Kan 320 which was a case for burglary, the four accused held a meeting to arrange for the crime a bar of iron and a pair of pincers were alone necessary, and these the accused brought, the facts were admitted of the accused having taken a carpenter's brace from a store and hidden it; a third person removed it, and the defendant never used it *Brewer J* observed "Would not the act be one tending to show preparation,—a prepar[illegible] fruitless by the unexpected act of another? Could it not be shown [illegible] homicide immediately prior thereto was providing [illegible] ? .... If one weapon [illegible] out in order Would [illegible] the others was admis[illegible] be shown unless the [illegible] were made indisputably [illegible] It is enough that the [illegible] crime, and then the motive

The fact of possession of a number of false coins, wrapped in separate papers, etc, was admitted to show a plan to utter them R v Jarvis, 7 Cox Cr 53 A is accused of the murder of B by poison, C of the murder of D by shooting, E of committing a burglary, F of arson, G of counterfeiting The fact that A had previously purchased some poison; that C had bought borrowed or stolen a gun or pistol that E had procured an axe a picklock or a dark lantern, that F had procured a quantity of turpentine, that G had made an instrument to manufacture coin are relevant and raise an inference of fact of guilt in each case Lawson Pre Ev § 106, see also R v Hill 20 How St Tr 1317; People ... murder of A by stabbing him ... cutter telling him that he ... wished to use it as a craving ... is accused of the murder of W by shooting him with a pistol The fact that I, a few days prior, had procured a pistol and had spent sometime practising at a mark, is relevant R v Talbot 18 How St Tr 1261 S was indicted for murdering R by shooting The fact that a day or two previous S had borrowed a gun from a friend stating that he wanted it to kill deer with, is relevant Strangeway's Case 5 Leg Obs 91

Preparation to prevent discovery of crime An innkeeper and his wife are accused of a murder of a guest It is shown that on the night the murder was committed they sent the maid servant out of the house and when she returned made her sleep in another part of the building This is relevant Drayne's Case 5 Leg Obs 123, Ferris's Case, 19 How St Tr 904

Preparation to aid his escape A was charged with the murder of T The fact that the day before the murder A had drawn a quantity of money from a bank in which he had it on deposit, is relevant as raising an inference that he was preparing to escape if necessary from the country Adam's Case, 11 Leg Obs 415

Preparation to avert suspicion from himself B and P lived in the same house and the former while sitting one eveing in his parlour was shot by a pistol in an unseen har...
home a loaded gun ...
family when a. home, ...
claimed at the time ...
by him This fact is r...
Pre Ev p 591 A ...

... St Tr 1122
... he deceased
... the prophecy
... the prosecu
... to the world

Apparitions noises voices music, reported to be heard from time to time in the deceased's house, even his days are numbered out, and his own child limits the space of his life but till the following month of October What could be the meaning of this but to prepare the world for a death that was pre determined? who would limit the days of a man's life but a person that knew what was intended to be done towards the shortening of it?

... inference of
... execu
... xecution

of which the preparations were ma le may h ive been subse juently fru trated or voluntarily abandone l *Lawso i Pre Ev* § 106 A is indicted for murdering B by poi oning him It appears that shortly before A purchased a quantity of poison This raises an inference of guilt . . . rchased the poison for no other rea on than to kill ve e of guilt *Best E* § 456 A is accused of th A sometime previous ha l spread a rumour that on account of ill ne . . . d not be likely to live long It turns out that A was really speaking the convic tion of his own mind This destroys any inference of guilt *Best Ev* § 45o, *Wills Ev* 81, *Reg* v *Delaney*, 20 C C C Sc s Pap 411 (1844), *Reg* v *Hartley* Times August 18th, 1864 cited in *Wills Ev* 81 A is found killed by a bullet from a gun It is proved that B a neighbour ha l purchase l a gun the day . . . The facts . . . en the . . . pares . . . ie and . . . n the

Conduct of any party The second paragraph of this section makes relevant the conduct of any person who is a party to a suit or proceed ing in reference to such suit or proceeding or in reference to any fact in issue therein or relevant thereto The conduct of a party interested in any proceeding at the time when the facts occurred, out of which the proceeding arises, is extremely relevant *Per Petheram C J* in *Queen Empress* v *Abdullah* 7 A 385 (F B) at p 391, see al o *Balamukund* v *Ghansham*, 22 C 391 401, 406 *R* v *Ishri*, 29 A 46 *R* v *Heramun*, 3 W R Cr 5, *R* v *Mahk* 37 A 395 *Dalip Singh* v *Nawal Kanwar* 30 A 258 (P C), *Fa uruddin* v *King Emperor* 42 C L J 111 = 90 Ind Cas 433 The word 'party includes not only the plaintiff and the defendant in a civil suit, but parties in a criminal prosecution, as for instance, a prisoner charged with murder This section provides that the term is to include any one against whom an offence is the . . . was . . . al . . . od . . . aid . . . nt . . . as . . . is . . . n . . . is . . . le . . . ly . . . m . . . ie . . . ct . . . v . . . t . . . ly . . . ct . . . ct

of a party is relevant *Anyiruddin* v *Emperor* 53 C 372 A person's . . . consis . . . and the latter . . . *tion*, . . . porin . . . but se . . . (Eng) . . . m tances *E* . . . *nwar* of *at* = 3 . . . B)— a deaf mute at the place where a dead body was found during the police . . . y, and

subsequently in Court are not admissible against the accused as conduct under s 8 of the Evidence Act *Samaulin v King Emperor*, 5 O C 216 But the signs made by the deceased, being the conduct of a person, an offence against whom is the subject of a proceeding are relevant under s 8 of the Evidence Act *Queen v Abdullah* 7 A 385 (F B) = A W N 1885, 78

Conduct, meaning of Conduct is the expression in outward behaviours, of the quality or condition operating to produce those effects These results are the traces by which we may infer the moving cause In point of time, conduct is closely associated with the internal condition giving rise to it; nevertheless the indication is strictly not a concomitant, but a retrospectant one, because the argument is backwards from effect (conduct) to cause (internal condition) *Wigmore* § *190*

Criminality of conduct, if material if it is otherwise relevant On principle the criminality of conduct is immaterial if it is otherwise relevant In *Blake v Ins Soc* 11 Cox Cr 251 *Lord Coleridge C J* said "In any but an English Court and to any but an English lawyer, the controversy whether this evidence is admissible or not, would seem, I imagine supremely ridiculous; because . plaintiff's claim
The obj be ascribed to the
inherent ng character and
conduct as showing other things If there is any other material or evidential proposition, for which it is relevant, and if it is offered for that purpose, it is receivable and its quality as misconduct or crime does not stand in the way *R* v *Wyley*, 2 Leach, 4th Ed 985 986, *R* v *Moore*, 2 C & P 235, *R* v *Rooney* 7 C & P 517, *R* v *Tissington* 1 Cox Cr C 12 *R* v *Dossett*, 3 C & K 306, 2 Cox Cr 243 *R* v *Bealsdale*, 2 Cr & K 765, *R* v *Gearing* 18 L J M C 215, *R* v *Weeks*, Leigh & C 18, 21 *R* v *Rearden*, 4 F & E 79, *Blake v Assur Co*, L R C P D 94, 102 In *R* v *Richardson*, 2 F & F 346, *Williams J* said 'There is no principle of law which prevents that being put in evidence which might otherwise be so merely because it discloses other indictable offence Evidence which is admissible for such
other felor
520, 541, s
antecedents as for the purpose of showing that he had opportunities of committing the offence, or that in a particular instance his act could not have been accidental But these cases only establish the principle that a relevant fact
[illegible] hereby rendered inadmis-

Walkers Case 1 Leigh

should exclude them, more than other facts apparently innocent Thus if a
[illegible]

murder just before the act was committed is undoubtedly admissible although it has the tendency to prove the prisoner guilty of a larceny Such circumstances constitute a part of the transaction and whether they are perfectly innocent themselves, or involve guilt makes no difference as to their bearing on the main question which they are adduced to prove But if the circumstances have no intimate connection with the main fact if they constitute no link in the chain of evidence then, supposing them innoc may be no

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A C 57 = 63
undoubtedly

8 not competent for th pro ecution to a lluc evi lence t nding to show that the accused has b en guilty of criminal acts other than those covere l by ind ctm t
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tends to show the commission of other crim s does not render it in idmissibl f it l e relevant to an issu b for the jury " So evi lence of conduct or char cter is a lmissible if otherwi e relevant *I mperor* v *Ste art* 21 S L R 5 = A I R 1927 Sind 2 , see also *Heera Gujer* v *I mperor*, 21 Bom L R 724=5 Inl C is 601

Antecedent conduct Und r this hea l come motives to commit the offenc ing it pr par itions for the commi on of, clarations of intention and threat t (l) and (e) are in tances of antece lent con uct "In tri ls for mur ler enmity ag in t the dead man and previous con duct are accept l as evi l nce *Per Lor l Atkin on* in *Director of Public Pros tion* v *Ball* 80 L J K B 691 at p 692 = (1911) A C 47

Previous attempts to commit it Pr vious attempts to commit an offence are losely allied to preparations for the commission of it, and only differ in being carrie l one step further an l ne irer to the criminal act of which ho ever like the former they fall short *Best* § *Benth Jud Ev* 69 So a former attempt by the accus d to perpetr ite the same crime in the same or in a diff rent manner is relev int on the question of his guilt of the latter crime *La son Pre Ev* 589 A i in licte l for poisoning his wife by giving her laudanum The fact that A ha l on a former occasion given her lau lanum which made l er s ck is relevant *Johnson* v *State* 17 Ala 69 In that case the Court ol serve l If his former attempt to poison his wife ha l been proved by a witness on the tr al the question of the admissibility of the

or on
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a domestic circle but in doing so if he would be very material In such a case r ttempt to poi on the patient mi ht not ct felony for the purpose of showing h

guilty knowledge in the last instance A is charged with setting fire to his house in order A had previously s t fire to his hous s relevant *Reg* v *Gray* 4 F & F and The fact that Z had previous ant *R* v *Gearing* 18 L J (M C also *R* v *Donnall* 2 C & K that V, at is charged ous day th *Dorgelt* 2 C & K 306

Proof & R 53 D on a pre ant *R* v

al or tortious r 919 *The* sion and the St Tr 1371 the accused, ow at sev ral d he would int [These on that of

qulification [i e circumstance] that the saying that a son would cut a father's throat is but a remote circumstance it is replied that the law and lawyers do
were to that it id it is

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he hated his father these six or seven years This is relevant R. v. Mandsfield, 11 How St Tr 1397. A woman and her paramour were accused of murdering her h[illegible]
unhap[illegible]
wishe[illegible]
accuse[illegible]
of J [illegible]
St Tr 841 J. is indicted for the murder of W The fact that J sometime previous said that he intended to "lay for W if he froze next Saturday night" is relevant *Jim v State*, Humph 116, *Republican v. Rob*, 1 Dall 145 H is charged with the murder of M He has been heard to say of M "If he don't do as he has agreed I will kill him" [illegible] *People v. Hon* 2 Wheel, Cr Cas [illegible] of her husband, she had previous [illegible] If she had a dose she would give it to him This is relevant R. v. Ogilvie 13 How St Trial 1273 S was found dead in a well It is proved that some time previous T had said that he would put S "in the well for two coppers' This is relevant on the Trial of T for the murder of S *Mrs Spooner's Case* 2 Chand Cr Tr 14 R is indicted for murder of S Before the murder R was heard to say of S "I will kick hell out of her I will break her damned neck' This is relevant *State v. Reed*, 62 M C 130 *In this last mentioned case the Court observed* . "*Threats* are significant Out of the abundance of the heart the mouth speaketh, Threats unexecuted amount to nothing, but when the thing, threatened is done, and is done as it was threatened, then the fact of the threat becomes an article of circumstantial evidence tending to inculpate the person threatening 'I will break her damned neck The dislocated neck of the victim of wrath and violence, her beaten and bruised body, show that what was threatened, was done The [illegible]
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he
threats indicate an inten[illegible]
a probability that he has [illegible]
clusive, but it may be [illegible]
determining the question of guilt [illegible] In R. v. *Hagan*, 12 Cox Cr 357, which was a case for murder of a child brought up in the family of the accused the following statement of the accused about a fortnight before, "the child is no good, he is eating the other children's food" was admitted

Time of threats In *Redd* v *State*, 68 Ala 492 (496) *Brickell C J* said "The length of time elapsing between the making of the threat and the criminal act, when the crime is to be proved only by circumstantial evidence, is of importance [illegible] If a long period intervenes,
injury and there
it would be a slight
here would be more
ughtless utterance,
ngth of time would
[illegible] So the
probative force of th[illegible]
during the whole [illegible]
continued to exist; [illegible]
that may have be[illegible]
Wigmore § 108

8. **Plans and Intentions as to wills, contracts, Deeds** Where the is is whether a will was executed, or whether a will was revoked or whether a will was made in a certain tenor or provision (as where an alteration is at issue) the plan or design or prior intention of the testator is relevant to show the doing or not doing of this alleged act, as any other act The argument is, " because he planned to make a will or planned to revoke a will, or planned to will property ... ...ried out his plan The relevancy of such a plan ... In Doe *Palmer* ...
not in the handwriting of ...
received of previous declarations by him that he intended to dispose of the property in the manner in which it is disposed of by the will in the altered form. If the draft of the will could be produced, corresponding with the will in its altered for... ...ury infer from it th... ...been compared and ... ...ions from the testator ... ...ly admissible? In what respect do such verbal instructions differ, for this purpose from a contemporaneous declaration by the testator to another person that he had determined in his will to dispose of his property in the manner carried into effect by the will as altered? It would not be creditable to the law if such evidence were to be excluded as a legal inference might be fairly drawn from it respecting priority of two events that is to say, the making of the alteration and the execution of the will, and I am not aware of any principle, rule of law, decided case, or dictum against ... They demonstrate that the alteration ... *...eonards*, L R 1 P D 154, *Mellish L* ... as to what he intended to put in his ... prior to the execution of his will are obviously evidence which corroborate the other testimony as to what is contained in the will because it is more probable that the testator has, than that he has not made a particular devise or a particular bequest when he has told a person previously ... it shows that he had in his mind to m... declaration See also *Keen* v *Keen* L R ... P D 60 (64); *Gould* v *Lakes*, L. R 6 P D 1

Contemporaneous Conduct This would include the pleadings of parties their behaviour as such, and their demeanour as witness *Donough Cr Tr* p 32

Illustrative Cases The fact that the accused pointed out the place where the weapon (with which the ... the place at which it was concealed ... was in a very agitated state and ... to show the spot where the weapon used in the commission of the murder was concealed are evidence of conduct under this section which renders highly probable the oral evidence in the case ... was the murderer ... *Emperor* ... 402. But ... dents nar... *Singh* v *Emperor*, ... of an acco... deposition ...

... accompanying st... 21 Bom L R 721= ... lence against a person ... is open to doubt his ... to be such evidence of ... against him in the ... L J 167

Falsehood, fraud, fabrication and suppression of Evidence, etc It has always been understood—the inference, indeed, is one of the simplest in human

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experience—that a party's falsehood or other fraud in the perpetration and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one, and from that consciousness may be inferred the fact it

merit *Wigmore* § 278; vide illustration (e);

Palmer, Cockle Cr Ev 58. In the last case

to the jury said "Then gentlemen it is

attention to the conduct of the prisoner at the bar, and there are some instances of his conduct of which you will say whether they belong to what might be expected from an innocent or a guilty man He was eager to have the body fastened

is certainly

was being conveyed, to be analysed

be obtained of his guilt Again,

and procuring from the postmaster the opening of a letter from Dr Taylor, who had been examining the contents of a jar, to Mr Gardiner, the attorney employed on the part of Mr Stevens And then, gentlemen, you have tampering with the coroner, and trying to induce him to procure a verdict from the coroner's jury which would amount to an acquittal.' So a party who gives or produces false evidence may by so doing give rise to a general presumption against the truth of the case *Girish Chunder* v *Issur Chandra*, 3 B L R A C J 341, see also *Step Dig Ev Art* illus (c), *Annesley* v *Earl of Anglesea*, 17 How St Tr 1217

In *Moriarty* v *R Co*, L R 5 Q B 319, *Cockburn C J* said "The conduct of a party to the cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of defence if he is defendant, is honest and just,—just as it is evidence against a prisoner that he has said one thing at

falsehoods leads fa

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and his endeavoured to have recourse to perjury, it is strong evidence that he

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succeed by righteous means, has recourse to means of a different character, that that which he desires, namely, the gaining of the victory, is not his due, or that he has not good ground for believing that justice entitles him to it but it is always evidence In *R* v *Castro (Tichborne Case) Cockburn C J* in his charge to the jury said "These falsehoods [of the defendant], however, must not operate unduly to the prejudice of the defendant beyond this, that falsehood is a badge of fraud; and a case which is sought to be supported by means of deception may '*prima facie*', until the contrary be shown, be taken to be a bad and dishonest case, and further, the recourse to fraud and falsehood necessarily engenders distrust" Similarly *Phillimore J* in *R* v *Watt* 20 Cox Cr 852

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L R 4 Ch D 637, 645 In the last mentioned case

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8 *R v Donnall*, Wills' Cir Ev 188 A is accused of shooting B with a pistol A pistol is found beside B in such a position that it would appear that it is a case of suicide But it is proved that it is A's pistol and that A placed it there This raises a presumption of A's guilt *R. v. Green*, 7 How St Tr. 159

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if a witness has been suborned by B, a clerk in the defendant's bank, it is idle to argue that such a clerk has no implied authority to tamper with witness, and

the question, whether the offer of
ness, by one employed as an agent to procure evidence is admissible, said "This is a lawful employment necessary in many cases, and being a lawful employment, it is to be presumed, until the contrary be shown that the employer means and intends that his agent shall execute it by lawful means. The prosecutor may, up to the very moment when the proof is offered, be wholly ignorant of the wicked act of his agent, it
informed of it, he may have rejected it with
the proferred testimony and withholden th
be absent from the trial, which frequently happens it may be impossible to prove his ignorance in the one case or the propriety of his conduct in the other [Nevertheless] I am by no means prepared to say that in no case and under no circumstances appearing at a trial i might not be fit and proper for a Judge to allow proof of this nature to be submitted

Subsequent conduct Subsequent conduct of a party or his agent is relevant To this class belong sudden change of life or circumstances, silence when accused false or evasive statements made by the accused, suppression or eloignment of evidence, forgery of exculpatory evidence, evasion of justice, by flight or other wise, tampering with officers of justice, and fear, indicated either by passive
2, *Vide illustrations (e) and (i)*
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Demeanour when charged, of accused One of the common and established
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which consists of outward signs
onscious guilt" So far from it, any indications of it, arising from the conduct, demeanour, or expressions of the party, are legal evidence against him The law can never limit the number or kind of such indications ' In *Moore v State*, 2 Oh St 592, *Caldwell J* said: "From our knowledge of the human mind and its workings, we expect, with almost positive certainty, that when it is the sole repository of so dreadful a secret it will affect the conduct and sayings of the person; hence the mind naturally looks to these with the most anxious scrutiny, and would require for its satisfaction, if such a thing were possible, a complete transcript of the person's conduct and sayings Sometimes a person is detected as the author of the crime by showing an unusual anxiety to discover the perpetrator, at other times the discovery is led by the person showing too much indifference In some instances the observation that the person appears to know too much about the transaction leads to the discovery, at other times the inquiry is started by his appearing to know too little These are generally acts that in themselves show no disposition to do mischief, but it is because they are unnatural, because they tend
mind conscious of guilt that they a
in themselves nothing, except as sl

So the conduct or demeanour

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Demeanour during trial The demeanour of an accused person in Court during trial is too elusive to be justifiably considered as any indication whatever
y v *People*, 140 Ill 50 But the accused's
the witness stand and during the trial *Rider*

Flight etc Flight from justice, and its analogous conduct, have always been deemed indicative of a consciousness of guilt *R* v *Sorab Roy*, 5 W R Cr 28, *R* v *Gobordhan*, 9 A 528 (568); *Gangaram* v *Emperor*, 62 Ind Cas 545 The wicked flee, even when no man pursueth, but the righteous are bold as a lion *Wigmore* § 276, *Best Ev* § 460 In primitive times, the accused who fled, whether
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with an off n c diff rent from that for which he was being tried, no effect should be given to his running away *Rakh il* v *Queen Empress* 2 C W N 81 In *R* v *Donnall*, 8 R Rep (1817) p 175 *Abbot J* said "A person however conscious of innocence might not have courage to stand a trial, but might although innocent think it nece ary to consult his safety by flight But see the case of *Deacon Broke* Not Tr, *R* v *Crifien*, Donough Cir Ev p 40

In *R* v *Hity* 2 C & P 159 which was a case of trespass, running away from the premises when let etc l was admitte l as evidence of not being thereby permissive The reason of this presumption is thus tated by *Parker J* in *Start* v *L* 164 U S (2" Th law says th it a man is to be judged by his consciou ness of the right or wrong of what he does, to some extent If he flees from justice because of that act, if he goes to a distant country and is living un ler an as um l name because of that act the law says that is not in harmony with what innoc nt n n ds and jurors have a right to consider it as evidence of gu lt, because he is an eye witness to the occurrence, he knows how it h l transpire he is pres u ne l to have a consciousness of that act It is a principle of human nature— in l ev ry man is conscious of it, I apprehend that if he does an t t wh l l con cious is wrong, his conduct will be along a certain line He will pursue a c rtain course not in harmony with the con luct of a man who is con cious that he has done an act which is innocent right an l proper The truth is—and it is an old scriptural adage—that the wicke l flee when no man pursueth b it the righteous are as bold as a lion Men who are conscious of right have nothing to fear They do not he itate t onfront the jury of their country, because th it jury will protect them"

Explanation of flight etc When a flight has been proved as furnishing evidence of guilt it is competent for the accu e l to prove other cau es which may have influ nc l him to fly, an l leave the jury to lecide whether his flight was caused by a con cicu ness of guilt an l apprehension of conviction or by such other caus s s he may prove to have ex sted *Kinnel y* v *Com*, 14 Bu h 340 *Rakhal* v *Queen Empress* 2 C W N 81 *Ganpuram* v *Emperator*, 62 Ind Cas Cr 314 = 2 A I J 529 Evi lence of f ct that he ha l b en advised to leave, to avoid vengeance by the lecea e l s fri nds is allowe l *Ballu* v *U S* 3 Ind 694 To the ame en l the a lvice of frien ls may be as igne l as the cau e of fleeing from the juris liction In all case the ac u d is entitled to prove by his own testimony the actual motive which ha influenced his conduct An absence due to insanity obviously gives rise to no infer nce of guilt. *Chamberlayne's Ev* § 1399 a. In a ca e wh re th only evi lence a ain t the accu ed was that he ab cond ed after the murder of a person it was hel l that the f ct of accused's absconding was not inconsistent with his innocence known hat an incorrect accusation has been brought a ainst him *Crown* v *Ahmel*, 1 P L R 1915 = 16 Cr L J 156 = 27 Ind Cas 219, *see also Emperor* v *Gangaram*, 23 Bom L R 1274 Post cards mailed by the accused shortly after his departure were admitted to indicate non-concealment of his whereabouts, an l thus to rebut the inference of guilt of a murder from his flight *Goforth* v *State*, 183 Ala 66

Attempt to escape An attempt to e cape stands in the same position as would escape itself Not unnaturally, more over, the possession of tools calculate l to assist an attempt at escape is regarded as a probative fact in such a connection Efforts to bribe a custodian of the jail in or ler to facilitate flight give rise to a similar inference, i e, conciousness of guilt None of these incriminating circumstances constitute a *prima facie* case of liability to the consequences of crime Standing alone therefore it will not warr int a conviction *Chamberlayne's Ev* § 1399(a)

Actor alone affected Naturally, flight or an attempt to flee affects only the actor—the person so conducting him-elf *Chamberlayne's Ev* § 1399 (a)

Declining to flee, voluntary return etc In such a connection, only such portions of conduct as bear against the accused are relevant It follows that while flight is competent, as grounding an inference, that the accused knew he was guilty, declining to flee when urged is, at most, a self serving act without probative force Any other rule of a lministration, indeed, would flood the Courts with fabricated testimony For the same reasons, one accused of crime cannot show that, having fled, he afterwards voluntarily returned *Chamberlayne's Ev* § 1399 (a)

Complaint by prosecutor The prisoner was indicted for theft and dishonestly receiving stolen property. The prosecutor, while travelling by train to Calcutta, discovered that his courier bag, containing his watch, chain, and a sum of money, had been stolen He reported his loss to a railway police inspector at the first station at which the train stopped after he became aware of the theft, the prisoner not then being present Evidence of this report is held admissible under s 8, *illustration (k) Queen* v *Macdonald*, 10 B L R App 2 The first information report against the accused is admissible under this section *Azimuddin* v *Emperor*, 41 C L J 253 = A I R 1927 Cal 17; *Soosa Lal* v *Emperor*, 82 Ind Cas 712, *Roman* v. *Emperor* 4 Lah L J 191; *Abdul Ghafur* v. *The Crown*, 25 P W. R 1910 = 6 Ind Cas 957 = 11 Cr L J, 125

Silence Sile... of the accused when charged with an offence ... nless the cha... c Cr 625 ... aulie v Dento ... ded upon the maxim *qui tacet* ... this ... is ... *gmore* § 1071 A is accused of administering ... of killing her A witness testifies that the wife had declared that A had attempted to poison her, in his presence, and that A was standing nearby, but made no response This is relevant *Com* v *Galavan*, 9 Allen 271 S is indicted for the murder of T Certain observations were made by his wife in the presence of others on the subject of crime, to which S made no direct reply These statements are relevant against S *R* v *Smithies*, 5 C & P 332, see also *R* v *Mallory*, 15 Cox 456 (458) The conduct, demeanour ...

to the Police that he had purchased opium from the accused is inadmissible, unless it is made in the presence of the accused *Ah Shin* v *Emperor*, 12 Cr L J 429 = 12 Ind. Cas 87 In resting on silence as to a particular matter as a legitimate ground of inference regard must be had to the circumstances, it must be considered whether there was any occasion for the words, and any reasonable explanation of the silence *Chabil Das* v *Dayal Mouji* 6 Bom L R 557

Conduct as evidence of consciousness of innocence The lack of guilty consciousness may be useful to show innocence of a crime This lack of guilty consciousness—in ot... e—seems not to have been doubted b... But, assuming ... proposition,—the ... to be feigned and ... Tr 159 (207),

Failure to prosecute In general a delay in instituting a prosecution is some indication of a consciousness of the weakness of one's cause The failure to complain speedily of a rape is universally conceded to be a damaging circumstance against the woman making the charge *Wigmore* § 284

Failure to produce evidence The non production of evidence that would naturally have been produced by an honest and therefore fearless claimant ... to the party's cause *Wig* ... Trial 3 2 *Rowan's Trial*, 22 ... ol, 605, *Boyce* v *Chapman*, ... F 150, 180 189, *Vaughton* v ... ox Cr 119 (432) In *Blatch* ... is certainly a maxim that ... which it was in the power of

one side to have produced and in the power of the other to have contradicted." Similarly in *R* v *Burdett*, 4 B & Ald 122, *Best J* said: "If the opposite party has in its power to rebut it by evidence, and yet offers none, then we have something like an admission that the presumption is just . . The law does not impose impossibilities on parties; it expects that a man who has the means of knowing who may be witnesses shall call them"

Party's failing to testify A party's failing to appear when he had a strong motive to appear, would be evidence against him *Brown* v *Stock* 77 Pa 471 So refusal to testify himself or to call available witnesses in his own behalf warrants inference unfavourable to the respondent *Att Gen* v *Pelletier*, 134 N E. 406

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raise an inference that his motive was a consciousness that he had no probable

1931 Bom 97, see also *Bonomalee Churn* v *Hafizuddin*, 13 B L R 247 Note= 12 W R 317, *Burola* v *Rughoonath*, 16 W R 295

Destruction or non production of documents, etc In *Anon* 1 Ld Raym 731, *Holt C J* said "If a man destroys a thing that is designed to be evidence against himself, a small matter will supply it" and so a copy sworn was admitted to prove a note of defendant torn by him See also *R* v *Arundel*, Hob 109, *Word* v *Apprice*, 6 Mod 264, *Samson* v *Rumsey*, 2 Vern 561; *Young* v *Holmes* 1 Stra, 70, *Armory* v *Delamirie*, 1 Stra 505 In *Cookes* v *Hellier*, 1 Ves Sr 234, *Hardwicke L C* said 'If dec' [illegible] arty who would take benefits thereof a Court of [illegible] further than the Court of law" See also *R* [illegible] ocument is not produced after proper notice, a strong presumption is raised against the party *Roe* v *Harvey* 4 Burr 284; see also *Clunes* v *Peggy* 1 Camp 8; *James* [illegible]

[illegible] nted [illegible] may [illegible] leed [illegible] against the persons keeping it *Devonport*, 27 L J C P 54, *Celd* 1 Q B 814 This rule is [illegible] ire

based upon the maxim *omnia praesumunt* [illegible] presumed against a spoliator)

[illegible] on [illegible] he [illegible] ng

poisoned T It appears that S has tried in every way to prevent the body of T from being exhumed and examined [illegible] *R* v *Stansfield*, 11 How St Tr 1402 [illegible] R being suspected of murdering him [illegible] ment floor, objected strongly, ar [illegible] would fall down The officers of [illegible] und underneath the floor A strong [illegible] Burr Ev 462 [illegible] pare her feet with [illegible] force to put her feet in [illegible] *Cicely*, 13 S & M 205

Fear exhibited by the accused The fact of fear exhibited by the accused raises an inference against the accused A being accused of the murder of B shows a great repugnance to looking at the dead body of B This is relevant *R* v *Stewart*, 19 How St Tr 156, *R* v *Ogilvie*, 19 How St Tr 1284 T comes into a town with a horse and immediately employs an auctioneer to sell it While the sale is going on T is observed to look excited and apprehensive, and on receiving the purchase money leaves the place at once, and on subse-

quently meeting the auctioneer endeavours to avoid him The conduct of T S. raises a presumption of his guilt. *Tyner* v *State*, 5 Humph 383

Possession by the accused of the fruits of crime Where the evidence against the accused is circumstantial in its character, the possession by the accused of the fruits of the crime is relevant as a circumstance in the chain of evidence from which guilt may be inferred *Wilson* v *U S*, 162 U S 613 M is indicted for the murder of a woman When arrested, property belonging to the woman, such as dress and jewellery, is found in his possession This raises an inference of guilt *State* v *Millain*, 3 Nev 109, *Ina* v *Queen*, 11 C 190 But a reasonable explanation by the accused of his possession over throws the presumption and casts the burden on the prosecution provided the explanation is not inconsistent with the identity of the property *R* v *Crowhurst*, 1 C & K 370, *R* v *Smith*, 2 C & K 206, *Queen* v *Evans*, 2 Cox C C 270

Sudden change in [illegible] idden change having taken [illegible] ubse quent to the crime is rel [illegible] man, is found murdered an [illegible] vards commences to live an [illegible] so an inference of B s guilt [illegible] Its effect may be very slight, and, in many cases furnish not the least ground for charging a party The possession of a large sum of money with strong accompanying circumstances of guilt of an independent character accom panied with evidence of entire destitution of money before the time of the leaving may probably be submitted to the jury' *Com* v *Montogomery* 11 Metc 534

Inconsistent and contradictory accounts of circumstances of the crime

[illegible]

intention more weighty than words, may be given in evidence in aid of its construction *Tay* § 1204, *see also Att Gen* v *Brazanox College* 2 Cl & Fin 295, *Att Gen* v *Drummond*, 1 Dur & War 153 In the last mentioned case *Lord Chancellor Sugden*, said Tell me what you have done under the deed and I will tell you what that deed means So in order to ascertain the sum of an old char [illegible] tions of the [illegible] certainly a lm [illegible] *Coll* 38 L J [illegible] the question is whether one of a large number of leases granted by a landlord at about the same time, under similar circumstances and on similar terms, was [illegible]

ascertain whether the parties intended ownership to pass independently of [illegible] *jan* v *Allah Ditta*, 9 Ind Cas 517=27 P L R [illegible] v *Nihal Singh*, 7 P R 1897 Rev, *Ramchand* v [illegible] case of ambiguous grant, subsequent conduct [illegible] grant *In re Parmanandas*, 7 B 109, see also

S *Cheetum Lal* v *Chutterdhari*, 19 W R 132 Conduct of parties and surroundi circumstances are relevant in order to ascertain whether a deed which appear ab-olute sale, is not in fact a deed of mortgag Kallychurn, 9 C 528 ; *Kashi Nath* v *Chand* ... *Gobinda*, 1 B 591; *Lincoln* v *Wright*, 4 ... ihar, 9 C 898 Where the meaning of a document regarding certain transactions is not clear, the conduct of the parties i admissible in evidence to show in wh ... ... garded the tran sactions *Badri* v *Sadappal*, A I R 1 ... rule is applicable in explaining the term ... 510; *Kuladi* v *Kalidas*, 12 C 536, 30 C 883 But the statement made by a person as to the circumstanc under which he executes a document a considerable time after the execution cannot be admitted to prove the facts stated by him *Virasamma* v *Billa Ke* 25 M L J 637

Explanation 1 Explanation 1 points out that mere statements, as distin guished from acts do not constitute conduct Conduct may be equivocal or insensible without statements explanatory or elucidatory of it Statements accompanying acts are in fact part of the *res gestae* just as much as the acts them selves They are often absolutely necessary to show the animus of the actor They have been styled verbal acts *Bateman* v *Bailey*, 5 Term R 512; *Hyde* v *Palmer*, 3 B & C 657, *Bennison* v *Cartwright*, 5 B & C 1 The admissibility of a statement depends not merely ... on the light it throws upon an act which is itsel ... A, & E 313; *Norton* p 10 , *R* v *Bliss* 7 A & E ... is to a case in which a person whose conduct is in dispute mixes up together actions and state ments, and in such a case those actions and statements may be proved as a whole For instance a person is seen running down a street in a wounded condition, and calling out the name of his assailant, and the circumstances under which the injuries were inflicted Here what the injured person says and what he does may be taken together and proved as a whole But th case would be very different if some passers by stopped him and sugge ted some name, or asked some questions regarding the transaction If a person were found making such statements without any questions first being asked, then his statements might be regarded as a part of his conduct But where the statement is made merely in response to some question or suggestion ... the fact in issue, but by interpo ... *Queen Empress* v *Abdulla*, 7 A ... ntends "to make those statements admissible, and those only, which are essential complements of acts done or refused to be done, so that the act itself or the omission to act acquires a special significance as a ground for inference with respect to the issues in the case under trial" *Per West J* in *Empress* v *Rama Birappa*, 3 B 12 (17); see also *Reg* v *Jora Hasst*, 11 B H C 242 U ...

... The question is not open to the objection of ... F 116 120 ... ying that act m ... *Wright* v *Tatham*, 1 A & E 361 The words must strictly accompany the physical act and be ... "It is not however, ... fact that will be re ... & P 550, ... a purpose ... *Phip Ev* ... "conduct" ... statement ... v *Vara*, 14 B 260 (F B)

Complaint Illustrations (j) and (k) make statements of a person against whom an offence has been committed, relevant. But a mere statement is not relevant ... These illustrations are ... an offence has been committed ... accompanying such conduct. ...
statement of fact of rape and r...
conduct, the former has no such t...
in discriminating between a staten...
the essential difference between ...
redress or punishment, and must b...
for instance, or a parent, or some other person to whom the complainant was justly entitled to look for assistance and protection The distinction is of importance, because while a complaint is always relevant, a statement not amounting to a complaint will only be relevant under the particular circumstances, e g, if it amounts to a dying declaration or can be used as a corroborative evidence *Norton Ev 111*

Complaint in cases of rape, criminal assault, etc Illustration (j) is an

thus coming into issue, the circumstance that at the time of the alleged rape the ... a self contradiction ... ming the victim of ... That she did not, ... assertion that ... at the time of ... ice as a virtual ... arity, therefore, ... be allowed to

Neal Utah 151 So in cases of rape, indecent assault and similar offences upon females (t...
shortly af...
with the ...
prosecution, not to prove the truth of the matters stated, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the ... of which she ... 905) 1 K B ... 6) 60 J P. ... of conduct
If the conduct of a woman who has been ravished is such that she lodges a complaint, then that conduct is relevant and the terms in which the complaint was made are relevant as conduct but they are not relevant as direct proof of the act The particulars of the complaint, may so far as they relate to the ... evidence of facts ... of the woman ... on her part

Cas 1043, see also *Soosalal* v *Emperor*, 82 Ind Cas 142, *Raman* v *Emper* 4 Lah L J 491 But if she only answered questions her evidence would be hearsay *Ibid*, see also *Nga Som* v *Emperor* 43 Ind Cas 113 = 19 Cr L J 115, *Emperor* v *Soopi*, 31 P L R 391 = 120 Ind Cas 539 = 31 Cr L J 141 A I R 1930 Lah 81

Whether [illegible] admissible Originally the details of a woman's statement [illegible] 2 Stark 242; *R* v *Walker* 2 Moo & Rc [illegible] v *Alexander*, 2 Craw & D 126, *R* v *Ol* [illegible] & K 246, *R* v *E*[illegible] 2 F & F 575 [illegible] *aller* (*ubi supra*) which was decided in 1839 *Parke B*, excluded the statement but said, 'The sense of the thing certainly is, that the jury should in the first instance know the nature of the complaint made by the prosecutrix and all that she then said But for reasons which I can never understand the usage has obtained that the prosecutrix's counsel should only enquire generally whether a complaint was made by the prosecution of the prisoner's conduct towards her leaving the prisoner's counsel to bring before the jury the particulars of that complaint by cross examination' See also *Steph Dig Ev* Note I; *Reg* v *Eyre*, 2 F & F 579 *Reg* v *Wood* 14 Cox 46 A series of rulings beginning with *R* v *Lillyman* (1896) 2 Q B 167 repudiated the original practice and declared the whole statement admissible In that case at p 177 *Hawkins J* observed 'After a very careful consideration [illegible] we are not bound by any authority to [illegible] the fact of [illegible] our doing complaint which [illegible] complaint of so The evidence [illegible] only for that which is charged against the prisoner and can be legitimately u[illegible] only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness box negativing her consent and affirming that the acts complained of were against her will and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her The jury, and they only, are the persons to be satisfied whether the woman's conduct was so consistent or not. Without proof of her condition demeanours and verbal expressions, all of which are of vital importance in the consideration of that question, how is it possible for them satisfactorily to determine it? Is it to be left to the witness to whom the statement is made to determine and report to the jury whether what the woman said amounted to a real complaint? Are the jury bound to accept the witness's interpretation of her words as binding upon them without having the [illegible] require it to be them to form [illegible] such questions [illegible] and answers is to [illegible] from imperfect materials perfect in [illegible] the witness in the box In our [illegible] speculation [illegible] the whole statement of a [illegible] s to the charge [illegible] for the prose[illegible] 9 Cox Cr 449 [illegible] 301 *Hedge's* *R* v *Osborne* (1905) 1 K B 551 [illegible] (1906) *Case*, 3 Cr App 262, *Graham's Case* 4 Cr App 218, *Christie's Case*, 10 Cr App 141 = 1914 A C 45, *R* v *Norcott* (1916) 1 K B 347 It appears from illustrations (j) and (l) that the Indian Legislature has given effect to the sound reasoning expressed by *Parke J* in *R* v *Walker*, 2 M & R 212 and *Bramwell J* in *Reg* v *Wood* 14 Cox 46 So under this section the particulars of a complaint are also admissible in evidence *Stoke's Anglo Indian Code*, 858, see also *Soosalal* v *Emperor*, 82 Ind Cas 142, *Emperor* v *Phagunia*, 82 Ind Cas 1043 = 1926 P 58

Time for making the complaint The rule is that the complaint should be made at the earliest reasonable opportunity But what is the earliest and reasonable opportunity of complaint depends on the circumstances of each case *R* v *J Lee* 7 Cr A R 31 In *Chesney* v *Newsholme*, (1908) P 301, which was a case of immoral acts by a clergyman with a boy the boy's statement to his mother on the same evening was admitted, but not his statement on the next evening

a complaint a month after was received *In* ...(1911) A C 45, which was a case for indecent ... identification of the accused within a few ... the ground that "complaint is only admissible to negative assent" In the case of the rape of an innocent girl of tender age, the evide... ment by ... evidence ... and also ... Cas 142

Complaint in answer to question The complaint must be volunteered, and not in answer to questions *R* v *Merry*, 19 Cox C C 432 In *King* v *Osborne*, (1905) 1 K B 551, the prisoner was indicted for an indecent assault on a girl ... therefore immaterial ... girl to a question ... why the girl had not waited for the other child at the prisoner's house *Held* that the girl's reply was a complaint of the prisoner's conduct to her In that case *Ridley J* in reading the judgn... first point, the c... had been put to... assault, and the ... ment made in answer to a question, it was a conversation and not a complaint, and he declined to allow it to be given in evidence It does not appear, however, from the report what the question was that was put to the girl It appears to us ... in such cases ... Questions of ... will render it ... other person what is the matter? or why are you crying? will not do so These are natural ... and, if ... he do ... ought to be rejected In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the ... reum ... no ... anti

R v *Norcott*, 12 Cr A R 166

... uch evidence is ... male person *R* ... R 162=86 J ... in that case obs... present law, that th... be thought ... in *Lillyman's* ... on of consent ... where no ... present day, ... historical ... by females in ... *Cullingworth*, ... admissibility ... girls but when one looks at the facts of those cases, it is apparent that the antithesis which the Judge had in mind was not an antithesis between cases in which a complaint of this nature was made by a female and cases where a complaint of this nature was made by a male person, but the antithesis is between what may be broadly described as sexual offence on the one hand and non-sexual

offences on the other" But section 8 of the Evidence Act is very wide, and a complaint of any offence is admissible *Vide illustration* (k)

In *R* v *Foster*, 6 C & P 325, which was a case of man-slaughter *Park J* allowed the statement of the deceased, made to a passer-by immediately after the accident, to ... the best possible testimony, that, in ... what it was that had knocked the dec... that case the evidence was not admitted to show the conduct of the prosecutor but apparently as part of *res gestae* Strictly speaking this testimonial evidence was admitted as an exception to Hearsay rule as spontaneous declaration for which no provision has been made in the Act, but the admission of which is indicated as a part of *res gestae* under section 6, *illustration* (a)

Explanation 2 Under this explanation another class of statements, i.e. statements which affect the conduct of a person, whose conduct is relevant under this section, is admissible Illustrations (f), (g) and (h) are examples of such statements The conduct of A in illustrations (f), (g) and (h) shows nothing unless the statements are put before the tribunal Here the statements made in the presence of the party are admissible as the ground work of their conduct Here the conduct of A is equivocal and statements are admissible to explain that conduct as part of the *res gestae* under the rule of Verbal Act doctrine explained in s 6 In this explanation statement includes document addressed to a party *Vide illustration* (h); *Reg* v *Thompson*, (1910) 1 K B 640 "But before a bare statement made by another person in an accused's presence and prejudicial to him is allowed to be used as evidence against him, there must be something in the shape of action, conduct or words, which in the opinion of the Judge, would justify the jury in drawing an inference that the accused subs... *R* v *Smith*, ... *Emperor*, 12 ... ower to make ... luced which ... e statement, ... being one ... explanation ... cter of any observations or explanations he thought fit to make, substantially admitted the truth of the whole or portion of it" *Ibid* But in *Rex* v *Thompson*, (1910) 1 K B 640=79 L J K B 321 at p 322, *Lord Alverston C J* said "But if the case ... statement ... is true ... is never ... , 71 J ... it goes to ... by the P. 103, ... consideration whether the prisoner has admitted the truth of the statement ... that such a ... would ... *Reg* v ... and the ... strenu... dmitted ... indict... n years, ... d done ... "*Sterne* ... it, she said ' you ... and on being asked by another person she ... *Norton*," and pointed to the accused The accused said, "No, *Madge*, you are ... on," and pointed to ... 'If I have done it, ... whether the statement ... Court consisting ... *Blackford J* observed, ... r investigation are ... ay; but to this rule there are exceptions One is that statements, made in the presence of a prisoner upon an occasion on which he might reasonably be expected to make some

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observation, explanation, or denial, are admissible under certain circumstances We think it is not strictly accurate and may b misleading, to say that they are

prisoner, as such an expression may seem to

of the facts stated in them; they

explanatory of the answer given to them by the p rson in whose presence they are made Such answer may of course be given either by words or by conduct —for example, by remaining silent on an occasion which demanded an answer

some part of
ts are admitted;
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(10th Ed) s 814
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whether given by words or conduct, acknowledges the truth of all or part of them If there be no such evidence the contents of such statements should be excluded It is perhaps too wide to say that in no case can the statements be given in evidence when they are denied by the prisoner as it is possible that a denial may be given under such circumstances and in such a manner as to constitute evidence from which an acknowledgment may be inferred, but as above stated we think they should be rejected unless there is some evidence of

v *Christie*,
l was charged
tly after the
"That is the
i was whether

the statement made in the presence of the accused is admissible *Lord Atkinson* in giving his judgment observed 'As to the second ground, the rule of law undoubtedly is that a statement
even upon an occasion which shoul
explanation or denial from him,
save so far as to make it, in effect hi
only, then to that extent alone it becomes his statement He may accept the

accused of the facts mentioned in the statement necessarily render the statement inadmissible becaue he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgment may be inferred by them" In the same case *Lord Moulton* said "If the prisoner admits the charge the evidence is obviously relevant If he denies it it may or may not be relevant For instance, if he is

behaviour of the prisoner, for the fact that some one makes a statement to him subsequently to the commission of the crime cannot in itself have any value as evidence for or against him The only evidence for or against him is his behaviour in response to the charge but I can see no justification for laying down as a rule of law that any particular form of response, whether of a positive or negative character, is such that it cannot in some circumstances have an evidential value I am therefore of opinion that there is no rule of law that evidence cannot be given of the accused being charged with the offence and of his behaviour on hearing such charge where that behaviour amounts to a denial of his guilt" In the same case *Lord Reading* also observed: "In general, such evidence can have little value in the direct bearing on the case unless the accused, upon hearing the statement, by conduct and demeanour, or by the answer made by him, or in certain circumstances by the refraining from

... art of ... nt ... cts ... wa ... his ... the
denial could infer that he acknowledged its truth in ... practice of the Judges has been to exclude it altogether" In this case the statement of the boy was held admissible See also *R* v *Hickey*, 6 Cr A R 200=27 T L R 441; *R* v *Wilson*, 6 Cr A R 207; *R* v *Adams*, 17 Cr A R 77, *R.* v *Strand*, 7 Cr A R 38

Which affects such conduct The statements whether oral or written must be shown 'to affect the conduct" of the person to whom they are made, and therefore mere statement to persons, which cannot be shown to be in any way connected with or to bear upon his conduct, would be inadmissible *Cun Ev* 97 In *R.* v *Bexley*, 70 J P 263, the prisoner was charged with murder of her child ... to the police ... wa ... n nt

is made by a person in the presence of accused and the accused upon hearing the statement, by conduct and demeanour, or by the answer made by him, or in certain circumstances, by the refraining from an answer, acknowledges the truth of the statement, it is evidence against him *R* v *Christie* (1914) A C 545 see also *Child* v *Grace*, 2 C & P 193, *R.* v *John*, 7 C & P 324, *Jones* v *Morrel*, 1 C & K 266; *R* v *Welsh*, 3 F & F 275; *Price* v *Burva*, 6 W R (Eng) 40, *R.* v *Mallory*, 15 Cox 458, *R.* v *Cox*, 1 F & F 90; *Hayslep* v *Gymer*, 1 A & E 165

Subsequent co... has established the guilt of the accu... the subsequent conduct of ... proof of the correctness of the c... from the evidence of the prosecution witnesses By itself however it ... furnish no legitimate proof of the guilt of the accused *Chandra Ka Prosad* v *Emperor* 126 Ind Cas 684=31 Cr L J 1081=A I R 1930 Oudh 324=7 O W N 564

Facts necessary to explain or introduce relevant facts

9 Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose

Illustrations

(*a*) The question is, whether a given document is the will of A

The state of A's property and of his family at the date of the alleged will may be relevant facts

(*b*) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true

The position and relations of the parties at the time when the libel was ... facts in issue ... ut a matter unconnected ... there was a dispute may

(*c*) A is accused of a crime

The fact that, soon after the commission of the crime, A absconded from his house, is relevant under section 8, as conduct subsequent to and affected by facts in issue

The fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent

(d) A sues B for inducing C to break a contract of service made by him with A C, on leaving A's service, says to A—"I am leaving you because B has made me a better offer" This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(e) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife B says as he delivers it—"A says you are to hide this" B's statement is relevant as explanatory of a fact which is part of the transaction

(f) A is tried for a riot and is proved to have marched at the head of a mob The cries of the mob are relevant as explanatory of the nature of the transaction

Introductory facts It would be practically impossible, in the conduct of

Those circumstances in relation to an action or suit may not *per se* be relevant, but in connection with the main issues to be put before the tribunal, they are treated as the introduction to the main matters or by way of inducement to it They take the place of the preamble to a statute, which, while it has no power in

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land referred to at a foreclosure sale with her money and for her Upon direct

introductory and explanatory are a

R 36 (50, 51)=17 W R Cr 15; see also illustrations (a) and (b) and illustration (c) to section 6

used in a conversation, the demonstration of the use of a scientific instrument,

testimony showing th...
that...
exc... servant e g, from
am...
wh... may be drawn are those which may
pro... explanatory A fact may well be admitted in evidence
alth... neither one of the *res gestae* nor probative in any direct line of
proof to the existence of such a fact It will be received if it explain or complete a *res gestae* or probative fact in such a way as to create, increase or diminish its direct probative value the objective inferences which may properly be drawn from it If a fact tendered in evidence fulfil these conditions it is not even a bar to its admissibility that, as direct evidence it would be rejected under some positive rule of law or procedure Facts of this nature are as it were correlating; they state the relations between the *res gestae* or probative facts either with each other or with extrinsic circumstances necessary to their full understanding Where the latter are entirely intelligible and complete in and of themselves no explanatory or supplementary facts are rationally required Facts of an explanatory or supplementary nature may even be used to give force and cogency to those in the direct line of proof, The effect of evidence of this nature is not however in all cases affirmative An explanation may equally well be intended and calculated to diminish the force of the evidence produced by one's adversary In point of time, the explanatory or supplemental fact may precede accompany or follow the probative or *res gestae* fact to which it is correlated" *Chamberlayne's Ev* 1755 Clause (c) affords an illustration of how an accused person alleged to have absconded after the events can produce evidence to explain his sudden departure, and thereby rebut the presumption which arose from his equivocal conduct *Donough Ev p 46* The field book or *Chitta* which describes the various plots is admissible under this section as explanatory of the partition paper which without the *Chitta* might be very difficult to understand *Janki* v *Dino*, 2 Ind Cas 367, but see *Gopal* v *Madhub* 21 W R 29 The Bombay Police received a telegram purporting to emanate from the chief commissioner of Police *Naya salad*, informing him that bank drafts in duplicate had been stolen and it was feared that signatures would be forged and negotiation attempted in Bombay A second telegram was received from *Naya salad* in reply to inquiries made by Bombay, Police The accused cashed a draft at the French Bank, Bombay and presented another at the Eastern Bank, Bombay The clerk informed his superiors and as a result the accused was arrested It was held that the telegrams purporting to be sent by the *Naya saland* Police were relevant to explain the conduct of the clerk of the Eastern Bank and the Bombay Police and were therefore admissible in evidence under this section *Emperor* v *Abdul Gani* 91 Ind Cas 690=27 Bom L R 1373=49 B 879=A I R 1926 B 71

Sudden flight—explanation The fact of the flight of the accused or his attempts to escape, is relevant under s 8 It may be the result of guilty knowledge or conscience, or it may be perfectly innocent Anything therefore that the party absconding says at the time of the act is receivable as explanatory of a relevant fact It would also be receivable as part of the *res gestae* and as a declaration accompanying an act *Norton Ev 119* see also illustrations (c) A and B after the commission of a murder which they are suspected of being guilty of, fly from their houses to a distant State This raises a presumption of guilt The fact that A and B fled because of a fear of violence at the hands of their pursuers overthrows this presumption *Plummer* v *Com* 1 Bush 76, *Golden* v *State*, 25 Ga 527, *Arnold* v *State*, 9 Tex App 436 In *Plummer* v *Com* the Court observed "But there was evidence before the jury tending to explain the concealment and flight of appellant upon the ground that they were occasioned by an apprehension of violence for soldiers or otherwise, and this in our opinion was competent evidence which the jury had a right to regard as conducing to rebut the presumption of guilt arising from the concealment of flight of the appellants In the case of *Oscar Slatur*, who was charged with murder he was able to prove that his trip to America was not a flight from justice as the prosecution alleged, but made in pursuance of a long contemplated plan and that his apparently sudden departure a few days after the event was a mere coincidence *Donough Ev*, 46 If after the commission of a crime a person, whose name is mentioned as a

participator in the crime ...
the crime ...
tive other ...

... State, 76 S W 167 But an explanation made sometime after flight is excluded Sherrill v State, 35 So 129

... kruptcy, when it is necessary to ... bankruptcy Norl Ev 118 Perhaps ... the application of the Verbal Act doctrine (vide s 6) has been ... alleged act of bankruptcy ... and requires explanation ... Rawson v Haigh, 9 Moore ... Gyde, 9 Bing 349, Rouch v ... of flight under section 8 at p 148.

Facts ... tly of the utmost importance ... unexplained, legitimately ... on A's innocence, for him to ... n so occur as to raise a strong suspicion against a man, and any fact which tends to dispel that suspicion is relevant Cun F ... case by bringing in new da...

... capacity to produce ...

really important and was likely to have been the true source of the effect observed, so that the proponent's instance may or must be attributed to that other and not to the alleged tendency or cause in question (3) The third method takes away the force of the proponent's instance by offering other instances in which the same effect is found, but without the presence of the alleged cause Wigmore § 449 Evidence of other offences committed by the prisoner is sometimes ... of a witness ... el, where the ... to produce ... received by ... ater R v ... So where the prisoner was charged with robbing the prosecutor of a coat by threatening to accuse him of an unnatural crime, evidence of ... ning, when the prisoner ... ticket was found on his ... ble, as confirmatory of ...

by proving that, shortly ... the prisoner had robbed another person [R v Briggs 2 M & Rob (199)], and even ...

9 question of his guilt and whether the previous statement is made to a Police officer, or to a judicial officer or to a third party is immaterial if the statement is relevant to the fact in issue, ... — *F ... ror*
73 Ind Cas 963 = 1 P L T 881 ... evidence
of minority when the question ... *Abdulh Pande*, 18 A 476 (479), *Sitish Chandra* v *Mohendralal*, 17 C 849 Where the accused were charged with committing or conspiring to commit dacoity and not with the charge of belonging to any gang it was held that the evidence tending to show the closeness of their association with the approver was inadmissible under s 11, though the same might be admissible under section 9 *Emperor* v *Wahiduddin* 54 B 524 = A I R 1930 Bom 157, The absence of an entry in a book of account has no doubt been regarded as a relevant fact, not under section 34 but under sections 9 and 11 of the Indian Evidence Act to prove that an alleged payment was not made *Ganjiram* v *Lachiram* 19 C W N 612 = 28 Ind Cas 70 *Tara Kumar* v *Kumar ... Chandra* 74 Ind Cas 383 = 36 C L J 389; *Jani* v *Sibdhari* 15 C L J 7 = 17 C W N 105, *Sagarmal* v *Manraj*, 4 C W N ccvii *Ali Nasir* v *Hamil* 25 A 90 *Deolia* v *Ray* 11 N L J 21 = A I R 1928 Nag 153 In *Emperor* v *Ganesh Damodar*, 34 B 391 the accused published a book containing eighteen poems, of which four were subject matter of charge The general trend of the poems charged as well as the remaining ones in the books evinced a spirit of blood thirstiness and murderous eagerness directed against the Government *Held*, that the Court was entitled to look into the poems other than those forming the subject matter of the charge for the purpose of finding out the intention of the writer and the design of the publication In order to rely on the evidence of persons who identified the accused in jail but failed to do so in Court the fact of the jail identification must be stated in witness's evidence An identification in jail is in essence a statement by the witness I saw this man who is before me taking part in the dacoity' That statement can be used to corroborate this evidence given in Court if the witness says in his evidence "A number of persons was shown to me at the jail and from among them I pointed out those persons whom I had seen taking part in the offence ... ndant evidence such as that of th... to prove the identity of the persons ... though the witness himself may not correctly remember who they were *Chutkan* v *King Emperor* A I R 1926 Oudh 36 — 90 Ind Cas 444 = 28 O C 298, *Abdul* v *Emperor* 47 A 39

Basis for admission of explanatory facts The peculiar danger of inductive proof is that there may be other explanations than the desired one for the fact taken as the basis of proof *Sidgwick Fallacies* 270 But in the study of Logic we are concerned with discovering the defects of a mode of Proof, while in the Law of Evidence, we are concerned merely with the propriety of admitting the fact at all with its quality as a possible *Inference*, not as absolute *Proof* If then, the potential defect of inductive Proof is that the fact offered as the basis of the conclusion may be open to one ... ations the test or requirement for mere ... of) must be something far short of this ... gl other rational hypothesis would be ... et and yet if only that single other hy... be an extremely high degree of probability for the conclusion under the Law of Evidence *Wigmore* § 32 Thus throughout the whole realm of evidence, circumstantial and testimonial, the theory of the inductive argument, as practically ... lentiary fact will ... non it is a ... when ... hable

Identity as a probandum—other principles discriminated "In evidencing that proposition commonly spoken of as Identity, there is apt to be a confusion in thought with two other processes which are really not germane (1) It is perhaps natural to apply the notion of Identity or Identification to the general process of proving an accused person guilty He is said to be "identified" as the murderer or the thief, i e the whole process of proof

and the whole mass of evidence is thought of as involving identity of the accused and the guilty person From this point of view, all distinctions between the various sorts of evidence heretofore analyzed are merged and become useless Such an indiscriminate confusion and merger of all sorts of probative elements naturally excites suspicion of the propriety of the term (identification) as thus applied In truth, there is no propriety in it The very looseness of the term shows that, since the various sorts of evidence thus covered by it may be further analyzed and separated, there would remain no

[illegible]

but needs to be distinguished

"Suppose, for example, to prove a murder evidence is offered that a gun found three days later in the defendant's possession is exactly fitted by a bullet found in the body of the deceased Here there are two inferences involved (a) Because the defendant possessed the gun when found later, therefore he probably possessed it at the time," this inference is always open to doubt, since the defendant may have borrowed the gun since the killing, or some third person may have surreptitiously placed the gun on his premises, (b) 'Because the gun, thus possessed by the defendant at the time of the killing, fitted the bullet found in the body, therefore the defendant's gun must be the one that shot the deceased", here the inference is open to doubt because the bullet may fit other the ces is [illegible] element of the Identity ces as pointing back to an *Wigmore's Principles of*

[illegible]

General Principle of Identity Evidence ' Identity may be thought of as a quality of a person or thing,—the quality of sameness with another person or thing The essential assumption is that two persons or things are first thought of as existing, and that then the one is alleged because of common features, to be the same as the other The process of inference thus has two necessary elements (1) it is a concomitant one, in its logical scheme, and (2) it operates by comparing common marks, found to exist in the two supposed separate objects of thought, with reference to the possibility of their being the same It follows that its force depends on the necessariness of the association between the mark and a single object Where a certain circumstance feature or mark, may commonly be found associated with a large number of objects, the presence of that feature or mark in two supposed objects is little indication of their identity, because, on the general principle of relevancy, the other conceivable hypotheses are so numerous i e the objects that possess that mark are numerous and therefore two of them possessing it may well be different But where the objects possessing the mark are only one or a few, and the mark is found in two supposed instances, the chances of the two being different are *nil* or are comparatively small Hence, in the process of identification of two supposed objects by a common mark the force of the inference depends on the degree of necessariness of association

[illegible]

associated with a single object Rarely can one circumstance alone be so [illegible] stance to circum [illegible] whole cannot be [illegible] *Wigmore* § *411* [illegible] cation thus consists [illegible] of which by itself [illegible] her can conceivably

S. 9. to exist in a single object only Each additional circumstance reduces the chance of there being more than one object so associated The process thus corresponds accurately to the

"It may [illegible] be negative as well as affirmative [illegible] sarily associated with an object in issue, the lack of that feature in a particular object offered tends to show that it cannot be the object in issue—in analogy with the argument from essential inconsistency Wigmore's Principles of Judicial Proof § 145

Scope of the identi[illegible] section This section does not deal with [illegible] Circumstantial evidence of identity are [illegible] in a party's identity with a certain person [illegible] in issue it may be proved or disproved not only by [illegible] resumptively by similarity or dissimi[larity] [illegible] height, size, hair, complexion voice [illegible] marks, faculties, or peculiarities) as [illegible] ationship, education, travel, religion knowledge of particular people places or facts, and other details of personal history (R v [illegible] cited Steph art [illegible]) In this connection too identity of mental qualities habits and disposition may became relevant, though it would be excluded in more specific enquiries Phip Ev 132 The inference of identity of a person, [illegible] by the use of [illegible] singular motion [illegible] a mark of identification The sound in question may well be that of a vo[ice] [illegible] Chamberlayne's Ev § 1866 [illegible] peculiar facts and many other [illegible] serve, in a very satisfactory way, as part of the basis of the inference of the witness as to identification In much the same fashion, the possession of skill and other mental training may be shown by its exhibition on other occasions and, in this way, serve to identify the doer of a particular act who must have possessed the qualities in question in order to have been able to do as he has done Ibid § 1869

Test of Admissibility The only matter that is here of concern is the admissibility of circumstantial evidence of identification, and it will easily be [illegible] So far as there [illegible] low [illegible] it [illegible] is that [illegible] But it [illegible] nces [illegible] ke it up Wigmore § 412

[illegible] of a person can be as er[illegible]

[illegible] Case]) charge of Cockb[illegible] Sturtivant 117 Mass 131 (139), R v Broome, Danough 81, R v Crippen Wills 490, R v Wainright's Not Tr[illegible] [illegible] Arshal [illegible] Layani [illegible] 61 (1909) [illegible] nowledge [illegible] ased was [illegible] 345; R v [illegible] the mur[illegible] ion of a [illegible] murder [illegible] ame ball [illegible] Peerage

(b) Residence, and [illegible] Case L R 10 App Cas 763, 775

(7) ... of a writing. *Hile's Tr* ... n *Brooks* v. *Tichborne* ... a habit of the plaintiff, so to spell the word was proved, it was some evidence against the plaintiff to show that he wrote the libel Indeed, we think that proposition c ... degree of pecul ... which the plain ...

the identity of that person are relevant ... see also *R* v. *Ball*, (1911) A C 47, *R* v ... other offences committed by the prisoner is sometimes admitted, with a view to establish identity. *Taylor* § 3 ... At a trial for offences under ss 302, 120 B and 380 I ... some two years subsequen ... identity, design and motiv ... pursued by the accused ... alleged in the subsequen ... 9 or section 11 or 14 or 15 of the Evidence Act *Emperor* v *Panchu Das*, 58 Ind Cas 929=24 C W N 501=31 C L J 102=47 C 671

...

the next indictment So the general principle that where a circumstance is relevant for some purpose, the incidental revelation, in offering it, of other criminal conduct by an accused does not stand in the way of receiving the evidence *Wigmore* § 416

Identity of name Identity of name raises a presumption of identity of person, where there is similarity of residence or trade, or circumstances, or where the name is an unusual one, but *aliter* where the name is a common one and there are several persons known of the same name and of the same place *Lawson Pre Ev* 307 "A concordance in name alone is always some evidence of identity, and it is not correct to say ... to the persons named, the ... of name goes for nothing, ... conclusion," *Groves* v ... L T R N S 795; *Re W* ... R 14 Eq 245; *Maden* v ... D 213 *Re Hocking*, (1898 ...

The question is whether one *Samuel Fry* of *Plymouth Rock* has written certain letters—he being the defendant in the case A witness testifies that he knows the handwriting of a *Sa*... *of Pl*... the only person of that name at the place Th ...

...

vessel A pilot named Henderson was in Court and answered this description The presumption was that he was the defendant There the Court observed "Th ... Co ... bee ... jury might assume him to be the defendant But then the counsel objects that the statement is not made under oath As to that there are many things which are

9. incapable of strict legal proof A man's name is mere matter of reputation, that which is termed in Scotch law the *status* of a man is matter of reputation and if precise evidence of the relationship of one man to another or other matters of that nature were always required no fact of that kind could ever be proved in practice Here there was evidence of the identity of the defendant although it was not proved directly that the name of the party who answered in Court was William There was evidence that he was a pilot, that he was the pilot on board the vessel, and he answered to the name of Henderson I think that is sufficient In an action against Charles Lyon for goods sold to his intestate, and a plea of *plene administravit* the plaintiff in order to show assets offered a copy of a bill and answer by one Charles Lyon to a Bill filed in Chancery against him in the character of an administrator The presumption is that they are the same person and evidence is admitted *Hennell* v *Lyon*, 1 B & Ald 112 In that case *Bayley J* observed 'There is nothing to show two administrations, and it is rather extraordinary to suppose that two persons of the same name should sustain the same character It is not to be presumed that there are two persons but the identity is rather to be presumed, unless the plaintiff could have shown the contrary '

An action is brought on a bill of exchange directed to, 'Charles Banner Crawford, East India House,' and accepted 'C B Crawford' A witness proves that the signature was that of a gentleman of that name, formerely a clerk in the East India House but he does not know whether that *Mr Crawford* is the defendant here The presumption is that the two are the same *Green Smith* v *Crawford*, 9 M & W 314 *Lord Abinger* said 'I am of opinion that the evidence was quite sufficient Here the bill is drawn upon by *Charles Banner Crawford*, and addressed to him at the India House. The evidence is that there is a person of the name of *Charles Banner Crawford*; that he once belonged to the India House and the acceptance is in his hand writing That is surely sufficient evidence of identity In an action against one *William Evans* for goods sold and delivered it appears that five years before, a person of that name had been a customer of plaintiff and had written a letter acknowledging the receipt of the goods The witness who proves this does not know whether the defendant who answered to the name is the same person The presumption is that he is *Smell* v *Evans* 4 Q B 626 In the course of argument *Denman C J* asked Does the name go for nothing at all in any case? Suppose the name of the defendant had been *William Linonel Gulliver Evans* and a sale had been proved to a party so named' An action is brought against *Henry Thomas Ryde*, as acceptor of a bill of exchange The cashier of the bank testifies that a person of that name had kept cash at the bank when the bill was made payable and that the acceptance is in his hand writing He cannot identify him with the defendant of the same name This is sufficient *prima facie* case *Roden* v *Ryde*, 4 Q B 626 In this case *Lord Denmam* said 'In cases where a particular circumstance tends to raise a question as to the party being the same, even identity or name is something from which an inference may be drawn If the name were only *John Smith* which is of very frequent concurrence there might not be much ground for drawing the conclusion But *Henry Thomas Rydes* are not so numerous, and from that and the circumstances generally there is every reason to believe that the acceptor and the defendant are indentical *Lord Lydhurst* asks (in *Whitelock* v *Musgrove*, 3 Tyrw 543) 'why the *onus* of proving a negative in these cases should be thrown upon the defendant' the answer is because the proof is so easy He might come into Court and have the witness asked whether he was the man

A note signed "*Hugh Jones*" is sued upon It appears that there are several" *Hugh* "*Jones*" at the place where the note was signed, and there is no evidence to show that the "*Hugh Jones*" who is sued is the '*Hugh Jones*" who signed the note. The plaintiff is non suited *Jones* v *Jones*, 9 M & W 75

Identity from family name and initial The fact that family name and initials are the same raises no presumption that the parties are the same *Ambs* v *R Co* 44 Minn 266; *London* v *Walepole* I Ind 321, *Bennet* v *Labhort*, 27 Mich 489, *Burford* v *McCru*, 53 Pa St 431; *Lau Pre Ev* 314

Two persons of same name but of different position Where two persons of the same name occupy different positions or relations, the presumption is that they are different persons *Law Pre Ev* 315, *Nicholas* v *Lansdale*,

Lill Sel Cas. 21, *Ellis worth* v. *Moore*, 5 Iowa, 486; *Cozzens* v *Gillispie*, 4 Mo 82.

of things may be presumed from circum- ... 231; *Byrd* v *Fleming*, 4 Bible 145. ... *nson Pre Et* 320 The inference of a wit- ... chattels So of the great ... and he like. *Chamber-* ... n those in common use,

the fact tha

while such

object, of special attention In other words, they either have no "ear mark" or none which is commonly observed In the first class would fall ordinary coins, stamped out in large numbers by means of a die In the second would be embraced banks notes, seldom identified by their position in a numerical series Pay checks may be regarded in a similar way This difficulty of identification affects merely the weight which may properly be attached to the mental result of the witness The evidence of the inference is, nevertheless admissible. *Ibid* § 1872 Identification by the witness may extend to estab- ... *Ibid* § 1872 ... *Surendra*

Identity of a person by voice or appearance A witness may testify to a person's identity from his voice alone *Hulet's Trial* 5 How St. Tr 1185, *Harrison's Trial* 12 How St Trial 846, *The Threshers' Trial*, 30 How St Tr. 197; *Picton's Trial*, 30 How St Tr 245, *R* v *Castro* Tichborne Case, see also ... *Emperor*, A I R 1925 Lah 137,

testified from observing his stature, ... from the sight of the person's photo- ... person's age, or intoxication merely from his appearance Chattels may be identified by their appearance and other qualities *Wigmore* § 660

Identity of person by photograph "The photograph was admissible" said *Wills J* in *R* v *Tolson*, 4 F. & F 103, "because it is only a visible representation of the image or impression made upon the minds of the witnesses by the sight of the person or the object it represents, and therefore is in reality only another species of the evidence which persons give of identity when they speak from memory, *Hindson* v *Ashby*, (1896) 2 Ch 21, 27, *Hill* v *Hill*, 11 T L R. 541" The identity of a person may ... by a person's photograph *Frith* v *Fr* ... case, which was a case for *divorce* ... upon a photograph alone and this ... asked to do this, but it should be known that it is not the practice of the Court, except under very special circumstances, to act upon a photograph alone It is high time that this should be understood" The same rule is applicable in all matrimonial cases, *Vide*, *Dawson* v *Dawson*, 23 T L R 716, *Hill* v *Hill*, *supra*, *Phip Ev* 386 As regards identification by photograph, *vide Emperor* v *Panchu Das*, 24 C W N 501 (F B) at p 524 In cases of ... officer to show to persons ... phs of those whom they ... 19 *R* v *Ferguson*, (1924) ... hat of a prisoner whom ... risoner was picked out by the prosecutor from a number of men in a room *Held*, that there was no ground for complaint against the method of identification *R* v *Melaney* 157 L T Jo 46; see also *Binde* ...

Ind Cas 167 So,

an engraving to a

9 given by a witness who has precisely identified the prisoner by a photograph must always be subject to that fact *R* v *Dwyer*, (1925) 2 K B 799

Identification of Prisoners Act The Identification of Prisoners Act, 1920 (Act No XXXIII of 1920) has been passed in order to provide legal authority for taking measurements, finger impressions foot prints and photographs of persons convicted of, or arrested in connection with certain offences This Act has been passed because the value of the scientific use of finger impressions, foot prints and photographs as agents in detecting crime and the identification of criminals is well known in England and other European countries and as such this subject can no longer be ignored —*Vide Statement of Objects and Reasons* Under section 5 of the Act which authorises a Magistrate to take the measurement which as defined in the Act include finger impression and foot print impressions or photographs of convicts and others, the thumb impression of the accused taken at the trial is admissible in evidence *Superintendent* v *Kiran Bala*, 14 C L J 79=30 C W N 373=27 Cr L J, 109

Identity evidence—Foot prints To connect a person accused of crime with the scene of its commission a most important circumstance is frequently that of foot prints or other tracks or marks made in the soil or on surrounding objects by some portion of the body of the person involved in the inquiry by the vehicle in which he was carried or by the animal which drew it The discovery of such marks and the legitimate inferences to be drawn from them may constitute a valuable link in the chain of incriminating evidence especially necessary in cases where no direct proof of the *res gestae* is attainable Naturally the probative force of such circumstances resides largely in the correspondence discovered to exist between the marks at the place of the *res gestae* and those produced appropriate articles associated with the individual in question These correspondences may under certain circumstances be stated by one who has observed them although an element of reasoning is necessarily combined with such a statement The declaration it is true be simply a method of stating facts Thus an observer may properly say whether a certain boot, shoe, or other specimen of foot wear is capable of producing particular tracks On the other hand, that certain marks were actually made by a given individual or even were the same as or similar to those made by him is an invasion of the province of the jury to justify which an adequate administrative necessity must be shown A contrary view has however been maintained The inference that certain foot prints 'corresponded has been received although there is a lack of unanimity on the point It is not required that a skilled witness should testify as to the existence of a correspondence It will be required as an administrative matter that the witness be shown to be possessed of knowledge so adequate to the statement made that jury might reasonably be justified in acting upon it In connection with inferences from correspondence of foot prints it will not be regarded as sufficient that the witness from a general idea of the size and configuration of the boot, believes that the shoes of the individual in question would make the marks actually found or ones similar to them In general where the facts detailed by the witness as the basis of his inference are clearly insufficient to support it as a matter of reason the results of the mental process are excluded —*Chamberlayne's Ev* § 1874

Actions of blood hounds The conduct and behaviour of blood hounds after being set on the trail of a fugitive criminal cannot be given in evidence to prove that the scent of the accused and the scent of the person who perpetrated the crime which is being investigated are identical *Chamberlayne's Ev* § 1743 (n)

Circumstantial and Testimonial Evidence of Identity, distinguished "The foregoing inference from circumstances forming an identity mark, and the inference from testimony asserting identity, must be distinguished In the former type, the identifying mark or marks are supposed to be known and proved; and it then becomes a question of the strength of the inference from those circumstances as tested by the logical principle But in the latter type we are given simply the testimonial assertion that the two things are identical, and our problem then is, to enquire into the testimonial basis of perception and recollection for that assertion and to ascertain the possible sources of error For example, if the identity of J S with a testamentary claimant is in issue, and it is known that J S ten years ago had a deep knife scar on the sole of the left

S.

foot, and if it is equally a fact that the claimant now has a similar knife scar, the problem is the validity of an inference from this knife scar to identity of the person But in the same case we may have, of ten witnesses who know J S five of them now ... J S and five of them asserting ... basis for these opposite ... *me proved* characteristic n ... l inference But on the othe ... event, the testimonial evi ... al *evidence* *Wigmore's Pri* ... ce existed, and person B is now presented to an observer who has seen A, and the observer is asked, 'Is this now person the same human being as that former person seen

... son bearing the same ... ark has been some how ... proof was effected But ... nple assertion (of the ... ed with the conditions ... with the inference from ... entity thus brings up ... Recollection, and (sometimes) in Narration

"Now, in ordinary judicial practice, a testimonial assertion as to identity is made in one of three typical forms

saw ... his l ... witn ... 'I be ... *left* ... the ... prin ... pres ... look ... is t ... vari ... he gives a reason for his recognition, but the essential thing is the recognition So that our enquiry now must be, what is the *psychic* process of recognition of Identity?

'Let us here realize that we have only one mental process to examine, ... be Resem- ... In the words ... more or less ... quoted in *Arnold, Psychology Applied to Legal* ... marks b c d e f, and the observer perceived or

involved in Recognition, ness' in varying degrees of Identity?'—*Wigmore*'

Mental conditions attending the Recognition of Indentity The original mental record of a perceived event preserves the several items of the perceived event connected in the memory record, this is the 'association of ideas' When later, o ... record, ... This pro ... blance, ...

9. is, first, that the original stages of perception and record and the later one of recognition may be (not necessarily are) *sub conscious*, and secondly, that the revival or recognition stage may be merely a general or single sensation of sameness (or resemblance) without a consciousness of the particular item or mark that has served as the stimulus e g when I first make the acquaintance, at a convention of Mr A from *San Francisco* my perception and record of his marks of personality are or may be subconscious; i e, I am not conscious of any specific items b c d etc and when next year I meet that person again, I may recognize him, with a single idea as Mr A from *San Francisco* without first being conscious of the particular item or items that have stimulated the idea of Mr A as a single whole *Wigmore's Principles of Judicial Proof* § 207

Caution and Precaution in dealing with Testimony to Identity "(1) It calls for caution in that testimonial assertions to identity must be accepted only after the most careful consideration On the one hand, the process of Recognition being often more or less subconscious it may be quite correct, even though no specification of marks can be given as reasons for recognition On the other hand the risk of injustice being so serious, the great possibilities of lurking error should cause hesitation and the investigator should seek to establish as many marks as possible that may serve circumstantially to check the testimonial assertions At this point there may be a logical value in numbers of witnesses

(2) The process also calls for precaution in taking measures beforehand objectively to reduce the chances of testimonial error

(i) At the time of original observation the investigator (police) should obtain from the observer a note of any marks of the personality observed, so that there will be less need to depend later on the observer's memory

(ii) At the time of presenting for recognition, whether upon arrest or at trial in the Court room measures should be taken to increase the stimulus of association and to decrease the risk of false suggestion (*a*) The person to be identified should be clothed and placed (so far as feasible) in the same conditions as when originally observed (*b*) The person to be identified should be presented in company with a dozen others of not too dissimilar personalities" *Wigmore's Principles of Judicial Proof* § 208

Value of evidence as regards identity based on personal impression "You compare in your mind said *Baron Parke, in Fryer* v *Gathercole*, 13 Jur 542, the man you have seen with the man you see at the trial' But 'evidence as to identity based on personal impression however *bona fide*, is perhaps of all classes of evidence the least to be relied on and therefore unless supported by other facts an unsafe basis for the verdict of the jury" *Vide Oscar Slater's Trial* Not Trial Ser *Adolf Beck's Trial, Ed Watson*, 1924, *Not British Trial Ser pp 118*

Qualification of observer To be qualified as witnesses in this matter of identity the ordinary observers who testify must have seen the persons or articles to be identified and speak upon the basis of such personal perception They are not at liberty to testify from information furnished by others They cannot, as would be proper in the case of experts state their judgment upon the facts observed by others It has been held that the mental result of the witness will not be received at all unless accompanied by a detailed statement of such constituent phenomena as will enable the Court to perceive that the jury might reasonably act in accordance with this inference *Chamberlayne's Ev* § 1863 Direct and positive evidence of identification is not in all cases obtainable Obviously, therefore, it is not indispensable The primary evidence of inspection is naturally, however, of greater weight, other things being equal, than the secondary evidence of circumstantial proof Witnesses therefore, who speak as to identity from the inspection of the person in question will, so far as this single circumstance is concerned be accorded greater weight than those who speak merely as to identifying circumstances Where more forceful proof of identity is lacking even so low a grade of evidence as that a given individual resembled defendant more than he did any one else known to the witness, or that two things appear to be similar, has been received It is not, however, sufficient identification especially in a serious matter, that the witness 'thought' or was "impressed" to the effect that defendant was identical with the doer of a given act That a witness was satisfied' with the identity of a defendant is not sufficient Only the weight of the evidence is affected by the fact that the basis is a slight one

Where no ground whatever is furnished, the inference is rejected, as of course S. *Chamberlayne's Ev* § 1861

[illegible] person is of opinion that a [illegible] ist, is not relevant to th[illegible] is not admissible [illegible] is the general rule of law, and is founded [illegible] matters in dispute—the Judge or jury, as the [illegible] their conclusions from the facts before [illegible]

whether the defendant was *Tichborne*, so far as the witness proposed, not merely to speak of the apparent sameness of appearance with the person he [illegible] the case In [illegible] ion evidence as [illegible] from minute [illegible] be described in human language, so as to convey any accurate impression of the object, and therefore, unless opinions are received there must be a failure of evidence When facts and peculiarities upon which the opinion is formed can be stated and described, they must be, and it is then for the jury and not the witness to form an opinion ' The reasons for its admission is thus also stated in *Cooper* v *State*, 23 Tex. 331 "I may feel a strong conviction, not, however, amounting to certainty

same man whom I knew in another place My opinion is entitled to some weight because it is the statement of a fact, about which, to be sure, I can not speak [illegible] ertainty as to satisfy the minds of

hand writing, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health questions, also, concerning

photographs and powder puffs were found upon him and in his rooms *Held* that the evidence was admissible as it tended to show that the appellant had abnormal propensities of the kind in question, and therefore that it was some evidence of identity *Thompson* v *R* (1918) A C 221 = 87 L J K B 478—118 L T 418 So photographs could properly be put in evidence as being things usually found ... ndecency with male ... *Tuis*, (1918) 2 K ... for conviction

... clearly identified by persons who were ... nd picked out of a crowd in circumstances ... of fraud or error, conviction based on such ... v *Emperor*, 2 Luck 441 = 101 Ind Cas 497 ... *q* v *Dindayal*, 81 Ind Cas 949, dissented from) The evidence which goes to prove that a person has identified another person as having taken part in a particular offence either in jail identification proceedings or elsewhere is admissible though the value of such evidence weakened perceptibly as a general rule by failure to identify subsequently in Court *Parbhu* v *Emperor* 104 Ind Cas 626 = 28 Cr L J 800, see also *Ramprosad* v *Emperor*, 1 Luck C 339 = A I R 1927 Oudh 369 Evidence of identification of person previously unknown after a number of months that certain persons took part in an attack is unreliable, unless there was a regular identification parade in which the witnesses picked out those persons from among others especially where it is not stated that such persons bear any distinguishing marks by which they can be recognised *Makhan Singh* v *Crown* 1924 Lah 722 In criminal cases it is improper to identify the accused only when in the dock the police should place him, before hand with others and ask the witness to pick him out Nor should the witness be guided in any way nor asked is that the man? *R* v *Cartwright*, 10 Cr App R 219, *R* v *Williams*, 8 id 84 *R* v *Chapman* 7 id 53, *R* v *Bundy*, 5 id 270— *R* v *Dickson* 5 id 142—143 *R* v *Smith*, 1 id 203, *Phip Ev* 387 There is no section in the Evidence Act, which renders identification proceedings in jail ... is illegal ... ier cases ... *ayam* v ... *Walab* v ... J 1564— 28 O C 258

Admissibility of other evidence in question of identity One of the questions in ... whether one ... *Gauri Shank* ... to a totally differer ... of a ... e in ... *Held* ... *ingh* ... 2 A

... ase of burglary the thief had gained admittance to the house by means of a pen knife which was broken in the attempt, and part left at the window frame, the broken knife was found in the pocket of the prisoner, and perfectly corresponded with the fragment In another case identification was established by the correspondence of the wadding of fire arms with a ... case on the N ... of the pistol, ... corres ponde ... *ir Ev* *3rd* ... r this section ... *r J* in *Suren* ... *Fatteh* *Lall*, 6 C 171

... Collect Jud ... s as an ... tinct on ... nimals.

A man may survey ten thousand people before he sees two faces perfectly alike,

S.

and in an army of an hundred thousand men every one may be known from another If there should be a likeness of feature there may be a discriminancy of voice, a difference in the gesture, the smile and various other things; whereas a family likeness generally runs through all these, for in everything there is a resemblance, as of features size, attitude and action" See also *Percy's Case,* 12 How St Tr 1199, *Annesley* v *Anglesea*, 17 How St Tr 1139, *Day* v *Day* quoted in *Hubback Succession*, 381, *Interess* v *Ist* , 8 C & P 7, *Morris* v *Davis* 3 C & P 211=5 Cl & F 1836, *Bagot* v *Bagot* (1878) 1 L R I R 308, *Furnaby* v *Bullie*, 12 Ch D 282 (-90)

Thumb Impression A comparison of thumb impression of the person, who presented the document before the Registrar with that of another person is admissible under this section if the similarity of the impressions can establish the identity of that person with the second person or under clause (2) of section 11 of the Act if their dissimilarity make such identification improbable In order to come under this section such comparison must be made by the Court itself *Per Banerjee J* in *Queen Empress* v *Fakir Sheikh* 1 C W N 33 The opinion of an expert as to the similarity of such impression is now admissible under s 45 of the Act Often a criminal is detected from finger prints From the finding of the trace or mark it is inferred that some person leaving that trace or mark was present at the time or place of doing the act charged and from the peculiarities of the trace or mark it is inferred that the accused was identical with that person Now the question is do human finger prints present a combination having that highest degree of certainty ? Science answers that they do In brief the accepted conclusion, after ...

of skin mark
matical theo
combination
confirmed the
marks is the
properly held
more § 414

In the case of finger prints the inference from identical marks is extra ordinarily strong But in the case of foot marks this inference is especially weak This is because the features usually taken as the basis of inference size, depth, colour etc —may not be c

Verification of time and place Under this section facts which are necessary to fix the time and place of an occurrence are admissible The time and place of the crime should be stated with certainty in the indictment though it is not necessary to prove them precisely as stated unless they are necessary ingredients *in the crime Underhill Cr Ev 56 When however time and place are material* the details of time and place must be proved previously as alleged *Ibid* The question c
' To renc
of the
son, was charged with the murder of a young
wom was the day the deceased was murdered, he replied, seemingly without embarrassment that he had been all day employed at his master's work a statement which his master and fellow servants who were present, confirmed Subsequently it was proved that he was absent from his work about half an hour (the time being distinctly ascertained) in the forenoon of that day It was also proved by a young girl that she saw a person exactly like him
where the deceased
ardson was absent
time of the crime
attacharji Lyon's
Med Jurisprudence Where the defence rests on *alibi*, the accused must show that he was present at some other place before the time of the alleged crime for such a length of time that it was impossible for him to have been at the place where the crime was committed either before or after the time he was at such other place *Mays* v *State*, 72 Neb 723=101 N W 979 So the question of

time is material in the case of an execution of a document when both persons die from a common accident, etc Similarly the place of occurrence is very material in many cases

This section makes admissible all facts which fix the time and place Often time is proved by Opinion evidence In *State v Baldwin*, 36 Kan 10, *Johnston J* said 'Facts which are made up of a great variety of circumstances and a combination of appearances which from the infirmity of language cannot properly be described [are admissible] in this category may be placed matters involving magnitude or quantities portions of time, space, motion, gravitation value, and such as relate to the condition or appearance of persons or things

"Amongst the numerous physical and mechanical circumstances which occasionally lead to the detection of forgery and fraud, a discrepancy between date of a writing and the *anno domini* water mark in the fabric of the paper is one of the most striking ... was detected by the circumstance that a lett... was written upon paper made in England ... the death of a person by violent means, it often becomes necessary to ascertain the time of his death In such a case in the absence of any direct evidence, the time of death is ascertained by *post mortem* examination Time of death is generally ascertained by digestion, by putrifaction by *rigor mortis* and by temperature of the body *Lyon's Med Juris*

In the case of *Empress v Sudhabode Bhattacharji*, Reported in *Lyon's Medical Juris* at p 154, the hour of the death of the deceased became very important The ... had taken a meal of *chupatties* curry ... p m with her husband (the pr... r left the house at 4 A M deceased ... he returned The question to be ... period 10 p m to 4 A M during which the prisoner was in her room, or did it occur after his leaving the house? After examining the contents of the stomach the medical expert gave the opinion that in all probability the death occurred before the prisoner left the house So in such a case in order to ascertain the time of death evidence is admissible to show what food she took, when she took the food condition of her health, her age etc vide *Lyon's Med Juris* p 154

Testimonial evidence as regards time The ordinary observer, the average man, is entirely familiar with the duration of ... customary intervals of time Such a witness may ... moment at which a given event occurred or ... place between two events In the latter case the amount of elapsed time may be stated in standard units of duration hours, minutes seconds and the like or on the other hand, the statement may be one more general in form Such an act of reasoning is, in many instances merely the statement of a fact Although such an inference more largely embodies the element of reasoning an observer ... time required for the doing of familiar ... a telegram and so forth How long it ... cross a high way or bring about some other definite result or occurrence may be to one familiar with the facts, a very simple act of reasoning *Chamberlayne's Ev* § 2093

Illustration (a) This illustration is an example of introductory fact This may also serve to illustrate section 7, as being an instance of facts which may ... It is to be ... ction of the ... ection of a ... the alleged ... (XXXIV ... *Hiscocks v* ... *Wilson* 9 Cl & F 556 and other cases cited in *Basu's Succession Act* under section 75 So where the factum of the will is in issue such evidence is ordinarily admissible as introductory facts Where the question is whether a will is forged or not, these facts may rebut an inference suggested by a fact in issue *Vide Nort* 117

on him *Clarl* v *Molyneux* 3 Q B D 237, *Jenoure* v *Delmege* (1891) App Cas 73, *Royal Aquarium &c Socy* v *Parkinson* (1892) 1 Q B 443 Malice is proved when it is shown
or that the defendant
9 Ex 615, *Dickson* v *E*
C 457 But to go int
waste of too much time It is sufficient to show that there was a quarrel *Simpson* v *Robinson* 12 Q B D 511 *Malin* v *Andrews*, M & M 336, *Nort Ev* 117

Illustration (c) The fact of absconding which is admissible under s 8 is in itself equivocal It may be the result of guilty knowledge or conscience, or it may be perfectly innocent Anything, therefore, that the party absconding says at the time of the act is receivable as explanatory of a relevant fact It would also be receivable as part of the *res gestae* and as a declaration accompanying an act The question frequently arises in bankruptcy when it is necessary to decide whether leaving the house is an act of bankruptcy or not The presumption of inference arising from the act of absconding is thus rebutted *Nort Ev*

Illustrations (d) and (e) It is presumed says *Norton* that the statements made by C in one case, and B in the other are only to be receivable as evidence

transaction *Woodroffe Ev 194* *But it is submitted that explanation presup*poses an adverse inference after which only an explanation is admissible to rebut that inference As regards illustration (e) the statement is neither admissible as part of *res gestae* under the Verbal Act doctrine nor it not being a spontaneous declaration its sanctity is guaranteed

Illustration (f) This illustration is founded on the well known case of *R* v *Lord George Gordon* 21 How St Trial 514 In the case put the cries

10 Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said done or written by any one of

Things said or done by conspirator in reference to common design

0. such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it

Illustrations

Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen

The facts that B procured arms in Europe for the purpose of the conspiracy C collected money in Calcutta for a like object D persuaded persons to join the conspiracy in Bombay E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Cabul the money which C had collected at Calcutta and the contents of a letter written by H giving an account of the conspiracy are each relevant both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him and although they may have taken place before he joined the conspiracy or after he left it

Conspiracy A conspiracy may be described in general terms, as a combination of two or more persons by some concerted action, to accomplish some criminal or unlawful purpose or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means *Greenleaf Ev Vol III* § 89, see also *Drake* v *Stewart* 10 U S App 173, *U S* v *Benson*, 44 ibid 219; *State* v *Clark*, 9 Houst 536, *Pettibone* v *U S*, 148 U S 197 'Conspiracy' says *Mr Bishop* is the corrupt agreeing together of two or more persons to do by concerted action something unlawful either as a means or as an end *Bishop Cr Law* Vol II § 171 The English Commissioners in their Report of 1843 proposed 'The crime of conspiracies consists in an agreement of two persons (not being husband and wife), or more than two persons to commit a crime or fraudulently or maliciously to injure or prejudice the public or any individual person 7th Rep Cr Law Com 1843 p 27 Section 120 A of the Indian Penal Code, lays down — When two or more persons agree to do or cause to be done – (1) an illegal act or (2) an act which is not illegal by illegal means such agreement onspiracy ich agree 15, *Tindal*

C J observed The crime of conspiracy is complete, if two or more than two should agree to do an illegal thing that is to effect something in itself unlawful or to effect by unlawful means something which in itself may be indifferent or even lawful It has accordingly been always held to be the law that the gist of the offence of conspiracy ... whether ing ory ars not

mean criminal for there are many cases in which a combination to do a ... ng is a crime, although the act itself, if done by an individual, would not be a crime, on the other hand, "unlawful" does not mean 'tortious' for there are torts which it is not a crime to conspire to commit Nor again, does any case go so far as to decide that a combination to commit a breach of contract is a criminal conspiracy *Roscoe, Cr Ev* 526 Hence the word unlawful in the definition of conspiracy has no precise meaning *Ibid* But a conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means ... rests in effect against able if

for criminal object for the use of criminal means The number and the

is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which if done should be criminal It is enough if the acts agreed to be done, although not criminal, are wrongful i e, amount to a civil wrong" Thus a combination to use another's automobile without his consent may be a c[illegible]
need not affe[illegible]
individual [illegible]
ful "does [illegible]
and for whi [illegible]
which, by [illegible]

towards another person It may be punished criminally by indictment, or civilly

in my opinion, the same though to sustain an action special damage must be proved . It has often been debated whether, assuming the existence of a

convinced that a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may with conspiracy, become dangerous and alarming, just as a grain of gunpowder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine but administered frequently or in larger quantities with a view to harm may be fatal as a poison Many illustrations of these views might be suggested, but I need them not if I have made myself understood" *Per Lord Brampton* in *Quinn* v *Leatham*, (1901) A C at pp 529, 530, see also *Mogul Case*, (1892) A C 25, *Rex* v *Journeymen Tailors*, [illegible] *Lord Mansfield*

done has not been done [illegible]

So conspiracy differs from other charges in this respect, that in other charges the intention to do a criminal act is not a crime of itself, until something is done amounting to the doing or attempting to do some act to carry out that intention conspiracy on the other hand, consists simply in the agreement of confederacy to do some act no matter whether it is done or not *Per Chesby B* in *R* v *Hibbert* 13 Cox 82; *R.* v *Most*, 7 Q B D 244, *Kalil Munda* v *King Emperor*, 28 C 797 But a conspiracy [illegible] only where acts agreed to be done, [illegible] without preconcert have involved a civil in[illegible] *nons*, 1 Q B 185 *Kearney* v *Lloyd*, 26 L [illegible] T 132, *Templeton* v *Laurie* 25 B 230

Union of Wills Obviously there must be, between the conspirators, a con[illegible]

[illegible] conspirator [illegible] Yet where the conspiracy is to commit a particular offence [illegible] not essential that both should be capable of it as principals of the first degree One to be chargeable need not have been the original contriver of the mischief for he may become a partaker in it by joining the others while it is being executed If he actually concurs, no proof is required of an agreement to concur *Bishop's Crim* [illegible] could have [illegible] The [illegible] be inferred by the jury from other facts proved, in other words from circumstantial evidence *Bishop's Cr Law* § 190 (2)

Combination to commit crime A combination to commit a substantive crime is an indictable offence *Roscoe Cr Ev* 526 In England at common law, husband and wife who are considered as one person are incapable of conspiring together 1 *Russ Cr* 146; *Director of P P* v *Blady*, (1912) 2 K B 89, 92 But they can severally or jointly conspire with other persons *R.* v *Whitehouse* 6 Cox 38 It is immaterial whether the principal offence is a felony, or misdemeanour or wh[illegible] *Russ Cr* 150 *Wright on* [illegible] bination to cause public [illegible] 730 (745), *R* v *Boulton*, 12 Cox 87 Criminal conspiracy consists in the agreement of two or more persons to commit an offence punishable by law It is undoubtedly true the law does not take notice of the intention or the state of the mind of the offender and there must be some overt act to give expression to that intention *Nirmal* v *King Emperor*, 31 C W N 239

Combination to Commit Torts [illegible] an indictable conspiracy in many, th[illegible] what cases *Kenny* says any tort that is [illegible] a trespass committed *bona fide* by persons eager to assert their supposed right of way ' *Roscoe Cr Ev* 526 In many cases an agreement to do a certain thing has been considered as the subject of an indictment for conspiracy at common law, though the same act if done separately by each individual without any [illegible] criminal or even actionable [illegible] 8 Mod [illegible]

have certainly a right to express by ap[illegible]

[illegible]

369, see also *Gregory* v *Duke of Brunswick*, 6 M & G 953, *R* v *Leigh* 1 C & K 28n, *Wright on Conspiracy*, 37 The law on the subject is thus summarised by *Bowen L J* in *Mogul Steamship Co* v *Mc Gregor & Co.* 23 Q B D 598 ' Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination

among several there can be no doubt The distinction is based on sound reason, *for a combination may make oppressive or dangerous that which if it proceeded* only from a single person would be otherwise and the very fact of the combination may shew that the object is simply to do harm and not to exercise one's just rights ' This case was approved by the *House of Lords* on appeal *vide* (1892) A C 25 see also *Allen* v *Flood* (1898) A C 1, *Quinn* v *Leatham* (1901) A C 495 *S Wales Miners Federation* v *Glamorgan* (1905) A C 239, 252 But in the application of this undoubted principle it is necessary to be very careful not

beyond that which is necessary for the *Mogul Steamship* v *Mc Gregor* 23 Q *iated Labourers* (1903) 2 K B 600 So a combination to violate without just cause private rights contractual or other in which the public has a sufficient intere

violation of the private right is an action *McGregor* (1892) A C. 25 (48) see also *R* v

A conspiracy to commit fraud is indictabl indictable *R* v *Warburton*, 11 Cox C C 5

be proved to be co trespassers by other competent evidence the declarations of one as to the motives and circumstances of the trespass will be evidence against

Co s which the Courts gerous to the public ts involving public *Roscoe Cr* Ev 596

Agree to commit breach of contract Agreement to commit a breach of contract in circumstances that are peculiarly injurious to the public is conspiracy *Vertue* v *L Clive* 4 Burr 2473, see also *Roscoe Cr Ev* 527

Proof of conspiracy Direct evidence is not essential to prove the conspiracy It need not be shown that the parties actually came together and agreed in express terms to enter in and pursue a common design *Underhill Cr Ev* § *491* In many cases the existence of conspiracy is a matter of inference deduced

mon criminal purpose I L 306 (317) The onspiracy may be and the jury from proof of facts and circumstances which taken together apparently indicate that they are merely parts of some comeplete whole *R* v *Parsons* 1 W Bl 392 *Emperor* v *Annappa* 9 Bom L R 347 *Kishen Chand* v *Emperor* 92 Ind Cas 419 Although the common design is the root of the charge it is not necessary to prove that the defendants came together and actually agreed in express terms to have the common design and to pursue it by into execution for in many cases of the most there are no means of proving any such thing v *Brittain*, 3 Cox 76, *R* v *Parnell* 14 Cox 60 persons pursue by their acts the same object, often by the same means one per *forming one part of an act and the other another part of the same act* so as to

conspiracy is to be inferred from the conduct of the parties *R.* v *Duffell* 5 Cox 401; *R.* v *Cope*, 1 Str. 144

When the proof of conspiracy depends upon proof of the participation of the accused in an overt act which itself amounts to an offence, the porper course is to put the accused on the trial for that offence However, the accused may legally be charged merely with the offence of criminal conspiracy The mere association of an accused with any of the conspirators is not enough by itself to convict him of being a member of the conspiracy *Kalidas* v *Emperor*, 39 C L J. 151=83 Ind Cas 513 Where the accused is charged with an offence of conspiracy and acts of cheating in pursuance of conspiracy, the charge is not bad and it is open to the prosecution to prove such acts in order that from these the existence of the conspiracy may be proved *Abdur* v *King Emperor*, 35 C L 279, *Subramania* v *Emperor*, 25 M 61 distinguished Conspiracy can be proved from surrounding circumstances and conduct of the accused It need not be proved by direct evidence *Emperor* v *Annappa*, 5 Cr L J 323 see also *Chidamboran Pillai* v *Emperor*, 32 M. 3 Criminal conspiracy might be proved by direct or circumstantial evidence In a charge for the offence of conspiracy the overt acts by which the object of the conspiracy in sought to be attained need not be given *Kishen Chand* v *Crown*, 92 Ind Cas 419=27 Cr L J 243=20 S L R 18=A I R 1926 Sind 171

Scope of the section The operation of this section is strictly conditional upon there being reasonable ground to believe that two or more persons have conspired together to commit an offence *Per Jenkins C J* in *Barindra* v *Emperor*, 37 C 467 at p 504 Before anything said done or written by any one alleged member of a conspiracy can be used as evidence against another, the Court must have reasonable ground for believing that the conspiracy between them existed 1930 M W N 1264 So it is reasonable as a general rule, that some *prima facie* and satisfactory evidence should, in the first instance, be given of the common purpose, before evidence of the acts in it by a multitude of persons who but for such common purpose would be absolute strangers, should be received *Nort Ev* 120 In *R.* v *Mc Kenna*, Ir Circ Rep 461, *Pennefather C J* said "It is necessary to prove the evidence of a conspiracy, and to connect the prisoner with it in the first instance where you seek to give in evidence against him the declaration of a co-conspirator; and having done so you are then at liberty to give in evidence against the prisoner acts done by any of the parties, whom you have connected with the conspiracy, but when a party's own declarations are to be given in evidence such preliminary proof is not requisite and you may as in any other offence, prove the whole case against him by his own admissions So if a *prima facie* evidence of a conspiracy is given and accepted, the evidence of statements made by any one of the conspirators in furtherance of the common object is admissible against all *Rex* v *Blake* 6 Q B D 126, *Rex* v *Baskerville* (1916) 2 K B 658=86 L J K B 28 The Indian Evidence Act did not mean to depart from the law as expounded in those cases *Lalaram Ganganmull, In re* 81 Ind, Cas 817=25 Cr L J 1041=20 L W 202 But a conspiracy within the terms of section 10 of the Act contemplates something more than the joint action of two or more persons to commit an offence If that were not so this section would be applicable to any offence committed by two or more persons jointly with deliberation and this would import into a trial a mass of hearsay evidence which the accused persons would find it impossible to meet *Nagendra Bala* v *The Empress*, 4 C W N 528 For the application of this section there must be reasonable ground to believe that two or more persons have conspired together to commit an offence, and that being shown, anything said, done or written by any one of such persons in reference to their common intention may be proved both for the purpose of proving the existence of the conspiracy as also for showing that any such person was party to it *Kalil* v *King Emperor*, 28 C 797, see also *Kusir Bap* v *Emperor*, 18 C L J 590 But statements made by an alleged conspirator to a third party suggesting that there had been a conspiracy between the plaintiff and others in connection with the forgery of an alleged will, are not relevant when such statements are used to prove (a) the existence of a conspiracy as to which there is no issue, or (b) that the plaintiff was a party to it. *Kadambini Dassi* v *Kumudini*, 30 C 983, see also *Pulin* v *Emperor*, 15 C L J 517 Where an agreement exists, between two parties, in pursuance of which speeches are delivered by them such speeches are admissible

S. 1

of law is that when several persons are proved to have combined together for the same illegal purpose any act done by one of the parties in pursuance of the concerted plan and with reference to the common object, is in the contemplation of the law the act of the whole Each party
out the objects of the conspiracy and do
common design *Per Couch C J* in *Queen* v
R Cr 15; see also *Emperor* v *Abani*, 38 C

It is a rule of substantive law and not a rule of Evidence The rule underlying this section is a rule of substantive law and not a rule of evidence The following extracts from the writings of *Professor James Bradley Thayer*, from American Law Review, XV 80, is very instructive on the point "The term *res gesta* is f
is whether a part
tion of another;
whether it shall be so used as having been brought home to him, and whether he shall be chargeable with it as if it were his own When the enquiry is whether the utterance
it is sai
busines
busines
engaged in the common enterprise and regarding that,—in such cases it is common to express this idea by saying that the declarations must be made as a part of the *res gesta*, and if it is not so made, it is deemed to be *res inter alios gesta* Now it is obvious, on a little reflection, that to settle this question adversely to the admissibility of that which is offered in evidence, is really to

said
busin
when
tor, th
enterprise, about the affairs of it, and as a part of the *res gesta*,
adds nothing, it is used as a compact expression for the business, as regards which the law for certain purposes identifies the two conspirators or the principal and agent In such cases, evidently, the declaration may be about a past fact as well as a present one, so long as it comes up to the above-named requirements "

Principle The principle on which the acts and declarations of other conspir

part of the *res gesta*,

conspiracy is to be inferred from the conduct of the parties *R.* v *Duffield*, 5 Cox. 404; *R* v *Cope*, 1 Str. 144

When the proof of conspiracy depends upon proof of the participation of the accused in an overt act which itself amounts to an offence, the porper course is to put the accused on the trial for that offence However, the accused may legally be charged merely with the offence of criminal conspiracy The mere association of an accused with any of the conspirators is not enough by itself to convict him of being a member of the conspiracy. *Kalidas* v *Emperor*, 33 C L J. 151=82 ... conspiracy anc ... and it is open ... existence of t ... Conspiracy can be proved ... accused It need not be ... 5 Cr. L J 323, see also *Chidamboran Pillai* v *Emperor*, 32 M. 3 Criminal conspiracy might be proved by direct or circumstantial evidence In a charge for the offence of conspiracy the overt acts by which the object of the conspiracy is sought to be attained need not be given *Kishen Chand* v *Crown*, 92 Ind Cas 419=27 Cr L. J 243=20 S L R. 18=A I R 1926 Sind 171.

Scope of the section The operation of this section is strictly conditional upon there being reasonable ground to believe that two or more persons have ... *Emperor*, ... alleged ... urt must ... exi ted ... ne *prima* ... n of the ... ons who ... received ... said "It ... pri oner ... m the with it ... erty to declarat ... m you give in ... have connected with the conspiracy, but when a party's own declarations are to be given in evidence, such preliminary proof is not requisite, and you may as in any other offence, prove the whole case against him by his own admissions" So if a *prima facie* evidence of a conspiracy is given and accepted, the evidence ... of the common ... v *Baskerville*, ... ld not mean ... *anmull, In re*, ... piracy within the terms of section 10 of ... more than the joint action of two or more persons ... not so, this section ... more persons jointly ... is of hearsay evidence ... eet *Nagendra Bala* v ... section there must ... ave conspired togethe ... aid, done or written by any one of such persons in reference to their common intention may be proved both for the purpose of proving the existence of the conspiracy as also for showing that any such person was party to it *Kalil* v *King Emperor*, 26 C 797, see also *Kusir Bap* v. *Emperor*, 18 C L J 590 But statements made by an alleged conspirator to a third party suggesting that there had been a conspiracy between the plaintiff and others in connection with the forgery of an alleged will, are not relevant when such statements are used to prove (a) the existence of a conspiracy as to which there is no issue, or (b) that the plaintiff was a party to it. *Kadambini Dassi* v. *Kumudini*, 30 C 983, see also *Pulin* v *Emperor*, 15 C L J. 517 Where an agreement exists, between two parties, in pursuance of which speeches are delivered by them such speeches are admissible

This section makes evidence communications between different conspirators while conspiracy is going on, with reference to the carrying out of a conspiracy But it is not intended to make evidence the confession of a co accused and put it on the same footing as a communication passing between conspirators, or between conspirators and other persons, with reference to the conspiracy *Emperor* v. *Abani*, 15 C W N 25=38 C 169 So letters written by one co-conspirator may be evidence against others even when they are not written in furtherance of the conspiracy. *Vide, Queen* v *Amir Khan*, 17 W R Cr. 15; *Queen* v *Amiruddin*, 7 B L R 63=15 W R Cr 25 The illustration to this section is inconsistent with the section The way that the words "and to prove A's complicity in it" come into the illustration are not quite in accordance with common sense or with the section but where the fact from the nature of things ... t matter much ... *Emperor*, 28

Existence of Reasonable Ground For the application of this section there must be reasonable ground to believe that two or more persons have conspired together to commit an offence and that being shown anything said, done or written by any one of such persons in reference to their common intention may be proved both for the purpose ... for showing that any such ... C 797, see also *Kusir Bap* v ... 14 C W N 1114=37 C 467, ... N 676, 1930 M W N 1264

... 248 But before admitting ... portions of the evidence ... the existence of a conspiracy ... that case the prisoner was ...

and done by *Ramraji* when the prisoner was not present are not relevant facts as aginst the prisoner, as the prisoner was not present when they were told unless

And here, also, ... at was said and done by the other conspirato ... declarations made and done while the conspir ... in furtherance of the ... said or done by them befo... missibility *Greenleaf I* ...

... guishable from that of ... (1892—1896) Vol I, 148 ... each ... fo ... liable for what is done by his fel ... nce of the common intention which they had both entertained *Emperor* v *Shafi Ahmad*, 31 Bom L R 515; *Queen* v *Amir Khan*, 9 B L R 36 = 17 W R. Cr 15

Difference between English and Ind ... adm- sible in cases of conspiracy much evide ... under the English Law The provisions o ... the English Law *Ramprasad* v *Empe* ... ees with others to effect a common ... as a party to every act, which either ... lone, by the confederates, in further- ance of the common design *Per Coleridge J* in *R* v *Murphy*, 8 C & P 311 So also it does not matter, whether the acts were done, or the declarations made, in the presence or in the absence of the accused, but everything said or done by any one of the conspirators or ... is evidence against e ... or absent, and whe ... place *R* v *Brandr* ... 535 As the English ... doctrine, a distinction ... themselves purporti ... accompany and expl ... those statements, whether written or oral, which, although made during the continuance of the plot are in fact a mere narrative of the measures that have already been taken. The last statement accordingly is inadmissible So a letter written by a co-conspirator to a private friend unconnected with the plot ... society to wh... which enc ... writer, and ... society, was rejected on the ground that it was ... merely a relation of the part w ... only admissible against hims ... 153, *per Eyre C J* *Macdonald*, ... In *R* v *Watson*, 32 How St ... great weight in the argument ... Legislators wisely departed fro ... n 24 How St Tr 451, 453 and laid down the law which is consonant with the principle indicated above It has already been stated that this rule, is not a rule of evidence as erroneously believed but is a rule of substantive law which considers the cons pirators as one person and as such any statement made by one should be consi dered as an admission by each one of the rest ... used against other ... as explained under s ... declarations of ... gainst his fellows, only when they ... any and explain acts, for which ... are in the nature of narratives, de ... §§ 593-594 The provisions of se ... those of English law according to which the act or declaration must have been done or said, not only with reference to the common intention but also in pursuance of the same *Mendai* v *King Emperor*, 5 Oudh Cas 321; *Ram Prosad* v *Emperor*, 1 Luck C 339 = A I R 1927 Oudh 369.

This section makes evidence communications between different conspirators while conspiracy is going on, with reference to the carrying out of a conspiracy But it is not intended to make evidence the confession of a co accused and put it on the same footing as a communication passing between conspirators, or between conspirators and other persons, with reference to the conspiracy. *Emperor* v. *Abani*, 15 C W N. 25=38 C 169 So letters written by one co-conspirator may be evidence against others even when they are not written in furtherance of the conspiracy. *Vide*, *Queen* v *Amir Khan*, 17 W R Cr 15; *Queen* v *Amiruddin*, 7 B L R 63=15 W R Cr. 25 The illustration to this section is inconsistent with the section The way that the words "and to prove A's complicity in it" come into the illustration are not quite in accordance with common sense or with the section but where the fact from the nature of things [illegible] t matter much [illegible] .. *Emperor*, 28

[illegible] application of this section there [illegible] more persons have conspired [illegible] g shown anything said, done or written by any one of such persons in reference to their common intention may be proved both for the purpose of [illegible] for showing that any such pers [illegible] C 797, see also *Kusir Bap* v *Em* [illegible] 14 C W N 1114=37 C 467, *Am* [illegible] N 676, 1930 M W N 1264 81 I [illegible]

[illegible] *Mendai* v *King Emperor*, 5 Oudh Cas 321 In that case the prisoner was

[illegible]

provi [illegible] e to the common intention of herse [illegible] missible in evidence, as the statement [illegible] that R and the prisoner had conspired together [illegible] Indian Evide [illegible] afforded a re [illegible] to murder J [illegible] *A J C* said: Evidence Act The Sessions Judge does not state the portions of the evidence of *Biraja* which afforded a reasonable ground for believing that the prisoner and [illegible]

[illegible] against the prisoner, and that unless such reasonable ground exists things said and done by *Ramraji* when the prisoner was not present are not relevant facts [illegible] at present when they were told unless [illegible] eving that [illegible]

to *Biraja* are rele [illegible] for as already [illegible] but the question [illegible] *Kusir Bap* v [illegible]

590 There is a difference between a reasonable ground to believe a thing and a proof of that thing *Balmukand v Emperor*, 28 Ind Cas 738=1 P R 1915 Cr =16 Cr L J 358 Proof of conspiracy is not essential to the admissibility of the evidence itself Reasonable proof of a conspiracy may however, be demanded before the agency of one alleged conspirator may be properly held to affect those claimed to be his associates *Chamberlayne's Ev* § 3244

Communications between conspirators As soon as it is proved that the prisoner was privy to the general conspiracy, everything done by each of his fellow conspirators must be imputed to him as a part of the conspiracy if it was done to carry out their general purpose *Per Eyre J* in *R* v *Hardy* 24 How St Tr 451 The day book kept by one of the conspirators is evidence of something done in the course of the transaction (*Per Lord Denman C J* in *R* v *Blake* 6 Q B 137), and as such it is receivable in evidence as a step in the proof of the conspiracy *Ibid*, *per Patterson J* In the same case *Coleridge J* said at p 140 "As to the counterfoil it is quite clear that no declaration of *Ty* ... in evidence against *Blake* which was made in *Blake's* absence ... What then was the statement ... ffected" In *Hardy's Case*, 24 How ... ecut on of a letter written by ... to his wife, who was not a party to the c... art he had taken in the crime *Eyre* ... ned the whole matter up thus I ... vate letter as anything more than J... *The l call's* ... h remotely ... done in the ... of his a ... o me that ... *The l call* in carrying the papers and delive... rt of the transaction itself" See also *Parll* 76 But it appears that suc... a letter is admissible under this section

Order of Proof It has already been stated that this section comes into ... two or more persons ... *Vide Kahl* ... ground for ... ndas v *King* *Emperor*, 5 Oudh C... In *R* v *O Connell*, 5 State Tr N S 710, *Pennefather C J* said "When evidence is once given to the jury of a conspiracy, against A, B, and C whatever is done by A B or C, in furtherance of the common commercial object is evidence against A, B, and C, though no direct proof be given that A, B, or C, knew of it or actually participated in it If the conspiracy be proved to have existed, or rather if evidence be given to the jury of its existence the acts of one in furtherance of the common design are the acts of all, and whatever one does in the furtherance of common design, he does as the *agent of the co-conspirators*"; see also *R* v *Hardy*, 24 How St Tr 451, *R* v *Stone*, 25 How St Tr 1; *R* v *Watson* 32 How St Tr 80 359, 539, *R* v *Brandreth* 24 How St Tr 766, 852, *R* v *Hu*... must be proved before giving ... olated acts may be proved ... ished *Fort* v *Elliot* 4 Ex ... In *R* v *Duffield*, 5 Cox ... pen one in a thousand times ... comes before the jury to ... conspire together, and ... species of evidence ... conspiracy is to be ... seen taking ... seen through ... for the jury ... bout that end, ... which their conduct ap... Russ Cr 192

So the fact of conspiracy must be established before the act of one can be made the act of all But the conspiracy may be proved by direct or indirect evidence *R.* v *Blake*, 6 Q ... ; *R* v *Baskerville*, (1916) 2 K B 658, ... 120; 1 East P C. 96, 2 *Stark Ev* 326 ... 2 B & B 302; *R* v. *Jacobs*, 1 Cox ... *rney*, 11 Cox 414 The object of this section is merely to ensure that one person shall not be made responsible for the acts or deeds of another until some bond in the nature of agency has been established between them and the acts words or writing of another which it is proposed to attribute vicariously to the person charged must be in furtherance of the common design and after such design was entertained *Indra* v *Chandra Emperor*, 116 Ind Cas. 756=30 Cr L J 646=A. I R 1929 Pat 145 (F. B)

The rule is applied by *East* as follows · "In this (high treason), as in cases founded in conspiracy, the conspiracy or agreement among several to act in concert together for a particular end must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner And *this must generally speaking, be done by evidence of the party's* own act, and cannot be collected from the acts of others, independent of his own, as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts" But it may also be done by "evidence of the acts of the prisoner, and of any other with whom he is ...

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evidence against another who is charged as a fellow conspirator, until such a ...

act, etc .... of one ... can properly be used as evidence to show designs of another; yet in some peculiar instances where it would be difficult to establish the defendant's privity without first proving the existence of the conspiracy, a deviation has been made from this rule, and evidence of acts and conduct of ... 's to the ... w on the ... *Mr Phip-* ... common ... existence ... , though ... v *Frost*, ... perfectly clear ... conspired is rec... his share in it ... cases of ... in otherwise ... of strangers ... remembered that it is an inversion of the usual order for the sake of convenience, and such evidence is, in the result, material so far only as the assent of the accused to what has been done by others is proved." *Roscoe Cr Ev* pp 533, 534; *Per Buller J* in *Hardy's Case* 24 How St Tr 451 So it is clear that the general principle affecting the order of evidence leaves it ultimately to be controlled by the trial Court's descretion In the present application, the rule of conditional relevancy naturally applies, i e statements of A being receivable against B on ... conspiracy must ... a given case, the ... 79; see also the ... , 229, 241; *R.* v ... een first given of general conspiracy before any proof of the particular part which the ... St Tr 1218, *Lord Russel's Case*, ... v *Hammond*, 2 Esp 718; *R.* v ... C 331. In the *Queen's Case* ...

2 B & B 303 (310) *Abbot C J* observed We are of opinion that on a prose cution for a crime to be proved by conspiracy general evidence of an exi ting conspiracy may, in the first instance, be received as a preliminary step to that more particular evidence by which it is shown that the individual defendant were guilty [illegible] It is often necessary to render the particular [illegible] and character of the acts [illegible] it we presume it is permitted But it is to be observed, that in such [illegible] es the general nature of the whole evidence intended to be adduced is previously opened to the Court, whereby the Judge is enabled to form, an opinion as to the probabil ty of affecting the individual defendants by particular proof applicable to them [illegible] the alleged conspiracy, and [illegible] proof s fficient [illegible] ity of [illegible] to be [illegible] received, [illegible] ng an unreasonable prejudice would certainly be a useless waste of time

The admissibility of the act or declaration of a co conspirator against the party defendant before the Court does not depend on whether such co conspi rator is indicted or not or tried or not with the defendant 2 *Starkie Ev* 3?9 see also *R* v *Dugual* 94 L T 887 In the case of a conspiracy to carry on the bus ness of common cheats, proof at different times of similar acts is adm ble as cumulative instances are necessary to prove the offence *R* v *Roberts* 1 Camp 399

Anything said or done etc In England originally such evidence was admissible on the principle of *res gestae* *Vide Phil Ev* 9th Ed Vol I 199 It follows, that any writings or verbal expressions, being acts in themselves [illegible] explaining other acts, and therefore part of the *res* [illegible] home to one conspirator, are evidence against [illegible] ed it sufficiently appears that they were u ed [illegible] design *Phil Ev* 9th Ed Vol I, 204, see also [illegible] r 404 What the effect of such evidence will be must depend on a variety of circumstances, as whether the prisoner was attending to the conversation whether he approved or disapproved *Per Eyre C J* in *Ib* [illegible] see also *Stone s Case* 6 T R 527, *Rex* v *Salter* 5 Esp 125 So also consulta [illegible] lance (*Lord Russel s Ca e* [illegible] ers found [illegible] ably con [illegible] ner was a [illegible] itions or [illegible] isoner is [illegible] y accom [illegible] lly out of [illegible] pany [illegible] fession [illegible] these acts, and not being [illegible] t of the of them Upon this pr [illegible] ions of [illegible] neeting [illegible] kind of [illegible] 54? On [illegible] pon ban ers, have [illegible] *Hunt*, 3 B & A 566 [illegible] ry where words or [illegible] but a mere relation [illegible] persons have had [illegible] nature original [illegible] and therefore [illegible] v St Tr 34? [illegible] h had been [illegible] to the design [illegible] o be admis [illegible] s admitted in [illegible] evidence is [illegible] v *Hardwick*,

11 East 585, *Powell* v *Hodgetts* 2 C & P 432, *North* v. *Miles* 1 Campb 389, S.
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declaration of a fellow conspirator against a defendant whether the former be indicted or not, or tried or not with the latter, for the making one a co defendant does not make his acts or declarations evidence against another, any more than they were before, the principle upon which they are admissible at all is, that the act or declaration of one is that of both united in common design, a principle which is wholly unaffected by the consideration of their being jointly indicted" 2 *Stark Ev* 329 3rd Ed But where the conspiracy was charged with "divers other person" *Watson J* made an order for the names to be given forthwith *R* v *Perrin*, 72 J P 144

A letter written by a person who is a stranger to the transaction is not admissible *King Emperor* v *Keshab* 25 Bom L R 248 In a trial of several accused for sedition an exercise book was put in evidence On each one save five of the 62 pages of the book there appeared an entry consisting in most cases of a name or pseudonym followed by an address and in most cases by a series of what was clearly pass words Each name was preceded by a pair of letters or a single letter and these were arranged in order so as to be divided into groups and it was clear that a particular letter or pair of letters was appropriate to the addresses in a particular locality Simultaneous searches at the residence of several of the named persons and investigation of their activities disclosed evidence that for the greater part they exhibited a form of activity manifested in different ways but in nearly all cases of a revolutionary trend and in many instances directed to actual violence in support of such trend The accused could give no account or explanation of the code Held that the cipher code book was not to be treated as the act, word or deed of a particular individual, but the fact that it existed, the fact that set forth the names and address of a substantial number of persons charged, the fact that it was in a peculiar form such as is not likely to be found in any code intended to be used for lawful purposes, and many internal in
use of words and names having
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be kept secret and in absence of evidence that the persons named in it were associated for some legitimate purpose to be kept secret for some legitimate reason, the cipher code was in itself a good ground for supposing that the persons named have conspired to commit an offence and any other acts or writings of *individual conspirators in furtherance of the* common design *became admissible* under s 10 *Indra Chandra* v *Emperor*, 116 Ind Cas 756=A I R 1929 Pat 145=30 Cr L J 646 (F B) A and B are indicted in England for a conspiracy to commit a felony The only evidence of the conspiracy consists of facts done
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Illustrations In *Balmukand* v *Emperor*, 28 Ind Cas 738=17 P R 1915 Cr *Johnstone J* observed 'I am however inclined to agree with *Mr Beechy* as to point (2) in support of which he quoted *Barindra Kumar Ghosh* v *Emperor*, 7 Ind Cas 359=14 C W N 1114=11 Cr L J 453=37 C 467 They say that the words 'and to prove A's complicity in it come into the
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adding proof of the existence and nature of conspiracy At the risk of being

tedious, I must give an illustration to explain my view In the case given in ... nanufacturer, to send ... otherwise *prima facie*, ... t both as to the nature ... does not mention A and A's name in no way comes into the business of ordering arms in Europe, how can it be said that B's ordering of arms there can produce in the mind of the Judge any added conviction that A was a member of the conspiracy? Of course in framing a law ... for the purpose ... the idea that the ... create a barren, ... an ar ... is not to matte ... ot, if as a matte ... towards the ... nderlying this ... absence

committing jointly any criminal offence are deemed to be mutual agents or confederates for the purpose only of the execution of the joint purpose Accordingly any act done by one of them in the execution of common purpose is deemed the act of the others also *Wills' Ev* 167; see also *R* v *Caton*, 12 Cox 624; *R* v. *Blake*, 6 Q B 126; *R* v *Murphy*, 8 C & P 297. So when a co-conspirator leaves a conspiracy, the mutual agency terminates so far as he is concerned and as such acts and declarations of other conspirators should not be admissible against him In England also a conversation held by D and E, two members of the conspiracy ... rs, and about an hour after th ... nd B, two other

... an abortion which A and B conspired to procure on July, 22 Evidence of doctor that B called on him in June and asked for a remedy for her condition, was held admissible against A as the act was in furtherance of the common purpose But a diary kept by B, incriminating A, and a letter intended for, but not sent to him, both written after the abortion, were rejected as not in furtherance of the common purpose Statement of a co accused after arrest is not admissible against other co accused *Sital* v *Emperor*, 46 C 7000=30 C L J 255 The ... particular defendant ... he conspiracy ... v *Dwyer*, 24 ... *B* are indicted in *Middlesex* for a conspiracy to destroy property After proof acts ... n Surrey ... *rdon* 21 ... 54, *Phip* ... s 229 ... itence of death in attempting to escape from confinement in jail He procured saw ... en by some ... ith certain ... as witness ... r the death ... e convicts ... 100 The request was repeated twice *Held*, that the evidence of the constable was admissible under the circumstances under s 10 *Maula Baksh* v *Emperor*, 119 Ind. Cas

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763=30 Cr L J 1103=1929 Cr L J. 190=A I R 1929 Lah 631 Where
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1930 Bom 137=32 Bom L. R 324

American law—common purpose is not sufficient A common purpose is not sufficient, standing alone, to secure admissibility for the evidence of what happened on other occasions The several acts may well have been done for the same purpose or in pursuance of a single agreement, the evidence nevertheless is not admissible unless the common purpose runs through the several acts rather than up to them In other words, the individual transactions must be connected, correlated and systematized in such a way that each act, though, perhaps, in a sense, complete in itself, is yet a necessary element in a plan to reach an ulterior object which has been in view from the start, simply unity of purpose is not sufficient A mere conspiracy to do a number of disconnected acts of a similar nature, *e, g*, to rob all the houses of a given neighbourhood and the carrying out of such an arrangement, would not be sufficient to authorize the Court in receiving evidence of one robbery as proof of the commission of another Those associated in common plan may each be liable, under the rules of substantive law governing the relations of conspirators, for the doing of any acts which may have been done during and in pursuance of the conspiracy But such a situation does not disclose an instance of the working of the rule under consideration *Chamberlayne's Ev* § 3244

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them were acquitted, the other is entitled to an acquittal, as a matter of course *Profulla* v *King-Emperor*, 30 C W. N 94=91 Ind Cas 813; *R* v *Manning*, 12 Q B D 241, *Kasem* v *Emperor*, 45 C L J 204, *Manindra* v. *Emperor*, 41 C 754

When facts not otherwise relevant become relevant

11. Facts not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations

(*a*) The question is whether A committed a crime at Calcutta, on a certain day.

The fact that, on that day, A was at Lahore is relevant.

The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant

(*b*) The question is, whether A committed a crime

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Scope of the section This section is, no doubt, expressed in terms so extensive that any fact which can, by a chain of ratiocination, be brought into

connection with another, so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning But the connections of human affairs are so infinitely various and so far reaching, that thus to take the section in its widest admissible sense would be to complicate every trial with a mass of collateral inquiries limited only by the patience and the means of the parties One of the objects of the law of evidence is to restrict the investigations made by courts within the bounds prescribed by general convenience, and this object would be completely frustrated by the admission, on all occasions of every circumstance on either side having some remote and conjectural probative force, the precise amount of which might itself be ascertainable only by a long trial and a determination of fresh collateral issues, growing up in endless

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only be admitted under sections 32 and 33 of the Evidence Act. It is conceded that the statements in question do not come within the purview of those sections and are, therefore, not admissible under those sections, but it is contended that
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can be admitted ... The terms of section 11 are, it is true, wide, ... must be read subject to the other sections of the Act, and therefore the fact relied on must be proved in accordance with the provisions of the Act If that fact is a statement made by a person who is not called or cannot be called, the statement
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the Legislature would appear from the following extracts of *Stephen's Introduction to Evidence Act*, 160 where he stated "It may possibly be argued that the effect of the second paragraph of section 11 would be to admit proof of such facts as these (namely, statements as to facts by persons not called as witness, transactions similar to but unconnected with the facts in issue; opinions formed by persons as to the facts in issue or relevant facts) It may, for instance be ... (a witness) was heard to declare that he had seen B commit
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... This was not the intention
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which are regarded as relevant facts either because the circumstances under which they are made invest them with importance, or because no better evidence can be got The sort of facts which the section was intended to include are facts which either exclude or imply more or less distinctly the existence of the facts sought to be proved Some degree of latitude was designedly left in the wording of the section (in compliance with a suggestion from the Madras Government) on account of the variety of matters to which it might apply

This section is not always controlled by Section 32 As a general rule s 11 of the Evidence Act is controlled by s 32 of the Act where the evidence consists of statements of persons who are
rule is subject to certain exceptions
9 Bom L R 1047, *Ambica* v *Kumud* A
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on the ground that it is itself a relevant fact under s 11 While I adhere to the
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veracity can then be tested by the art of cross examination Where however witnesses cannot be brought before the Court their previous statements
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into play Briefly the test whether the statement of a person who is dead or who cannot be found is relevant under section 11

said was true or false, but highly material that he did say it In these circumstances
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his will where the fact that is relevant under s 11 is not what a deceased person chose to predicate about a thing but that he mentioned it at all, whether what he predicated of it were true or false, then and then only it is a case outside s. 32"

Fact whether includes judgment Everything which has been called into being by some agency or other, is in the widest sense a fact and in certain sense, a judgment may be said to be a fact within the meaning of s 3 of the Act. *Gajjul Lall* v *Fatteh Lal*, 6 C. 171, *Per Jackson J*, contra *ibid Mitter J* Former judgments which are not of the nature of judgments *in rem*, nor judgments

' be admitted, where parties are different, as

r s 11 or under any other section of the Act

i, 10 B 43 *The Collector of Gorakhpur* v *Palak*

dhari 12 A 1 Though the recital in a judgment cannot be used as evidence still the judgment is evidence as a relevant fact in issue or as a transaction

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estion in a suit.

see also *Indar*

Singh v *Fateh Singh*, 1 Lah 540

Facts not otherwise relevant As regards clause (2) of this section *Mr*

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really positive evidence which in the nature of things necessarily implied a negative' When a defence rests on proof of an *alibi*, it must cover the time when the offence is shown to have been committed, so as to preclude the possibility of the prisoner's presence at the place of the murder for if it be possible that he could have been at both places the proof of the *alibi* is valueless *Per Agnew J* in *Briceland* v *Com*, 74 Pa 463 469 Such expressions however seem in truth to refer only to the weight of the *alibi* argument, by pointing out that it falls short of complete proof except on these conditions If they were intended to mean anything more, they are clearly unsound, and would exclude nine *alibi* arguments out of ten Even as affecting the weight of the argument (with which ... statements seem erroneous, for an *alibi* ... but only high improbability, and yet be

Non access of husband to show illegitimacy Since legitimacy of offspring implies a begetting by the husband it would be relevant, in disproving legitimacy to use his absence from wife at the probable time of begetting as showing the impossibility of the act of begetting *Wigmore* § 137, *Banbury Peerage Case*, App p 1 etc, *Le Marchants* Rep of Gardner Peerage 435, 489, 1 Sim & St 153, *Morris* v *Davies* 3 C & P 215, 217, *Gordon* v *Gordon*, Prob 141

Survival of the alleged deceased Where the *corpus delicti* is disputed as for example, in a charge of homicide the alleged deceased is claimed by the defendant not to have been killed the argument is obviously available that he is still alive after the time of the supposed death for this would be absolutely inconsistent with his death as supposed *Wigmore* § 138

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or both might be innocent, and a common guilt or a common innocence was as presumable as the guilt of one only . But proof that certain acts constituting a part of the criminal transaction itself were done by W M might have been of high importance to the prisoner by removing so much of the inference of guilt as would be raised were those acts brought home to him Proof that the taking was by any one other than the prisoner perhaps might repel this inference (of guilt)—not because the guilt of one shows the innocence of the other but because proof that specific acts were done by one weakens or removes the presumption that the same acts were done by another

... defendant is ... ive killed the ... ns or desires ... or probability ... be matter for ... the evidence ... y also not be ... ought not to ... en 157 Mass 180, *Field C J* said If it could be shown that during the week before her death she had actually attempted to drown herself and had been prevented from doing so it seems manifest that this act, according to the general experience of mankind would have some tendency to show that she might have made a second attempt In *Spencer Cowpers Trial*, 13 How St Tr 1166 where the issue was whether the deceased had committed suicide or was killed, evidence was received of her being melancholy and depressed, she said her distemper lay in her mind and the sooner it did kill her the better, she neglected herself in doing those things that were necessary for her health in hope it would carry her off and often wished herself dead

Highly probable The words 'highly probable' point out that the connection between the facts in issue and the collateral facts sought to be proved must be so mediate as to render the co existence of the two highly probable *Per Mitter J* in *Empress* v *M J Vyapoory*, 6 C 655 at p 662 In *Govt of Bombay* v

Merwanji, 10 Bom L R 907, at p 419, *Batchelor J* observed: 'In s 11 of the Evidence Act provision is made for the admission of facts not otherwise relevant when they make the existence or non existence of any fact in issue or relevant fact highly probable or improbable, and the adverb was not introduced into the section without good reason" In *In the matter of the Malabar Timber Yards etc* 13 M L T 282=18 Ind Cas 997 at p 1004 *Fayabji J* said: "It has recently been pointed out by the Bombay High Court, in *Government of Bombay v Merwanji Mencharji*, 10 Bom L R 907, that the words 'highly probable' are of great importance in considering this section It is clear that, in regard to this section the admissibility of the particular piece of evidence, that is offered, is closely connected with and in fact depends upon the weight to be attached to that piece of evidence if it is taken into consideration In other words, this section makes only those facts admissible which assuming that they are admitted in evidence, will be of great weight in bringing the Court to a conclusion one way or the other as regards the existence or non existence of the facts in question I agree with the learned Chief Justice, that if these letters were admitted in evidence they would not be of much assistance to us in coming to the conclusion one way or the other on the facts in question That being so, it seems to me that under section 11 of the Evidence Act, that cannot be admissible at all" So there must always be room for the exercise of discretion when the relevancy of testimony rests upon its effect towards making the affirmation or negation of a proposition highly probable *R v Prabhu Das*, 11 B H. C. R 90 The following extract from professor *Thayer's* article in 3 *Harvard Law Review*, p 143 is very instructive "In stating thus our two fundamental conceptions, we must not fall into the error of supposing that relevancy, logical connection real or supposed, is the only test of admissibility, for so we should drop out of sight the chief part of the law of evidence When we have said (1) that, without any exception, nothing which is not supposed to be logically relevant is admissible, and (2) that subject to many exceptions and qualifications, whatever is logically relevant is admissible, it is obvious that, in reality, there are tests of admissibility other than logical relevancy Some things are rejected as being of too slight a significance, or as having too conjectural and remote a connection, others as being dangerous and likely to be misused or over estimated by a jury, others, as being impolitic *e g* unsafe for the State, others on the bare ground of precedent ..... [The law] assuming, as it does, that in general what is evidential is receivable is occupied in pointing out what part of this matter is excluded It denies to this excluded part not the name of evidence but the name of admissible evidence. Admissibility is determined, first by relevancy—an affair of logic and not of law,—secondly, but only indirectly by the law of Evidence which in strictness, only declares whether matter which is logically probative is excluded It is here that *Mr Justice Stephen's* treatment of the law of evidence is perplexing, indeed it comes to have the aspect of a *tour de force*..................How are we to know what those things are (that are logically probative)? Not by any rule of the law The law furnishes no test of relevancy, for this it tacitly refers to logic, assuming that the principles of reasoning are known to its Judge and ministers just as a vast multitude of other things are assumed as already sufficiently known. .... Admissibility is determined, first, by relevancy,—an affair of logic and and not of law" But the statement is not accurately true So long as Courts continue to declare in judicial rulings what their notions of logic are just so long will there be rules of law which much be observed *Wigmore* § 12 In *State v Lapage*, 57 N H 288 *Curting C J* thus differentiates the rules of logic and the rules of law 'Although undoubtedly the relevancy of testimony is originally a matter of logic and common sense, still there are many instances in which the evidence of particular facts as bearing upon particular issues has been so often the subject of discussion in Courts of law, and so often ruled upon that the united logic of great many Judges and lawyers may be said to furnish evidence of the sense common to a great many individuals, and, therefore, the best evidence of what may be properly called common sense and thus to acquire the authority of law It is for this reason that the subject of the relevancy of testimony has become, to so great an extent matter of precedent and authority that we may with entire propriety speak of its legal relevancy

Admissibility, on the other hand falls short of Proof or Demonstration The distinction is due to the circumstance that each evidential fact is offered separately and the quality of complete demonstration could therefore never be

expected of it Since the production of evidence takes time and since one piece of evidence must precede another, the rule of admissibility if there be any at all, can have nothing to do with the inquiry whether certain evidence effects complete proof *Wigmore* § 12

Degree of probative value required The general and broad requirement for Relevancy is that the claimed conclusion from the offered fact must be a probable or a more probable hypothesis with reference to the possibility of other hypotheses *Wigmore* § 38 So it is competent to a jury to find matters of fact without direct or positive testimony of those facts and upon circumstantial evidence only although the inference or conclusion to be drawn from the circumstances proved be not absolutely certain or necessary, that it is sufficient if the circumstantial evidence be such as may afford a fair and reasonable presumption of the facts to be tried, and if the evidence has that tendency it ought to be received and left to the consideration of the jury, to whom alone belongs to determine upon the precise force and effect of the circumstances proved and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue' *Gibson* v *Hunter*, 2 H M 298 'The proper test for the admissibility of evidence ought to be, we think, whether it has a tendency to affect belief in the mind of a reasonably cautious person who should receive and weigh it with judicial fairness *Stewart* v *People*, 23 Mich 75

Illustration (b) Where the guilt lies between A and C and there is no reason for believing that C has any concern with the commission of the crime, while the motive and other surrounding circumstances are too incriminating against A, the irresistible inference is that A has committed the crime *Mehro* v *Crown* 8 P W R 1907 Cr = 5 Cr L J 182

Venereal Disease to show adultery The existence of venereal disease in a husband is some evidence of an act of adultery on his part Whether this disease is sufficient evidence of adultery may depend upon circumstances *Popkin* v *Popkin*, 1 Hog Eccl 765, 767

Pecuniary Capacity A party's pecuniary capacity to pay a debt or to lend money is relevant to the probability of his paying or lending To show his pecuniary condition as to his capacity, his conduct in borrowing and not paying thus becomes relevant *Wigmore* § 224, see also *Dowling* v *Dowling*, 10 Ir C L R 224

Report to the police In cases where forcible re entry by the lessor is set up by the lessee the fact that a report complaining of the use of force or intimidation was made to the police soon after the occurrence is a relevant fact under this section and is admissible in evidence *Habibullah* v *Bakht Bali* 30 Ind Cas 292 = 2 O L J 299

between strangers to the suit, suit or their predecessors cutants of the document is 9 Lah 78 = 111 Ind Cas Lah 448 = 8 Lah 651 So third parties in favour of utant is not dead and does I R 1928 Lah 428, see 448 = 8 Lah 276 = 9 L L J *atar Chandra*, 44 C L J *adhab* 86 Ind Cas 734 = 41 = A I R 1928 Cal 893; *Lajpat* v *Faiz* 8 Lah 651 = 103 Ind Cas 889 = A I R 1927 Lah 448 *Abdul* v *Jonabali* A I R 1923 Cal 299, *Trimbak* v *Ganesh* A I R 1923 Nag 22, *Brojo* v *Gaya* 30 C W N 761 = 97 Ind Cas 265, *Abdul Karim* v *Chhab Ahamed* 91 Ind Cas 688 = A I R 1926 Cal 479, *Nihar* v *Kader Baksh* 1923 [illegible] C W N 1092 = 84 Ind Cas n *Saroj Kumar* v *Umed Ali*, ided that a document of this rovisions of either section 11 uthorities some of which are t *Mr Justice Mukherjee* who , C L J 659 had apparently

held that a document of this nature was admissible in evedence under sections 11 and 13 of the Indian Evidence Ac, altered his view in the decision in *Abdulla v Kunj Behari* 16 C W N 252=14 C L J 467 where he held that a document of this nature was not admissible in evidence under the provisions of sections 11 and 13 of the Indian Evidence Ac, thus differing from the view which he had previously expressed Both the cases in *Saroj Kumar v Umed Ali* and *Abdulla v Kunj Behari*, must be taken to overrule the decision in *Dwarka Nath v Mukunda Lal*, 5 C L J 55, where it was held that a document of this nature was admissible under the provisions of sections 11 and 13, of the Indian Evidence Act See also *Abdul Ali v Saied Rajan* 19 C W N 468, *Cherag Ali v Mohini Bardhan*, 19 Ind Cas 61, *Sarat Chandra v Sarala Bala*, 105 Ind Cas 61, *Kumud Kumari v Dilsook*, 45 C L J 138=101 Ind Cas 542 A lessor's statement in the *pattah* previously granted would not be said to be a fact within the meaning of section 11 and that section could not be invoked for admitting the statement *Radha v Sarbeswar*, 29 C W N 469=86 Ind Cas 674

Where certain lands are entered in the record of rights as chaukidari chakran lands so far as a stranger is concerned, the only way in which those papers can be treated as evidence would be under this section *Rahimuddin v Umesh Chandra*, A I R 1926 Cal 115=87 Ind Cas 694

A document relating to land on the boundaries of the land in dispute is not admissible in evidence for the purpose of determining whether a certain party was or was not in possession of the land in dispute at the date of the execution of the document *Abdul Karim v Chhale Ahamed*, 91 Ind Cas 688=A I R 1926 Cal 479

The plaintiff brought a suit against his son for recovery of possession of a land which stood in the name of the latter alleging that the same was acquired *benami* by him The defendant alleged that the land was purchased for him by his paternal grand father The plaintiff answered that his father had died before the property was acquired, and he produced a mortgage bond executed by him long before the date of the purchase in which he described his father as dead *Held* that the statement made by the plaintiff in the mortage bond to which the [illegible] admissible in evidence as against the latter with section 11, clause (2) of the Evidence under section 159 of the Act *Sayeru [illegible]* R 1923 Cal 378

Documents containing recitals that a particular plot of land belongs to a particular Will are admissible in evidence either under section 11 (b) or section 13 of the Evidence Act although they are no between parties to the suit *Farzand v Zafar Ali* 46 Ind Cas 119=132 P W R 1918 This case was decided relying on *Dwarka Nath Bakshi v Mukunda Lal*, 5 C L J 55 in which also reliance was placed in *Vythilinga v Venkatachala*, 16 M 194 and *Dattari Mohanti v Jugabinahoo*, 23 W R 293 But the case of *Dwarka Nath v Mukunda Lal*, 5 C L J 55 was overruled by *Suraj Kuar v Umed Ali*, 25 C W N 1027= 35 C L J 19

[illegible] he case of a house said to have been built [illegible] to who constructed it may not be easily [illegible] ing by whom it was built are admissible [illegible] 82 Ind Cas 582=A I R 1924 All 526

[illegible] and 4 sold a *jote* to defendant [illegible] subsequently colluded with the [illegible] sale, the statements previously [illegible] been a partition and they had [illegible] im, and the statements were [illegible] (2) of the Evidence Act. *Ebi* [illegible] 5 C 210, see also *Naro Vinayat v Narhan* 16 B 125

[illegible] e Will In *Nana v Shanker*, [illegible] s who attended on the testatrix [illegible] ement made to the witness [illegible] by Will The District Judge [illegible] in delivering the judgment

of the Court *Jenkins C J* observed "For the appellant it is urged that it would be admissible under section 11 of the Evidence Act ... . The defendant on the other hand refers to *Atkinson v Morris*, L R 1897 P D 40 as a conclusive authority against its admissibility; for it was there held that statements made by a testator are not admissible to prove the execution by him of a Will This case, however, and the others on which it proceeds, are based on the fact that the English Wills Act prescribes a particular form of proof, while to the Will in this case no such rule applies (the testator being an inhabitant of Poona) *Atkinson v Morris* therefore, throws no light on the point, we have to decide and it must be determined by other principles Now this Will would only operate on that, which, in its absence, would devolve on *Ganga's* representatives, and a statement by her suggesting any inference as to the execution of a Will would be an admission relevant against her representatives and would therefore be admissible as evidence"

History of a family Where the history and status of a particular family, which is one of a group, is in question, evidence may be adduced to elucidate the history and status of connected families in the same group, and such evidence is admissible under this section *Sarada v Uma Kanta* 77 Ind. Cas 450=37 C L J 433=50 C 370

Absence of entry The fact that no [illegible] found in the defendant's books is relevant [illegible] *Haji Jamil*, 75 Ind Cas 327=A I R [illegible] v *Manraj*, 4 C W N ccvi, *Imrit v Sr*[illegible] *Ali Nasir v Manik*, 25 A 90, but see *Queen Empress v Grees Chandra*, 10 C 1024, *In the matter of Jaggun Lal*, 7 C L R 356, *Ramprosad Singh v Lakhpati Kuar* 30 C 231 (247)=7 C W N 162 So it is clear that on this point there is some divergence of judicial opinion It was pointed out in *Imambandi v. Mutsaddi*, 45 C 878=28 C L J 409=23 C W. N 50 P C and *Imrit v Sridhar*, *ubi supra*, the cases of *Queen Empress, v Grees Chunder Banerjee*, *ubi supra* and *In the matter of J Juggun* [illegible] the entries in a book of account are relevant to [illegible] Evidence Act such a book is [illegible] absence of any entry The [illegible] *Davey* and *Lord Robertson* in [illegible] at 247=30 I A 1=7 C W [illegible] *Manraj ubi supra* it was ruled, however, that the cases just mentioned did not decide that the fact of absence of an entry is no evidence at all under any section of the Indian Evidence Act, and that evidence that there is no entry in the account books, though not admissible under section 34 may be admissible under sections 9 and 11 The question arose again before a Full Bench of the Allahabad High Court in *Sadhu Sahu v Raja Ram*, 16 A 40 (F B)=A W N 1893, 200 and the Judges were divided in opinion The point may now be taken to have been set at rest by the judgment of the Judicial Committee in *Imambandi v. Mutsaddi ubi supra*, where the fact of absence of entry was held relevant, its effect to be determined in the light of the general evidence in the case This fits in with the opinion expressed by *Turner J* in *Wise v Bhoobon Moyee*, 10 M I A. 165 at 174 In that case, reliance was placed on the fact that a disputed Taluk was not mentioned in the Decennial or Quinquennial Settlement as such, the relevancy of the circumstances was not questioned, but Judicial Committee observed that even assuming the statements to be accurate, in the absence of particulars of the settlements, the fact did not seem to afford any strong inference against the existence of the Taluk, see also *Dwarka Nath Roy v Horonauth* W. R. (1864) 238, *Tara Kumar Ghosh v Kumar Arun Chandra*, 30 C L J 389=A I R 1923 C 261, *Gauga Ram v Lachmi Ram*, 28 Ind Cas 705=19 C W N 611.

Highly probable or improbable—Cases. Accused were charged with having obtained money from complainants by falsely representing that they were servants of one Akbari Begum, a wealthy lady of Rampur, who was anxious to lend money on easy terms *held*, that the evidence that at or about the very same time when the accused were alleged to have made such a representation to the complainants they had been making precisely the same representation to a third person, was admissible under sections 11 and 14 of the Evidence Act to corroborate the story of the prosecution and to prove the intention of the

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Where certain lands are entered in the record of rights as chaukidari chakran lands so far as a stranger is concerned the only way in which those papers can be treated as evidence would be under this section *Rahimuddin v Umesh Chandra* A I R 1926 Cal 115=87 Ind Cas 694

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Documents containing recitals that a particular plot of land belongs to a particular Will are admissible in evidence either under section 11 (b) or section 13 of the Evidence Act although they are not between parties to the suit *Farzand v Zafar Ali* 46 Ind Cas 119=132 P W R 1918 This case was decided relying on *Dwarka Nath Bakshi v Mukunda Lal* 5 C L J 55 in which also reliance was placed in *Vythilinga v Venkatachala*, 16 M 194 and *Dautari Mohanti v Jugabanahoo* 23 W R 293 But the case of *Dwarka Nath v Mukunda Lal*, 5 C L J 55 was overruled by *Suraj Kuar v Umed Ali*, 25 C W N 1027=35 C L J 19

Recital in old documents In the case of a house said to have been built over half century ago direct evidence as to who constructed it may not be easily available and old documents mentioning by whom it was built are admissible in evidence *Raghunath v Bindeshwari* 82 Ind Cas 582=A I R 1924 All 526

Admission Where the defendants Nos 2 and 4 sold a *jote* to defendant No [illegible] subsequently colluded with the [illegible] sale, the statements previously [illegible] been a partition and they had [illegible] him and the statements were [illegible] (2) of the Evidence Act *Bir* [illegible] 5 C 210, see also *Naro Vinayak v Narhari* 16 B 125

Statements made by testatrix to prove the Will In *Nana v Shanker* 3 Bom L R 465, which was a probate case, a witness who attended on the testatrix during her last illness, was asked to depose to a statement made to the witness by the testatrix as to the disposition of her ornaments by Will The District Judge disallowed the question On appeal to the High Court, in delivering the judgment

of the Court *Jenkins C J* observed · "For the appellant it is urged that it would be admissible under section 11 of the Evidence Act .... The defendant on the other hand refers to *Atkinson* v *Morris*, L R 1897 P D 40 as a conclusive authority against its admissibility ; for it was there held that statements made by a testator are not admissible to prove the execution by him of a Will This case, however, and the others on which it proceeds, are based on the fact that the English Wills Act prescribes a particular form of proof, while to the Will in this case no such rule applies (the testator being an inhabitant of Poona) *Atkinson* v. *Morris* therefore, throws no light on the point, we have to decide and it must be determined by other principles Now this Will would only operate on that, which, in its absence, would devolve on *Gangu's* representatives, and a statement by her suggesting any inference as to the execution of a Will would be an admission relevant against her representatives and would therefore be admissible as evidence"

History of a family Where the history and status of a particular family, which is one of a group, is in question, evidence may be adduced to elucidate the history and status of connected families in the same group, and such evidence is admissible under this section *Sarada* v *Uma Kanta* 77 Ind Cas 450=37 C L J 433=50 C 370

Absence of entry The fact that no entry of the alleged payment was to be found in the defendant's books is relevant under this section *Kasam* v *Firm of Haji Jamal*, 76 Ind Cas 327=A I R 1924 Nag 22, see also *Sagurmull* v *Manraj*, 4 C W N ccvii, *Imrit* v *Sridhar* 15 C L J 7=17 C W N 108, *Ali Nasir* v *Manik*, 25 A 90, but see *Queen Empress* v *Grees Chandra* 10 C 1024, *In the matter of Jaggun Lal*, 7 C I [illegible]
Kuar, 30 C 231 (247)=7 C W N 16 [illegible]
is some divergence of judicial opinion [illegible]
Mutsadai, 45 C 878=28 C L J 409=23 [illegible]
ubi supra, the cases of *Queen Empress*, [illegible]
In the matter of J Juggun Lal, *ubi supra*, assume that though entries in a book of account are relevant to the extent provided by section 35 of the Indian Evidence Act such a book is not by [illegible]
absence of any entry The same vie[illegible]
Davey and *Lord Robertson* in *Ram F*[illegible]
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Highly probable or improbable—Cases Accused were charged with having obtained money from complainants by falsely representing that they were servants of one Akbari Begum, a wealthy lady of Rampur, who was anxious to lend money on easy terms *held*, that the evidence that at or about the very same time when the accused were alleged to have made such a representation to the complainants they had been making precisely the same representation to a third person, was admissible under sections 11 and 14 of the Evidence Act to corroborate the story of the prosecution and to prove the intention of the

accused *Emperor* v *Yakub*, 39 Ind. Cas. 673=15 A L J 241=39 A 273=18 Cr L J 529

Where in a case of a disputed deed of adoption the defendant alleged that the deceased executant had become shortly after the execution of the deed, aware of its existence, purport a ... cancel it or to nullify ... became admittedly a ... merely a relevant fact, but a very important fact in the case ; and the evidence offered by the defendant as to statements made by the executant in the interval of ... the view taken by him of the deed which he had conceived himself to ... irrelevant, but is admissible under section 11 of the Act *Mir Sayed* v *Taiyaba Begam*, 26 Ind Cas 547=1 O L J 591

Self serving statements are admissible where they make relevant fact highly probable or improbable or where they are *res gestae* *Harihar Prosad* v *Kesho Prosad*, A I R 1925 Pat 68=92 Ind Cas 954

A cablegram, purporting to be from one, in Calcutta was sent to P in London ... and expressly referring to it P posted a reply to ... ply to B would be a relevant fact under section ... that B was the sender of the cablegram *C H* ... 79=18 C L J 567=18 C W N 386=15 Cr L J 33, see also *R* v *Derrington*, 2 C & P 418

An admission made by one of the defendants in a previous suit (to which he was himself a party, as to the common character of a portion of a lane, may be used in evidence against other defendants even though they may not be parties to that previous suit. A statement to the same effect made by one of the defendants in a deed put in by him to prove his title to his own house is admissible in evidence to establish the common character of the entire lane as alleged by the plaintiff under section 11 of the Evidence Act Facts are relevant which make the existence of a fact in issue highly probable , therefore, the fact of common ownership in other parts of the lane should be treated as relevant to the issue as to the common character of the entire land *Naro Vinayak* v *Narahari*, 16 B 125

Where in a suit for rent under a lease of land, alleged to be purchased from and leased to the defendant again the defendant totally denied the sale and lease of the defendant proved that he did not sell the land the fact that he did not sell it would be inconsistent with the fact of the lease, and hence, relevant under 11 (1) *King Hla Pru* v *San Paw*, 3 L B R 90

Frequent transfers of the interest in a tank without any change in the terms of the holding, or in the amount of rent paid extending over a period of more than 60 years, were held to prove that the tenure was permanent and transferable, the fact of the transfer being inconsisteat with the interest being terminable at will *Nidhi Krishna* v *Nistarini*, 13 B L R 416=21 W R 316

On the question whether certain leases were perpetual, it was held that the fact that the intention implicated by the acts and conduct of the parties was to make ... , under similar circumstances, same was the intention with ... ating to these leases would be ... *Dayal* v *Ram Narayan* 30 C ... N 297 , *Kamalashri* v *Kanhiri* ...

In a charge of forgery, evidence of possession by the accused of other documents suspected or even proved to be forged is admissible under this section *Reg* v *Prabhudas*, 11 B H C 90

The statement of a witness for the defence, that a witness for the prosecution was at a particular place at a particular time, and consequently could not then have been at another place, when the latter states he was and saw the accused persons, is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross examined on the point *Reg* v *Sakharam*, 11 B H C 166

When the question is whether a man is a habitual cheat, the fact that he belonged to an organisation formed for the purpose of habitually cheating in concert is relevant under s 11 of the Evidence Act *Kalu Mirza* v *Emperor*, 37 C 91=14 C W N 49=5 Ind Cas 29

The mental feelings of a person who is dead are highly relevant to the question of his religion and the expression of these feelings in a formal manner, such as in a Will executed by the deceased, are valuable evidence as to their existence Such statements are admissible both under s 11 (2) and s 21 (2) of the Evidence Act *Leong Hone* v *Leon Ah Foom*, 7 R 720=121 Ind Cas 796=A I R 1930 Rang 42

Where the suit related to rights to properties belonging to a *math* and the question as to dedication was put in issue and the gift of a certain item of property belonging to the institution was sought to be relied on as throwing light on the general question *held* that it was admissible under s 11 (2) of the Evidence Act *Bhagwat Prosad* v *Bindeswar*, 1930 A L J 964

In a charge under s 401, I P Code, a former judgment of 25 years old convicting accused of dacoity, was held admissible to show criminal tendency and not habit A I R 1925 Bom 195=26 Bom L R. 1223=26 Cr. L J 1391=89 Ind Cas 527

In a trial for an offence under s 4 (a) of the Prevention of Gambling Act, 1887, the evidence that he was previously convicted of similar offence cannot be let in either under s 54 or s 11 of the Evidence Act *Emperor* v *Alloomya*, 28 B 129

[illegible]

a period of extremely strained communal feeling enunciated that it was the

[illegible]

Emperor, 33 C W N 477=47 C L J 444=111 Ind Cas 396 Judgments *inter partes* are relevant as authoritative statements of facts as found by the Court *Gopal Rao* v *Sitaram*, A I R 1927 Nag 19 The author of a book was proceeded against by the Government for creating class hatred and the books themselves were forfeited The author applied to the High Court under section 99 of the Criminal Procedure Code to set aside that order It was dismissed The judgment was held admissible in a prosecution against the same person under s 153 A of the Penal Code *Kali* v *Emperor*, 25 A L J 846=A I R 1927 All 654=28 Cr L J 785 *Batwara* papers are admissible in evidence against strangers if they can be under s 11 of the Evidence Act *Rahimuddin* v *Umesh* 87 Ind Cas 694 *Ex parte* decrees for rent obtained by a landlord against the heirs of a tenant and satisfied by the latter, are evidence of the existence of the tenancy at the date of those decrees *Anukul* v *Kamala*, A I R 1923 Cal 270 Where the question was whether proceedings in lunacy held under Act XXXIV of 1858, are admissible in evidence in a subsequent suit to show that the defendant was a lunatic at a particular time it was held that the orders and reports made under the Act by the Judge before whom the lunacy proceedings were held, were admissible in evidence *Srimati Padmabati* v *Bonomali*, 24 C W N 378=58 Ind Cas 566 A full horscope perepared from a short one is admissible in evidence so far as the date of the birth and the parentage is concerned *Harbahadur* v *Chand Raj*, 21 O C 298=48 Ind Cas 400 An entry made in a register of indoor patients in a hospital is admissible in evidence to prove that the person mentioned in the entry was in the hospital on a certain date *Amolak* v *Emperor*, 56 P L R 1918=13 P W R Cr 1918=43 Ind Cas 429 The judgment and the proceedings in a civil suit against a vakil, out of which a charge of profesional misconduct is framed against him, are admissible in evidence in an enquiry into the latter charge [illegible] rt in not conclusive [illegible] *Row*, 23 M L J [illegible] e case was that a [illegible] lar occasion, then [illegible] ce or intimidation was made soon after the occurrence was a relevant fact under s 11 of the Evidence

Act and admissible in evidence *Habib Ullah* v *Bakhl Bali Singh*, 30 Ind Cas 292 On a charge against the accused of cheating by falsely representing that they were the servants of a wealthy lady and were entrusted to act on her behalf in the arrangements for loans, to be made with the complainants out of the money she possessed, and thereby obtaining money from them on one pretext or another in connection with this affair, *held* that evidence of instances of similar but unconnected transactions with other persons, during the period covered by the evidence of the complainants] is admissible under s 11 in order to corroborate the prosecution evidence in support of the particular offence charged *Emperor* v *Yakub Ali*, 15 A L J 241=39 A 273 Where the question was whether a channel was an old one or recently constructed, and what was the custom as to the flow of water a prior decision on these questions, though it is no evidence of the custom as against one who was not a party to it is, yet *prima facie* evidence of the fact of the existence of the chancel at the date of the litigation *Kurupam* v *Merangi*, 5 M 253 (254)

Illustrative cases Inadmissible evidence In a suit for rent a statement contained in an order for rent a statement contained in an order for delivery of possession as to the rent payable is not admissible in evidence *Chandra* v *Sheiky*, 87 Ind Cas 512 When the charges against the accused are of dacoity and rioting evidence that on the day after the occurrence, the accused who was a Mussalman wanted another a Hindu, to embrace Islam, and threatened to beat him if he did not, is wholly irrelevant to either of the charges and should not be admitted, notwithstanding that the riots in which the accused was involved were due to Hindu Muslim dissension *Dargahi* v *Emperor* 52 C 499=88 Ind Cas 733 Prior deposition of a third party is inadmissible to contradict the evidence or impeach the credit of a witness in a case *Bobba* v *Bobba* 78 Ind Cas 176=A I R 1924 Mad 537 Where a document has been admitted in evidence as evidence of a transaction the parties are often apt to refer to the recitals therein as relevant evidence But the recitals are not evidence especially if they are used as assertions by a person who is alive and who might have been brought before to Court as a witness *Nihar* v *Kader*, A I R 1923 Cal 290 The accused was charged with having caused grievous hurt to one of his wives and killed another The wounded woman on the day of occurrence on her arrival in hospital made a statement to a Magistrate to the effect that it was the accused who had attacked her and her co wife *Held* that the contents of the statement are not admissible under s 11 *Emperor* v *Abdul*, 23 C W N 933 A statement by a person who is dead in a petition for guardianship, that a certain person was born at a certain time, is not admissible in evidence under s 32 of the Evidence Act Such a statement alone is not admissible under s 11 of the said Act *Ram Krishna Sadhu Khan* v *Moninda Mohan* 20 C L J 302=27 Ind Cas 30 A witness's statement as to what a deceased person had said to him regarding the ownership of the property alleged to be stolen, is not admissible in evidence under s 11 or under s 32 of the Evidence Act *In re Doraisami Ayyar*, 16 Cr L J 640=30 Ind Cas 464 Where the suit was for ejectment, the fact that the proprietor of a neighbouring piece of land in describing the boundaries of his parcel stated that the land of the predecessor of the defendant was situated on that boundary is not relevant under section 11 *Abdulla* v *Kunj Behary*, 14 C L J 467 Proceedings before Magistrate for assault are not relevant in a subsequent civil ... 2=33 Ind Cas 583 P C At ... of the Penal Code, the Judge ... o years subsequently in some ... design and motive and illegal association and that a system had been pursued by the accused *Held* that the ... eged in the subsequent case ... 9 or section 11 or section 14 or ... *Panchu Das*, 58 Ind Cas 99=

In suits for damages, facts tending to enable Court to determine amount are relevant

12 In suits in which damages are claimed any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant

Scope of the section In a case for damage no denial or defence shall be necessary as to damages claimed, or their amount, but they shall be deemed to be put in issue in all cases unless expressly admitted—*vide Roscoe's Nisi Prius Ev* 286 So in a suit in which damages are claimed, the amount of damages is [illegible]

Damage—definition of Damages may be defined as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another, whether such act or default is a breach of contract or tort, or, to put more shortly, damages are the recompense given by process of law to a person for the wrong that another has done him. *Halsbury, Vol 10* p 302.

Amount of damages how ascertained Theoretically speaking the great underlying principle by which the Courts are guided in awarding damages is *restitutio in integrum* *Per Bowen J* in *The Argentined,* 13 P D 191 at p 200, 201 By this is meant that the law will endeavour, so far as money can do it, to place the injured person in the same situation as if the contract has been performed (*Robinson* v *Harman* 1 Exch 850, *Bain* v *Fothergill* L R 7 H L 150, *Gray* v *Fowler,* L R 8 Exch 249, *France* v *Gandet,* L R 6 Q B 199), or in the position he occupied before the occurrence of the tort [*Philips* v *Landon and South Western Rail Co* (1879) 5 Q B D 78, *Livingston* v *Rawyards Coal Co* 5 App Cas 25; The *Mediana,* (1900) A C 113] which adversely [illegible] plary damages the principle [illegible] ry damages are generally [illegible] *Finlay* v. *Chirney,* 2 Q. [illegible] re concerned, an exemplary damage is only awarded in the case of breach of promise of marriage *Smith* v. *Woodfine,* 1 C B N. S 660; *Berry* v *Da Costa,* L R 1 C P. 331 Such damages are generally awarded in an action for tort, as for instance, assault, trespass, negligence, nuisance, libel, slander, seduction, malicious prosecution, and false imprisonment *Halsbury* Vol. 10, p 307

Measure of damages in [illegible] contract such damages are to [illegible] been in the contemplation [illegible] probable result of the breach [illegible] where the contracting parties arrange beforehand among themselves at what sum the amount of damages for breach of contract shall be estimated, it is the duty of the Courts to enforce the [illegible] of law *Palmer* v *The Secre*[illegible] cannot recover as damages [illegible] *Madhab* v *Lukhu,* 9 W R [illegible] before a Court can give a decree for damages *Kisto Mohun* v *Juggurnath* 11 W R 236 The measure of damages in a suit for breach of contract is the [illegible] e date of breach [illegible] *Sut,* 1 L B R [illegible] v *Messrs Gokul Chand,* 27 C W [illegible] that of *Hadley* v [illegible]

Damages in cases of torts In cases of torts "one who commits a wrongful act is responsible for the ordinary consequences which are likely to occur, but generally speaking he is not liable for damage which *is not the natural or* ordinary consequence, unless it is shown that he knows or has reasonable means of knowing that the consequences not usually resulting from the act are, by reason

of some existing cause, likely to intervene so as to cause damage" *Sharp* v *Powell*, (1872) L R 7 C. P 253

Aggravation and mitigation In actions of contracts as a rule the motives or conduct of the defendants are not to be taken into account in assessing damages, nor [illegible] wounded feelings, injury t [illegible] 323 *In Hamlin* v *Great* [illegible] 'Generally speaking, [illegible] entirely with the jury, [illegible] ry to the party's feelings and the pain he has experienced, as, for [illegible] xtent of violation in an action of assault, and many [illegible] find place in an action for tort or wrong [illegible] place whatever in an ordinary action of con [illegible] torts no [illegible] the *Mediana* [illegible]

moneys counted [illegible] of money which would [illegible] tion [illegible] person has undergone by reason of a th [illegible] recognises that as a topic upon which an [illegible] damages can be given [illegible] damages may be given by the defendant *Thompson* v *Place* 1 Mood [illegible] in giving such evidence the [illegible] al matters *Simpson* v *Thompson* [illegible] N C 279, *Jebsen* v *East and* [illegible] 0, *Creevy* v *Carr*, 7 C & P 64 [illegible] contracted

claimed the difference between the [illegible] as a member of [illegible] showing that the [illegible] profitable work, and they had been [illegible] he J stopped this [illegible] ve judgment for [illegible] examination [illegible] damages In that [illegible] e loss had [illegible] for this [illegible] bility that [illegible] cting the [illegible] ant ought [illegible] the face [illegible] ould prob-

[illegible] of character The evidence of character is [illegible] of action or defence as the case [illegible] f character is not admissible to [illegible] which, [illegible] measure [illegible] slander [illegible] h still [illegible] to same measure of damages with one whose character is unblemished and is [illegible] mpetent

to show that by evidence."—v. *Moor*, 1 M & S 281 In *Edward* v. *Kansas City Times Co*, 32 Fed 813, a leading American case, *Brewer J* puts it a little better. After stating
repute, he
impure, and
entitled to

that *I am known in the community, and justly so, as a common drunkard*, a bar room loafer, one that every man despises as he meets, and one of you should circulate and publish a statement against me that I had told a lie, or that I had stolen money That may not have been my reputation before People may simply have looked upon me as a mere wreck, a dissipated and worthless man, and may not have looked upon me as one who was a liar or a thief Of course, in a certain sense, by the publication or statement you have injured my reputation; you have gotten people
before but on the other hand, if I
say 'Well, it does not hurt
before as they do after the statement; my character and reputation in the community is not worth much, you cannot hurt that which is already injured" And inasmuch as the action for libel or slander is brought for the injury to the reputation the less valuable that reputation is, the less proportionate damage is suffered In the last mentioned case the learned Judge thus applies his reason-

added to a bad reputation that she had already Now, in respect to her reputation you have the testimony of their witnesses as to what it was in that community; you have also the testimony of one witness in which he says that he saw this plaintiff and her brother having improper intercourse If it be true that she did have that incestuous intercourse with her brother, then, although it may not be of that intercourse, your common sense tell jured she has suffered very little by this
defendant may show th
was injured by reaso
sum by way of damage
v *Mukund Roy*, 17
thereunder

Conduct of the defendant In an action for libel the plaintiff may show that the libel was scattered broad cast when the defendant was under no duty and had not right to publish
v *Wellsley*, 5 Bing 4
Miall, 15 L J Ex 179
of the suit, may aggrav
12 Q B 511 at pp 5
conduct in putting a
prove and will not aban

ant from the time
rdict They may
tion, and in Court
Q B D p 55
So also in cases of seduction the conduct of the d effecting the ruin of the plaintiff's daughter by fraud and under cover of a promise of marriage may be taken into consideration *Halsbury* Vol 10, p 325 So also where a insulting or oppressive
hough actual injury is
laden, L R 4 Exch 13;

Moore v *Shelley* 8 App Cas 285, 294 P C The defendant's conduct may also be proved in mitigation of damages *Mountford* v *Gibson* 4 East 441, *Cook* v *Hostle* 8 C & P 568

Proof of financial standing of defendant It comes rather as a shock to the lay mind that that there is one law for the rich and another for the poor although in the administra
better of the community
easily analysed We hav
relevant in civil actions and that generally when admitted such evidence received to affect the measure of damages The stage marks one law for the man of good repute and another for him who is said to live evilly Under ordinary circumstances the financial situation and standing of the parties are wholly irrelevant The amount of damages depends upon the terms of the contract or in action of tort upon other circumstances wholly independent of the wealth or poverty of the parties but it is well settled that there is a class of cases in which the wealth of the defendant becomes a material fact, and which may be proved on the question of the amount of damages For example

fortune Evidence of the wealth or standing of the defendant is relevant for the purpose of determining compensatory damages This is for the reason that the financial standing of the defendant is one of the elements
cial environment and there are injuries
by the fact that the persons responsible for
Burr Jones Ev § 159 ' So far as the cause of action rests upon an injury to the character or an insult to the person compensatory damages may be increased by proof of the wealth of the defendant. This is upon the ground that wealth is an element which goes to make up his rank and influence in society and thereby renders the injury or insult resulting from the wrongful acts the greater ' *Johnson* v *Smith*, 64 Me 553 (555) Evidence of the pecuniary circumstances of the defendant is admissible in two
may be
ndant
ct ons
ible
ly fall
n as a
berate
with such gross
thers and in such
159
ple of awarding
at loss
pondent
350=96
Ind Cas. 1018=A I R 19 Cal 383 (F B)

Breach of promise of marriage In estimating the damages, in an action for breach of promise of marriage where the plaintiff had been seduced by the defendant, the altered position of the plaintiff in relation to her house and family through the defendant s conduct towa
Maung Hamaing v *Ma Pwa Me*, L B I
Ducosta L R 1 C P 331, *Hamlin* v
Parshotamdas v *Parshotamdas* 21 B 23 Damages for a breach of contract of marriage may be awarded to a man But the fact that the man has merely become the butt of his acquaintances jests or has experienced a feeling of shame does not constitute an injury for which damages can be awarded in a suit of this nature *Ma Ngwe Yin* v *Maung Po Taw* 7 Bur L T 14=23 Ind. Cas 370

Defendant's fortune In an action for breach of a promise of marriage
obviously tends to
dultery (*James*
Taylor, L R 9

Q. B 79); nor for malicious prosecution; for it is nothing to the purpose, "that damages are taken from a deep pocket." *Short* v *Story*, Winton Sun; *Roscoe N P Ev* 86

Time and place In an action for assault and battery the circumstances of the time and place, when, [illegible] damages, thus it is a greater [illegible] in a private room *Per Bath* [illegible] v *Oxford*, 2 M & S 77 *Merest* v *Harvey*, 5 Taunt 412

[illegible] ssault and battery, the pecuniary circumstances [illegible] t, and condition of his family may be given in [illegible] specially where the case is one of exemplary [illegible]

support of himself and fam [illegible]

[illegible] *Jones Ev* 101

Facts relevant when right or custom is in question

13. Where the question is as to the existence of any right or custom, the following facts are relevant.—

(*a*) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence ;

(*b*) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from

Illustration

[illegible] A deed conferring the fisher [illegible] y A's father, a subsequent grant [illegible] the mortgage, particular instances in which A s father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts

Principle and Scope The general [illegible] may prove all facts tha [illegible] *oe*, 7 A & E 31[illegible] 's by cases of [illegible] incorporeal, as an ancient water course or a right of common, or corporeal, as a field, or a road strip In such cases every act of enjoyment or possession is a relevant fact, since the right claimed is constituted by an indefinite number of acts of user exercised *animo domini* But inasmuch as such acts are more or less discontinuous in their character—and in the case of ancient rights the evidence of them is by lapse of time rendered even more so—the question for the jury is whether the acts proved are so numerous and so connected that the right of possession may be inferred from them If they are so frequent and of such a character as

to indicate the exercise of one continuous open claim at all times when it would be natural for the person claiming it to exercise it, the jury will ordinarily infer the general right inasmuch as the mere discontinuity of evidence is not in itself any ground of suspicion The acts of enjoyment from which ownership of real property may ... for instance, the cutting of timber (*Stanley* v ... of fences or banks (*J* ... v *Williams*, 2 M & ... of a manor or parish (*Weeks* v *S* ... taking of wreck on the fore shore (*Att Gen* v ... the granting to others of license (*Rogers* v. *A* ... which possession is taken and held (*Bristow* v *Cornican*, 3 App Cas 641) also the receipt of rents from tenants of the property (*Malcolmson* v *O Dea*, 10 H L ... total of enjoyment which chara ... 60, 61 In the absence of title ... *Collector of Rajshahy* v *Doorga* ... 2 W R 212

A custom may also be evidenced by distinct and repeated acts; the conditions being that they should be sufficiently numerous, and should have occurred under fairly similar circumstances In the field of contracts, the principle is applicable to proof of an agency by other acts of authorization to the same person about the same matter (*Gibson* v *Hunter*, 2 H. Bl 288, *Barbar* v *Gingell*, 3 Esp 61) to proof of a contract by other similar contracts with the same person (*Bourne* v *Gatliff*, 11 Cl & F 45) and even in some instances to proof of a contract by other similar contracts with other persons (*Carter* v *Pryke*, Peak, 95, *Spenceley* v. *Wilmot*, 7 East 108; *Hollingham* v *Head*, 4 C B N S 388; *Smith* v *Wilkins*, 6 C & P. 180, *Woodward* v *Buchanon* L R 5 Q B 286; *Barden* v *Keverberg* 2 M & W 61) As applied in proving prescriptive possession the principle sanctions the use of other acts of possession on premises so connected—i e parts of the same manor, estate, or the like—that acts done upon the one would be done only as a part of a system or habit of doing upon the rest (*Stanley* v *White*, 14 East 332; *Barnes* v *Mawson* 1 M & S 85, *Doe* v *Kemp*, 7 Bing 333; *Jones* v *Williams* 2 M & W 326, *Doe* v *Robert*, 13 M & W 520, *Bristow* v *Cormican*, L R 3 App Cas 641; *Neill* v *Devonshire*, L R 8 App Cas 135 (166) So also a custom in one place or one trade may be evidence of a custom in another place, provided the place or the trades are such that a uniformity of practice may be assumed (*Noble* v *Kennoway*, 2 Dougl 510; ... 3 B & S 360; *Place* v ... Q B 126, *M'Fadden* v *Murdock*, ... principle in England to customs o ... admitting in evidence the c ... or in the same township or other entity (*Blundell* v *Howard* 1 M & S 292, *Jamison* v *Dayson*, 9 M & W 540), and even in other manors where the conditions on the matter in question were presumably the same *Moulin* v *Dallison*, Cro Ca ... *Somerset* v *France*, 1 Stra 654 *Fernea* ... *ker*, 5 T R 26, 31; *R.* v *Fle* ... 1 M ... *Anglesey* v *Hatherton*, 10 M & W. 218:

Public or general rights or customs can also be proved by reputation or opinion of persons who are dead *Higham* v *Ridgway*, 10 East 109, 120, *S 32, clause (4)* But "the most cogent evidence of custom is not that which is afforded by the expression of opinion as to the existence, but by the enumeration of ... proof ... at the ... *Khan*, 1 A. 440 (441) So customs should be supported by actual examples of the usage asserted. *Gopalayan* v *Raghupatiyyan*, 7 M H C R 250, 254; see also *Bhagwan Das* v *Rajmal*, 10 B H C R 261 "Ownership may be proved by ... the land ... here the ... ted by a ... as man ... dgment in that case *Coutts J* said. "Now in the present case the question is of the

existence of a right and the *el rarnama* comes both within clauses (a) and (b); it is both a transaction in which the right was claimed and an instance in which the right was exercised If authority, that

course with a must under various conditions, are to be taken into account in determining the sufficiency of possession" *Per Lord O Hagan* in *Lord Advocate* v *Lord Lavat*, 5 App Cas 273 (288), cited with approval by *Lord Macnaghten* in *Johnston* v *O'Neill*, (1912) A C 552 (583) and by *Lord Shaw* in *Kirby* v *Cowderoy*, (1912) A C 599=81 L J P C 222

So title to real or personal property may be inferred from acts of ownership, done by the party for or against whom they are tendered, e g possession, receipts of rents and profits, or the discharge of burdens and repairs of the property. Planting or felling timber
Ashburner, 21 L T 595), and

aggınson, 4 M. & W. h facts are receivable proof is admissible

p
b
head of hearsay are usually classed those cases in which expired leases, grants,

part of
from w
such ch
though
Dug 189, *Bristow* v *Cormican*, 3 App Cas 641 And such counterparts are evidence of seisin, though only executed by the lessee *Doe* v *Palman*, 3 Q B D 622, *Magdalen* v *Knotts*, 8 Ch D 709 C A ; *Roscoe Ev* 18th Ed p 53

Clause (a) Where the ques
brahmattar right in a certain p
that the father of the defendants
brahmattar land, was produced

clause (a) of section 13 if the requirements of that clause are satisfied The question being whether the defendants have a *niskar brahmattar* right, a deed conferring the *niskar brahmattar* right on the defendant's predecessor would be admissible as a transaction by which the right was created, but not a sale deed executed by the defendants in respect of that right. The word, *claimed*, need not

be considered, as the word implies a demand ... of the party against whom such demand is made and either to comply with it or refuse it. Ther... 'recognition' or denial' in such a case as that of a deed of sale. The exercise of a right is not inconsistent with the existence of the right but is on the other hand inconsistent with its non-existence. The deed, however, is a transaction in which the right is asserted, for the sale involves an assertion of the existence of the right. As pointed out by *Geidt J* in ... *Mir Amir Ali*, 11 C. W. N. 703, the word 'by' and not '... at stress should be laid on the use of the wo... the view expressed by *Seshagiri Aiyar J* in the case of *Sarripatti* v. *Kota*, (1914) M. W. N. 779. The question therefore ... whether the assertion of the *niskar brahmattar* right in the deed is an ass... the deed, or in other words, ... between the vendors and ... the transaction is one by which the vendor asserted ... that he had such interest in the property ... all, and by this transaction the other ... The deed therefore does not come within ... *Chandra*, 99 Ind. Cas. 189 = 31 C. W. N. ... *Cumming J* said: "Now the transac... can it be said that the *niskar* right was ... not. All that could be said to be ... property ... vendor ... by ... was no doubt asserted in the document by which ... 'A ... sale. Clause (a) does not I think help the respondents ... in section ... therefore not ... A. I. R. 1928 Mad. ... derives his title can ... reference to the land ... *Mooladar* v. *Alep* 101 In... section 13 are very wide ... the right ... erted. Giving a ... interpre... it is sufficient. *Ram Kumar* ... R. 1926 Cal. 727. Documents containing assertions of the right of a tenure holder to hold the tenure at a certain rental are admissible under section 13 of the Evidence Act. *Ram Dinamani* v. *Jagat Chunder*, 23 Ind. Cas. 773. A document containing ... within the meaning of ... under section 13 ... 17 M. L. T. 271 = ... it is not enough ... in the course of which, the ... transaction will be relevant under ... was asserted or denied. *Bansi* ... possession of land in assertion of a ... title. *Mahomed Ali* v. *The* ... 36 C. 1 = 12 C. W. N. 1095 = 10 ... *mahant* were asserted a report ... prove the ... J. 961 ... to have a *niskar* ... ted to show ... as his *niskar* ... that the ... *brahmattar* land, was produced. In declaring the evidence not admissible under ... "To turn now to clause (b). The wording ... ects. It speaks ... be admissible ... An instance ... conceivable apart

from the transaction by which it was created or modified and so the words 'created' or 'modified' are omitted in clause (b) There may be a transaction by which there has been the recognition of a right or custom, there may also be particular instances of its recognition, and so 'recognised' appears in both the clauses Instead of the words, "by which the right or custom is asserted or denied or which was inconsistent with its existence" we have the words 'in which the right or custom was exercised or in which the exercise was disputed, asserted or departed from' It is clear that in clause (b) instances of assertions

fail to see any. I am therefore of opinion that a transaction or instance in which there is mere assertion or denial of a r
13 but only such a transaction is
asserted or denied It has been urge
view, but I do not see that it does
question is whether A has a right to a fishery In such a case a deed conferring the fishery on A's ancestors should be a transaction by which a right to the fishery was created; so a mortgage by A's father would be a transaction by

Recitals in a deed are not transactions but instances of assertions or denials of the existence of the right. They come neither under clause (a) nor under clause (b) They are statements which unless they are relevant under some other provisions of the law *e g*, as admissions or statements of deceased persons, etc, are not admissible in evidence" *Brojendra Kishore* v *Mohim Chandra*, 31 C W N 32 (38, 39)

The word "claim," denotes a demand or assertion in relation to a thing or attribute as against or from some person or persons, showing the existence of a right to it in the claimant A bare statement may or may not be a claim according to the attending circumstances in which it is made It may amount to a claim or be a mere statement of claim though in some circumstances a statement may amount to a claim A statement in the *pattah* that the land to the west of

a judgment may be an instance *Sri Protap Chandra* v *Sri Raja Jagadish*, 82

Right, meaning of In *Gujju Lal* v *Fatteh Lall* 6 C. 171 (F B), at pages 186, 187 *Garth C J* said "It may be difficult, perhaps, to define precisely the scope of the word 'right' but I think it was here intended to include those

3. properties only of an incorporeal nature, which in legal phraseology are generally called 'rights' ... word 'custom'
It is certainl ... t (see s 48 and
sub section 4 ... eral 'rights or
customs' and in s
private rights of that
is a right which may
the expression is used in this limited sense is shown also, as it seems to me, ...
the words with which it is associated The right mentioned in the section is on
which can be 'created or exercised' which expressions are perfectly appropri...
when speaking of an incorporeal right, but would be wholly inapplicable to th
word 'right' when used in its more extended sense It would be quite correct t
speak of the creation or the exercise of a right of way or of a franchise, but r
lawyer would think of saying that a right to a chattel or to damages had bee
'created or exercised'" In the same case *Jackson J* said at pp 184, 185 "It seem
to me as clear as anything can be, that the 'right' here spoken of is something qu
distinct from ownership What is referred to in the section cited is evidently
... T
... on
... di
... ht
... th
... eal rights only, because in other pa...
... here the same words occur in conjunctio
in that sense In the first place, it is b
... eal rights It is no
... or general natur
... orporeal, but it is b
... that the sectio
... atur
in question refers only to i ... ult t
does not seem to me to be ... n th
suggest a reason which
... ghts respectively
... v *Rajoni Mohun*
... *anerjee J* observed
... incorporeal righ
... limitation on th
... the view taken b
... ed of in *Kaladhar*
... *Palakdhari*, 12 A
... majority of th
Full Bench in *Gajjul* ... tation o
the word 'right' ... *er* as d
Sir Charles Sargent C ... *hoddas* v
Bapu, 10 B 439, that the majority of the Full Bench of the Calcutta High Court
in *Gujjulal* v *Fatteh Lall*, put too narrow a construction on the word 'right' in s 13
and that 'right' there includes not only incorporeal rights but a right of ownersh p.
This view was also accepted by *Ranade J* in *Laksmin* v *Amrit*, 24 B 591 (599);
see also *Rama Sami* v *Appa*, 12 M 9 (13), *Venkata Sami* v *Venkatareddi*, 15 M 12
Vythilinga v *Venkatacha*, 16 M 194, *Stephen Dig Ev* Article 5 The illustra
tion to this section shows that the right mentioned in it, is not a public right only
the right there mentioned being a private one viz A's right to a fishery *Surja*
v *Bishambhar*, 23 W R 311 So right and custom in this section must be
understood as comprehending all rights and customs recognised by law, and
therefore, including a right of ownership *Ranchhodas* v *Bapu*, 10 B 439 (417)
At present the balance of authority favours the extension of the term "right" to
include every right known to the law *Per Beaman J* in *Mahammad* v *Ilt an*
31 B 143 (154) The whole context indicates that the section is dealing with
continuous rights which may be interrupted without being necessarily destroyed
Ibid at p 155 But a right wh ... bound up in a
document does not admit ... of assertion
and denial, and is, therefore, ... from all
the rights denoted in this section *Ibid* p 154.

S.

Custom A custom is a particular rule which had existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular lo[illegible]
common law [illegible]
218 A cus[illegible]
general rig[illegible]

can never be considered binding until it has become a law by some act, legislative or judicial, of some sovereign [illegible] is to be found in one judgment of t[illegible] *[illegible]ilaram Charlu*, 1 Mad H C 424) [illegible] It is open to the obvious objection [illegible] could ever be judicially recognized for the first time A decision in its favour would assume that it was already binding The sounder view appears to be that law and usage act and re act upon each other A belief in the propriety, or the [illegible]

v *Lsu* 4 B 545; *Mayne's Hindu Law*, 6th Ed 56 So local customary law has its source in those immemorial customs which prevail in particular parts of a country and [illegible] in derogation of the general law of the [illegible] immemorial custom does upon occasion [illegible] respect of the former operation, it is [illegible] which as a source of law retains the

[illegible]

distinguished as legal and conventional A legal custom is one whose legal authority is absolute—one which in itself and *proprio vigore* possesses the force of law A conventional custom is one whose authority is conditional on its [illegible]

custom, prevelant or having the force of law in a particular locality only, or the general custom of the realm, in force as law throughout all over the country.—*Salmond's Jurisprudence*, p 211. The word 'custom' in this section

3. properties onl ... which in legal phraseology are generally
called 'rights' ... conjunction with the word 'custom'
It is certainl ... quent parts of the Act (see s 45 and
sub section 4 of s 32), wh ... or general 'rights or
... and in s 13 ... o include both public or
... the illustration
nstances That
ms to me, by
e section is one
tly appropriate
when speaking o ... pplicable to the
word 'right' when ... quite correct to
speak of the cre ... franchise, but no
lawyer would think of saying that a right to a chattel or to damages had been
... In the same case *Jackson J* said at pp. 184, 185 "It seems
... ly a
... To
... ions
this interpretation, the object, the particular facts ...
to the section, all seem to me to conduce" But in the same case *Mitter J*, in dis-
... interpretation to the word 'right'
Evidence Act, the
e in other parts of
cur in conjunction
first place it is by
l rights It is not
general nature
al but it is by
e section
e nature,
in question refers only to incorporeal ... fficult to
does not seem to me to be warranted ... ween the
suggest a reason which would justify the existence of a ... rights respectively,
... *Mohun*
... bserved
... al right.
... n on the
... taken by
On the other ... *Kaludhun*
12 A
of the
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hi k, however, as did
the word 'right' ... in *Ranchhoddas* v
Sir Charles Sargent C J
Bapu, 10 B 439, that the ... the Full Bench of the Calcutta High Court
in *Gujjulal* v *Fatteh Lall* ... construction on the word 'right' in s 13,
and that 'right' there incl... real rights but a right of ownership,
This view was also acce... *Lakshmin* v *Amrit*, 24 B 591 (599),
see also *Rama Sami* v ... *nkata Sami* v. *Venkatareddi*, 15 M 12,
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C 171. Although I always have a

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usage *Dalglish* v. *Guzuffer*, 23 C 427;
ng to *Sir John Woodroffe* the word custom

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may be
ordinari
would be 'usage' within the meaning of the section" *Dalglish* v *Guzuffer*, 23 C. 427 (429); *Saratullah* v *Pran*, 26 185 *In the Indian Evidence Act we find* mention of three kinds of customs, (1) private, (2) general (*vide* s 48) and (3) public (*Vide* s 32 clause 4)

Private Custom—usage of a single family In *Raj Kishen* v *Ramjoy*, 1 C 186 (195, 196)=19 W R 8 P C their Lordships of the Privy Council said "Their Lordships cannot find any principle or authority, for holding that in point of law a manner of descent of an ordinary estate, depending solely on family

Family custom—how proved If a party rely upon the especial custom of

particular family has from a long usuage obtained the force of law which must
the general rule
3 I A 259 (285),
Cas 43 Such a
v *Janki*, 3 Ind
of comparatively
period is wholly
Narayan, 3 M L
h distinctness and
certainty *Seruman* v. *Palathan* 15 W. R 47 P. C it is an acknowledged

3. *Durga Charn* v *Raghu Nath*, 18 C W N 55 (58) A family custom must be established by clear and unambiguous evidence *Abdul* v *Sona* 45 C 450-27 C. L. J 240; see also *Lal Gajendra* v *Lal Mathura*, 20 C W. N. 876, *Nogendra* v *Raghu*, W R (1864) 20

General Custom The words "general custom" are used in section 48 of the Evidence Act The term 'general custom' in that section probably includes 'public custom" *Whitely Stokes*, Vol II p. 884 According to English law the term includes the custom of banker's
Brandao v *Barnett* 3 C
Bank of Australia v *White*, 4
of gravel kind and borough english (*Clement* v *Scudamore*, 1703, 2 *Ld Raym* 1024-1026) i e such as have an extended local application *Wills' Ev 2nd Ed* 20 According to *Mr Justice Woodroffe* the expression "general custom" is defined to include customs common to any considerable class of persons and includes (a) local custom; (b) caste or class custom, and (c) trade custom or usage *Woodroffe's Evidence 8th Ed* p 169 If we are to take the analogy from public rights and "general rights" we must say that general customs are those in which some class of the community has a common interest, as for examples, those which are based on the customs of manors (*Doe* v *Sisson* 12 East 62; *Crease* v *Barrett* 1 C M & R 919), parish
M D C [1899] 1 C
are connected with
hamlets (*Thomas* v
of manors (*Barness* *Wills Ev 2nd Ed* 222 Public customs are those in which all the subjects of the king are interested

Local

manner already explained In order that a local custom may be valid and operative as a source of law, it must conform to certain local customs are binding on all
y, 1 C 116; *Satyanarain* v *Satya*
v *Barm* 17 W R 316; *Marquis*
By Ben Reg IV of 1827, s 26 the

of the Broach District, the
though contrary to Mahomedan law *Abas*
R 36 As to pre-emption in village co
Kunwar Ahmad, 19 C W N 393, *Madhab* W R 210 Local custom or usage is termed *desachar* *Field Ev* 7th Ed 563

Caste or class custom *Cutchi*
the whole of their property by will
regards the succession amongst the
Memon's Case, Perry Or Cas 110,
In re Haji Ismail 6 B 452; *Ashabai*, 9 B 115 As regards tribal custom, *vide* 16 B 470 (476) and 24 P L R 1903

Requisites of valid custom Under the English law a valid custom must fulfil the following conditions :—

[(a) It must be ancient i e, it must be in existence beyond the memory of man or it must go back as far as the reign of Richard I (*Lenkharst* v *Cooper*, 7 C & P 119)
(b) It must be reasonable.
(c) It must be certain
(d) It must have been continued
(e) Peaceable (*Lala* v *Hira*, 2 A 49)
(f) Compulsory
(g) Not immoral or unnecessary

Antiquity In the words of *Littleton* "No custom is to be allowed, but such custom as hath been used by title of prescription, that is to say, from time out of mind" So "no usage can be part of law, or have the force of custom, that is not 5 In *London Corporation*
Co 'A custom originating within
time at law." In *Chapman* v

Smith, 2 Ves 505, *Lord Hardwicke, L. C.* at p 510 said: 'Local, common law, S.

practice

word "
if proved to extend for a hundred years may very well be called immemorial

) B 528; *Hur Prosad* v *Sheo Dyal*, L J. 306; *Jugamohan* v *Manick*, *Gouria* 6 B L R 238; *Durg*, v *,* 11 B H. C R 271, *Mahamaya*

Reasonableness A custom must be reasonable Co Litt 62 (a), *Tanistry* *Broadbent* v *Wilkes*, *ovas* 24 C W N H C 19, *De Souza* A 257, *Kuarsen* v 235; *Hurpurshad* v *Shibnarain* v *Bhut-* W N 735, *Gauri* 1 = 61 Ind Cas 132; *Radha Prasad* v *Dinanath*, 43 Ind Cas 451 (Pat) So even where a custom is established by evidence, it cannot be treated as a valid custom on the ground of

sively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient times on the party setting up the custom *Halsbury* Vol . *Johnson* v *Clark*, (1908) valid must be reason *Clark*, *ubi supra* The s inception *Mercer* v *Tyson* v *Smith*, 9 Add & El 406; *Sheikh* v *Behari Lall* 6 Pat. L J 11 = 61 Ind Cas 132 A custom is not unreasonable where it is beneficial to a community but against the interest of a particular person *Tyson* v *Smith*, *ubi supra*

Certainty *Tanistry Case* (1608) Dov Ir at p 33; v *Scott*, Filz G 55 *Blewitt* v *Tregon* *e*, (1904) 2 Ch 534; *Hurpurshad* v *S* *anja*, 17 W R. 553, *Luchman* v *Akb* *oy*, 1 C 195 (196);

Raturaji v *Pahlwan*, 33 A 196 (F B); *Lali* v *Hira Singh*, 2 A 48; *Krishna* v *Atul*, 39 C L J 612, *Lachman Bai* v *Akbar Khan*, 1 A 440, *Jamila Khatun* v *Pagal*, 1 W R 250; *Beni Madhab* v *Joy Kishna* 7 B L R 152, *Ram Mina* v *Ichamoyee*, 27 C L J 587, *Rai Jatindra* v *Hari Charan* 20 C L J 476 *Gopi* v *Abdul*, 34 C L J 319, *Tekact* v *Tekact*, 20 W. R 157, *Bhagawan Das* v *Balgobind*, 1 Bo R S N (X) In *Broadbent* v *Wilks*, Wiles, 360, *Wiles C J* said "That every custom must be certain is laid down as a rule in all the books which treat of customs It is said of a custom as by way of definition, that *consuetudo ex certa et rationabili causa privat communium legem*, and it must be certain because, if it be not certain, it cannot be proved to have been time out of mind, for how anything can be said to have been time out of mind when it is not certain what it is?" There must be some definite limit to the right claimed to exist under an alleged custom—in respect of its nature generally, in respect of the locality where the custom is alleged to exist and in respect of the person alleged to be affected by the custom *Halsbury Vol X p 227 228*

Continuity A custom to be valid must be continued without interruption since time immemorial *Halsbury Vol X 231*, *Tanistry Case*, Dav Jr 32, *Tyson* v *Smith* 9 Ad & El 406 *Simpson* v *Wells*, L R 7 B 314, *Abraham* v *Abraham*, 9 M I A 242, *Rama* v *Appaiu*, 12 M 14, *Subramanja* v *Muthu*, 3 M H C 75, *Beni* v *Jai Kissen*, 7 B L R 152 It should be unaltered, uniform and constant *Jameela* v *Pagul*, 1 W R 250, *Lala* v *Hira* 2 A 49 In *Ram Kishen* v *Ramjoy*, 1 [illegible] 196 'It is the esse [illegible] -able, and continuous, and [illegible] destroy them This would [illegible] dental causes, [illegible] s been intentionally brought about b[illegible] also *Tara Chand* v *Reeb Ram* 3 M H [illegible] C A C J 113 In cases of a widely spread local custom want of continuity would be evidence that it had never had a legal existence *Mayne's Hindu Law*, p 58, see also *per Jessel M. R.* in *Hammerton* v *Honey*, 24 W R 603 There is however, a distinction between an interruption of the right which forms the subject matter of the custom, and an interruption in the possession of that right, or the user and enjoyment of that right. If [illegible] matter for how short a period, the right [illegible] revive it its revival would involve [illegible] ry and thereupon the custom would be void But as regards interruption of the possession or enjoyment of the right such an interruption may occur and continue for ten or twenty years [illegible] nterruption being merely [illegible] ury Vol X p 232 In L[illegible] The mere non-user dur[illegible] material, for it was no inte[illegible] but only of the possession See also *Hamid Fatima* v *Bhola*, 52 Ind Cas 869

Obligatory [illegible] having [illegible] Imm[illegible] own to [illegible] n the [illegible] Ver-

Lart v *Vettivelu* 11 M 459, 461, 462 A caste-custom which is against law ought to be established by very clear proof that the conscience of the members of the caste had come to regard it as binding *Petal Vendra van* v *Patal Manilal* 16 B 470 A custom to be valid must be acquiesced in *Nitya* v *Provas* 24 C W N 309

Not immoral or unreasonable A custom deserves to be recognized and enforced by the Courts, unless it is injurious to the public interests, or is in conflict with any express law of the ruling power *Tarachand* v *Reeb Ram*, 3 M H C 56, *Khau* v *Sundrabai*, 11 B H C 249, *Mathura* v *Esu*, 4 B 545 So a custom should not be immoral or opposed to public policy or unreasonable *Raja Vurmah* v *Rabi Vurmah*, 1 M 235, *Lakhmi* v *Sadatula*, 9 C 698 *Lachmeeput* v *Sadaulla*, 9 C 698, *Krishna Swami* v *Vira Swami*, 10 M 133 *DeSouza* v *Pestonji*, 8 B 408, *Langa* v *Pengari* 20 C W N 406=22 C L J 92, *Syed Ali* v *Sarjan*, 18 C W N 735, *Krishna* v *Raman*, 14 L W 329

Immoral custom is not recognized as valid *Ghasiti* v *Umaraojan*, 20 I A 149 (P C), *Chinna* v *Tegarai*, 1 M 168 **S. 1**

Transaction Transaction in its ordinary
management of any undertaking or business
been brought partly or wholly to a conclusion
or obligations *Standard Dictionary* *Worcester* defines it as the act of transacting or conducting any business, negotiation, management a proceeding *Webster*, as t ment of any affair; performance, on as the derivation denotes persons by a cross or reciprocal action as it were *Per Jackson J* in *Gujju Lall* v *Fatteh Lall* 6 C 185 Whatever may be done by one person which affects another s rights and out of which a cause of action may arise, is a transaction *Scarborough* v *Smith*, 18 Kan 399, 406 It is a broader term than the contract for while every contract is a transaction every transaction is not a contract *Roberts* v *Donovan*, 70 Cal 108, 113 The term transaction is one of large import, and might although by o proceedings in a suit. *Jackson J* in *Gujju Lall* v transaction, *vide post*

The word 'transaction' in section 13 of the Evidence Act means a business or dealing which is carried on or transacted between two or more persons Written statements filed in suits are not transactions within the meaning of the section Where in the specified boundaries of an adjacent land the suit land is described as belonging to one of the parties it is transaction but not a e party is asserted claimed or even recognised dence under section 13 *Sanpalli* v *Fota* Ind Cas 747 A private transaction between

m) A transaction contemplated by section 13 is a genuine and *bona fide* transaction, but a *benami* transaction

land was held admissible both under clause (a) and clause (b) of section 13 on the ground that it was a transaction in which the right was exercised In this case the *Ali* v *Syed Rejanali* 19 C W N 468 was dou *Dulari* *Mahanti* 194 and also upon the decision later *Dasi* a a as

Previous transaction in respect of different property is not a transaction' within the section *Radha Krishna* v *Sarabeswar Nag* 29 C W N 469 86 Ind Cas 674 = A I R 1925 Cal 684, see also *Abdul Ali* v *Rejan Ali*, 21 Ind Cas 618.

Instar strative case, something *Webster's* *Dictionary* the right or custom which its section 13 of t of lands other than ular instance by or d or denied *Abdulla* tatement of an agent

that his principal was a bastard was admissible under section 13 of the Evidence Act as establishing an instance in which the legitimacy of the person in question was denied *Held* also that a judgment referring to such illegitimacy was also admissible under the same section *Raj Fateh Singh* v *Baldeo Singh* 5 O W N 143 – 109 Ind Cas 310 = A I R 1928 Oudh 233 When a custom has been established, instances showing that there has been no variation in the custom are important and should be relied upon, no matter if such instances relate to transactions which took place after the suit involving the question of custom had been instituted *Kishan Singh* v *Faqir*, A I R 1928 Lah 66 Uncontested instances are by no means worthless evidence of the existence of right *Muhammad Husain* v *Ghulam Muhammad* 10 Ind Cas = 138 P L R 1911 Statements contained in petitions by members of a family recognizing the existence of a custom of *primogeniture* in the family, are relevant and admissible as evidence of particular instances in which the custom was recognized as affecting their own rights *Shyamanand* v *Rama Kanto* 32 C 6 Instances in the neighbouring sub divisions of a town are relevant on the question of custom in a particular sub division of a town under section 13 of the Evidence Act and they may be treated as evidence supplementary to the evidence afforded by instances in the sub division Admission by a vendee in a suit for pre emption that the custom for pre emption existed in the locality is an instance of the recognition of a right which is relevant under section 13 of the Evidence Act *Sant Singh* v *Jowala Sahib* 59 P L R 1903 = 42 P R 1903 Statements made by persons in a suit cannot be considered as instances although the whole litigation ending in a judgment can well be called an instance *Sree Pratap* v *Sree Raja Jagadis* 40 C L J 331 (363)

Proof of trade custom by particular instances In evidencing a custom or usage (i e the habit of a body of persons) by specific instances, the following general principle is applicable that is the instances offered (a) should be sufficiently numerous to indicate a regular course of business, and (b) should occur under conditions substantially similar to that in question *Wigmore* § 379

Number of instances Individual instances offered one at a time are receivable *Doe* v *Mason* 3 Wils 63 In *Roe* v *Jeffrey* 2 M & S 92 *Ellenborough L C J* said It is true that one act undisturbed does not make a custom, but it will be evidence of custom The alleged custom must be very satisfactorily proved by evidence of particular instances so numerous as to justify the Court in finding in favour of the custom *Durga* v *Raghunath*, 18 C W N 55 *Lachman* v *Akbar*, 1 A 440 *Debendra* v *Pitamber* 98 Ind Cas 43 = A I R 1927 Cal 177 *Jugmohandas* v *Mangaldas* 10 B 578 (543), *Sarabjit* v *Indrajit* 27 A 203, *Chandika* v *Menia* 24 A 273 = 29 I A 70

Custom should occur under conditions substantially similar to that in question It is obvious that there must be such a similarity or unity of conditions that what is done by one or more persons or sets of persons may be taken as indicating the probable general habit of the class of persons under similar circumstances The precedents illustrate all sorts of trade and usage and no detailed generalization seems feasible *Wigmore* § 376 To prove a custom of London as to the stowage of goods in regard to general average a similar custom in other English ports was received *Milward* v *Hibbect* 3 Q B 120 139 So also to prove a custom of trade between Liverpool and California, after incorporation with the United States as to discounts on freight, a similar custom as to trade with Texas after incorporation and as to other ports of British America, etc was received *Falkner* v *Earle* 3 B & S 360 Similarly in proving, usage as to bleaching linen in Nottingham usage at Loughborough was admitted by reason of the vicinity of the places and the interchange of trade In *Fleet* v *Morton*, L R 2 Q B D 126 = 41 L J Q B N S 49 the action was for the price of fruit on a sold note signed by the brokers only the dispute being whether in that trade brokers were liable on such notes for the default of principals The custom of trade being held to be involved in the contract, evidence was received with some hesitation, of the custom on the point in the colonial market. *Blackburn J* observed It seemed to be conceded in the trial that the two trades were so far allied to each other that the same usages would be likely to prevail in both, and I thought that upon the question of the liability of a broker evidence of his liability in a similar trade ought to be received' So it is enough to point out (1) that no particular circumstance is conclusive either *pro* or *con*, (2) that

instances from another trade or another region are not necessarily without ... locality are not ... ther the offered ... ey are receivable ... *unyway*, 2 Doug ...

Customary rights in land, etc Custom in India is transcendent law But a custom cannot be established by a few instances or by instances of recent date Consequently, it is the duty of the Court when it has to pronounce upon the ... not only as to the sufficiency ... required to ...

sion of ...
the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records of private accounts and receipts that the custom has been enforced" *Per Turner J* in *Lachman Rai* v *Akbar Khan*, 1 A 440 (441), see also *Ashutosh* v. *Chandi*, A I R 1927 Cal 177 = 98 Ind Cas 43 Though judicial ... the establishment of custom- ... *Tara Chand* v *Reeb Ram*, ... v *Baboo Burm Narain Singh*, ... t to establish a family custom ... clear, distinct and ...

... st be shown that the c... set up is pecu... *Ashutosh* v *Cl*... members of a family recognising the existence of a custom of primogeniture in the family, are relevant and admissible as evidence of particular instances in which the custom was recognized as affecting their own rights *Shyamanand* v *Rama Kanta*, 32 C 6 In *Pal k Dhari Rai* v *Manners*, 23 C 179, a suit by a landlord for ejectment of purchasers from *raiyats* having only a right of occupancy, on the ground that the holdings of such *raiyats* were not transferable without the landlord's consent, the defendants pleaded custom or usage in support of the transfers Questions arose as to the character of the usage required to be proved in such cases, and the nature of the evidence required to prove the usage In that case the Court observed at p... that he has been purcha... 200 *kobalas* of such lands ... which are on the record ... and by themselves would certainly establish neither a custom ... to such transactions We would here refer to section 13 of the Evidence Act as showing the character of evidence by which a right or custom may be proved *Mr Manners'* evidence is not of that description The Subordinate Judge next states that 'one of the purchases was made so long ago as in the year 1277' ... isolated instance, and it relates ... ced in evidence also ... ext refers to the fact ... of their other ...

not be properly regarded as a recognition of a ... consent of the landlord"

Instances occurring within the same manor, it is clear, will be received, because the original unity of the holding allows each instance to appear as merely

one illustration of a general system working uniformly So in order to prove a custom of descent in the female line, particular instances were received of such descent in other estates of the manor, as well as of a general ... custom of descent in the manor, th... branches from the same root" P... 12 East 62 Similarly to prove cust... in the same township were admitt... Howard, 1 M & S 292, see also Jeu... 540, 566, Lendrum v Deaxley 4 L R Ire 63 On the same principle however, instances from other manors may be received, provided that, behind their apparent difference of conditions a unity of some sort can be shown which makes instances from the one equally illustrative of a general system including and operating in the other Wigmore § 380 In Moulin v Dallison Cro Car 484, the question was whether an estate descended by custom to the eldest daughter in manor S After showing that S was a part of a manor O, and thus establishing the unity of custom, the fact was received of the rule of descent in O see also Champion v Atkinson, 3 Keb 90, Somerset v France, 1 Stra 654 In Furpeaux v Hutchins 2 Cowp 807 Lord Mansfield C J said, "Proof of the custom in other parishes is no evidence to affect the parish in question unless the custom had been proved as a custom of the whole country" In Rowe v Brenton, 8 B & C 737, 758, the issue was as to the ownership of copper mines and the rights of a plaintiff who was a "conventionary lessee" in the copper on his land there were 17 manors in the duchy, and some of the above tenancies, renewable every 7 years, existed in each manor Evidence was received as to the terms of the customary right of such a tenant in those other manors Tenterden L C J said "The same character, whatever that may be belongs to them all It certainly belongs to all those called 'free conventionaries', in this district Must we not, then in fairness, in order to ascertain what are the relative rights of the lords and these tenants in one part of the district enquire what are the rights in another?" In the same case Bayley J said "I am of opinion that the usage which has prevailed in one part, is evidence to explain a grant expressed in similar terms to any other part of the district" Similarly in Anglesey v Hatherton 10 M & W 218 Abinger C B said "It should be established clearly and beyond all controversy that the two manors originally formed one manor there prevails throughout those manors a particular species of tenure, called tenant right, since in those manors all the tenants hold under the same right if it should happen that in one particular manor no example can be adduced of what is the custom in any particular case in order to explain the nature which is not confined to one manor but prevails in a great number you may show what is the general usage in respect to that tenure" He also approved Rowe v Brenton, ubi supra In the same case, Alderson B said, "If indeed there be some general connecting link between them—as, for instance if the custom in question be a particular incident of the general tenure which is common to two manors then you have a right to show what the custom of one manor is as to the tenure, for the purpose of showing what the custom of the other manor is as to that tenure; but you must begin by showing that there is a general tenure common to both, that fact fails here"

To prove a custom or usage that occupancy holdings are transferable in any locality, it is not sufficient to show simply that such holdings are sold in the village or neighbouring villages The essence of a usage of transferability is that transfers made to the knowledge of but without the consent of the landlord are valid and must be recognised by him Peary Mohun v Jote Kumar, 11 C W N 83

Transaction whether includes judgment "A transaction in the ordinary sense of the word is some business or dealing which is carried on or transacted between two or more persons If the parties to a suit were to adjust differences inter se, the adjustment would be a transaction, and by a somewhat strained use of the word the proceedings in a suit might also be called transaction, but to say that the decision of a Court of Justice is a tran... misapplication of the term' Per Garth C J ... C. 171 at p 186 A transaction, as the deri... has been concluded between persons by a cross ...

whe
trib
den
the
of
22
Court admitted, in evidence against the defenda
the *itnamee* right had been successfully asserte
the tenure that was said to have created the
defendant had not been a party *Sir Richard*
ment of the Court said that he could not think that such judgments were intended to be excluded, and that the expression 'transaction' in section 13 was large enough to include proceedings in suits, and that the section did not require the suit to have been between the same parties, but left it to the Court to decide what weight attached to it In *Narain Bikhanbai* v *Dipa Umed*, 3 B 3, where the plaintiffs sought to recover arrears of a *Chirda Lak*, *Westroff, C. J* and *Melville, J*, adopting the views taken by *Couch C J.* of section 13, held that decrees establishing the right in prior suits between the same persons were admissible in evidence "for the purpose of
been asserted, but recognized by the tribunals
" In *Ranchhoddas* v *Bapu*, 10 B 439 at

as is to be found in
be understood as
therefore, including

doubted whether such was the intention of the framer of the code" In *Tepu Khan* *Rooni Mohan*, 2 C W N 501, (504) = 25 C 522 (F B) *Banerjee J* said: "If
the meaning of clause
place,
ransac-
the
insta
sion
is,
B 143 "It seems to me the true point is, not that the judgments and decrees themselves are 'tran ere made was a transaction, and th place they are the best evidence *Per* *kdhari*, 12 A 1 (F. B); see also *I* per *Sir William De Grey*.

"Th
says *Pr*
from sc
quence
no long
In oth
utteran
determining what are the terms of their act *Wigmore* § 24
tion of a transaction, is either voluntary or compulsory In the former instance
it
wh
su
—the law insists, independently of the parties' choice that the transaction be
embodied in
ces attach
the only in
and negotiat
roll, as fina

3, as adjudicated, and this supersedes the miscellaneous mass of oral and written pleading, motions, and orders which have gone to make up the proceedings *Ramsbotto*
in legal th
and many
strictness
need to appear in the record,—hence may be established without regard to the contents of the record This involves the whole theory of trials and appeals" From the above observation of *Prof Wigmore*, one of the greatest authority on the Law of Evidence it is abundantly clear that a judgment or decree is but an *integration* of various transactions When such transactions are relevant under section 13, a judgment or decree is also admissible under this section As regard the probative value of such judgments and decrees *vide infra*

Judgment whether relevant under this section Judgments in Courts of Justice on other occasions form an exception to the exclusion of evidence of transactions not specifically connected with facts in issue *Step Intro* 161 There are two kinds of judgments, namely judgments *in rem* and judgments in *personam* The former kinds of judgments are always relevant (*Vide s 41*) Judgments in *personam* bind only parties and privies to facts in issue (*Vide Notes under s 40*) So a judgment which operates as *resjudicata* is relevant in a subsequent suit (*Vide s 40*) So also judgments, orders, or decrees are relevant if they relate to matters of public nature relevant to the enquiry (*Vide s 42*) Now the question is whether judgments, which are not judgments *in rem*, nor
public nature
section Such
is presumed to be faithfully recorded and as such is proof of its own existence, date and of its legal consequences not simply *inter parties*, but against all the world, but not of the truth of the fact on which it rested In other words, the law attributes unerring verity to the substantive as opposed to the judicial, portions of the record *Phip Ev 392* Thus where A has been tried and acquitted of a crime against B and afterwards sues B for malicious prosecution the record in the criminal trial is conclusive evidence of A s acquittal, but it is no proof whatever that A was innocent or that B was the prosecutor, or actuated by malice *Legath* v *Tollerey* 14 East 302, *Purcell* v *Macnamara*, 9 East 36; *Leyman* v *Latimer* 3 Ex D 352 354 *Phip Ev 392* Such judgments are also relevant under section 43 of the Evidence Act if the existence of such judgment is a fact in issue, or is relevant under some other sections (*Vide section 43 Hill* v *Clifford*, (1907) 2 Ch 236) Otherwise such judgments when tendered against strangers ar
Fontaine Morean 11
more commonly on

11 C L R 530 Ordinarily a statement of opinion made by the Judge in a previous judgment not *inter partes* is no evidence in a subsequent case *Harnath* v *Mohanlal*, A I R 1929 Lah 123=10 L L J 519 Under section 13 a judgment is relevant if its existence is a transaction under clause (a) or its existence be considered an instance under clause (b) *Tepu Khan* v *Rajoni* 2 C W N 501 504 On this point there is some conflict of opinion and it is better to treat the decisions of different tribunals under separate headings

English Ca
to hereditament
Cas 135; *Bland*
non repairs of
and judgments for the recovery of prescriptive tolls (*City of London* ... Carth 181, *Layborn* v *Crisp*, 4 M & W 320) are admissible as relevant facts

when the right to the land, the way, or the toll respectively is in question. **S.** *Wills. Ev 61.*

Calcutta Cases A judgment in a former suit brought by other parties

tlnamee r 3, and as such *Goroo Doss,* 22

arose in 1880 in *Gujju Lall* v *Fatteh Lall,* 6 C 171, which was a suit to recover

possession of the land covered by ...
right, and alleges that B was ...
passed, the former judgment woul ...
rari right, see *Sooromonee D* ...
Krishna Behari v *Brojeswari*, 2 ...
Evidence as at present adm... in England, it would equally be considered conclusive, and, if not conclusive, at least as cogent evidence in the subsequent suit . Was it intended by the Evidence Act to declare such *judgment* as this irrelevant? But it would be irrelevant unless it be relevant either under s 11 or s 13 It is not relevant under s 40, because its existence does not by law prevent the Court from taking cognizance of the second s ... under the circumstances, I apprehend it wou ...

... at least in some cases not being admissible ... der ss 41 and ... ant under some ... tion' and 'right ... section Is ... setting ... al for ... not the ... le to be highly ... r these reasons I ... nce is relevant

However the d ... Full Bench in *Gujju Lall* v *Fateh Lal* ... C L R 528 (530), *Ramnarain* v *Ramcooma* ... C 207 and affirmed in *Surender Nath* v *Br* ... the case of *Surender Nath* v *Brojendra Nath* was followed ... *Gobind Chunder* v *Srigobind*, 24 C 330; see als ... the case of *Surender Nath* ... the Full Bench, *McDonell and* ... have contended before us tha ... the Evidence Act, and that the ... *Gujju Lall* v *Fatte* ... and it ... Bench ... gment ... must ... t Full ... *Brojo Behari Mitter* v *Kedar Nath Mozumdar*, 12 C 580 (F B), has ruled in a case where the parties were not arrayed as plaintiff and defendant in a previous suit but as co-defendants, that the judg- ... the ... ants ... een ... of ... has been shaken ... Privy Council decision in the case of P ...

... Council, although the Ju ... between the parties was not ... they still treated such judgment evidence in the case ... In the ... although not *inter part* ... nature of the possession ... the case *Hira Lal Pal* ... a rent decree of a ... character was used as evidence for the purpose of showing that rent was successfully claimed for the lands, which were in the subsequent suit alleged to be *lakiraj* ... It seems to us that the question raised before us is of considerable importance, and one which often arises in our Courts, and we therefore think it necessary to refer the following question to a Full Bench: Whether under

the circumstances stated, the judgment in the previous case is evidence or not" But again the [illegible]
Wilson, O K[illegible]
the question [illegible]
think, concluded by the two Full Bench cases, *Gujju Lal* v *Fatteh Lal supra* and and *Brojo Behari Mitter* v *Kedar Nath Mozumdar*, 12 C 580 (F B)" The Full Bench neither discussed the question nor tried to distinguish the cases referred to in the order of reference *Mitter J* however dissented from the view taken by the Full Bench

The question again arose in a suit for rent in which the amount of land held by the defendant was questioned, and it was contended that the land must be measured with a *hath* of 21 ¼ inches and not one of 18 inches, as claimed by the plaintiff Zamindar Certain decrees obtained by the Zamindar against other tenants in the same pergunnah in suits in which 18 inches had been taken as the *hath* were tendered in evidence in support of the plaintiff s contention that the customary *hath* in the pergunnah was one of 18 inches In that case such decrees were admissible in evidence under the provisions of s 13 of the Evidence Act, as they furnished evidence of particular instances in which a custom was claimed Of course such decrees and judgments are clearly admissible under s 42 of the Evidence Act as being judgments and decrees which relate to matters of a public nature relevant to the enquiries, i e the measurement of the *hath* in the pergunnah But the Court admitted the judgments under s 13 of the Evidence Act *Jamatulla* v *Romoni Kant*, 15 C 233

In *Jiaullah Sheikh* v *Inu Khan*, 23 C 693 it was held that a decree for possession made by a Court under s 9 of the Specific Relief Act (I of 1877) in a suit beyond the pecuniary limits of that Court's jurisdiction, although not *res judicata*, is some evidence of dispossession by the defendant in a subsequent suit against the same defendants to recover *mesne* profits In delivering the judgment the Court observed at p 697. "It was argued for the respondent, on the authority of *Gujju Lal* v *Fatteh Lall*, 6 C 171 (F B); *Brojo Behari* v *Kedar Nath*, 12 C 580, and *Surender Nath* v *Brojo Nath*, 13 C 352 (F B) that the decree, if not conclusive evidence is not evidence at all; but the decrees which it was sought to put in evidence in those cases were not *inter partes* In *Madhusudan Saha Mundal* v *Brae*, 16 C 300, the Full Court held that an *ex parte* decree for arrears of rent did not [illegible]
of rent *res judicata*, but the ques[illegible]
The case of *Run Bahadur* v *Luc*[illegible]
although not conclusive eviden[illegible]
There the survivor of two brothers, claiming the whole estate by survivorship, brought a suit in the Court of the Subordinate Judge against the widow of the deceased brother who claimed her husband's share as her separate estate and the question was whether the brothers were joint or separate in estate The decision of a Munsif in a rent suit between the same parties was put in to show that the brothers were separate The Judicial Committee held that the judgment was [illegible] d as evidence to which some [illegible] hen the question again came up [illegible] *Teju Khan* v *Rajani Mohun* [illegible] n was whether a judgment in a previous suit by a co-sharer of the plaintiff for the recovery of possession of two thirds is admissible in evidence in the plaintiff s suit against the same defendants for the recovery of possession of the remaining one third share of the same property *Mr Justice Banerjee* in referring the case to the Full Bench observed at pp 524—528 If the cases of *Gujju Lall* v *Fatteh Lall* 6 C 171 (F B) and *Surender Nath* v *Brojo Nath* 13 C 352 (F B) upon the authority of which the lower Appellate Court has held the judgments tendered in evidence for the defendants to be inadmissible are good law the first ground urged before us must fail But if those cases have in effect been overruled by the decisions of the Privy Council in *Ram Ranjan* v *Ram Narain* 22 C 533—22 I A 60 and *Bhitto Kunwar* v *Kesho Pershad* 24 I A 10=1 C W N 265 then the question arises whether the judgments referred to are admissible in evidence In the two cases relied upon by the lower Appellate Court namely *Gujju Lall* v *Fatteh Lall*, 6 C 171 and *Surender Nath* v *Brojo Nath* 13 C 352 it was held by this Court that a former judgment which is not a judgment *in rem* nor one relating to matters of a public nature, is not admissible

in evidence in a subsequent suit either as *res judicata* or as proof of the particular point decided, unless between the same parties or those claiming under them But in the case of *Ram Ranjon Chakerbati v. Ram Narain Singh*, 23 C 533=22 I A 60, it was he[illegible] that a judgment passed in a suit to which the plaintif [illegible] plaintiff as evidence showing the rent [illegible] *Pershad*, 24 I A 10=1 C W N [illegible] speaking of judgment in a former suit against one of the defendants *Bacha Tewari*, observe 'this decision is not conclusive against *Bacha Tewari*, if the suit [illegible] their Lordships agreed [illegible] ence against him These [illegible] in effect over ruled the [illegible] being so the question

as to the relevancy of the judgment, that is, the circumstance that a particular judgment was passsed, is clearly a fact within the meaning assigned to the term in section 13 . Next as to relevancy of the judgment in suit no 732 of 18[illegible] under section 13 [illegible] transaction within the meaning of clau[illegible] terminating in the judgment took [illegible] meaning of the [illegible] the defendants [illegible] of the [illegible] ection [illegible] right [illegible] on on

the meaning of the term as used in the section The judgment therefore is, in my opinion, relevant under section 13 If such judgments were not relevant under either of the two sections 11 and 13, they could not be admissible in evidence [illegible] two cases referred to above [illegible] such judgments in evidence [illegible] the Law of Evidence, (see Tay[illegible] no man ought to be bound by proceedings to which he was a stranger [illegible] conduct of which [illegible] judg[illegible] vidence, [illegible] to the

evidence being left to the Court to determine And in the second place the reason stated above, though it is a good reason for excluding from consideration as against a stranger, the ev[illegible] so far as it is the opinion of a Court upon mate[illegible] Court the stranger could have had no [illegible] good where [illegible] by the [illegible] on and [illegible] rpo es, [illegible] h law [illegible] person, [illegible] of the [illegible] missible [illegible] before [illegible] with the [illegible] ed In [illegible] roperty [illegible] recover [illegible] suits is [illegible] ifferent [illegible] ight to [illegible] missibl [illegible] rt viz [illegible] Muth

Pal v *Broja Nath Pal*, have been referred to, I feel bound to express my opinion that having regard to the recent observations of the Privy Council in the case of *Ram* [illegible]

In *Abinash Chandra Chatterjee* v *Paresh Nath Ghosh*, 9 C W N 402 the Court agreed with the view taken by the Full Bench in *Tepu Khan* v *Rajani* [illegible] a quite [illegible] 44 the [illegible] e judg- [illegible] ed for [illegible] It is well settled that although a judgment not *inter partes* may be used in evidence in certain circumstances, as a fact or as a relevant fact, of possibly as a transaction, (*Ram Ranjan* v *Ramnarain* 22 C 583; *Bitto* v *Kesho Pershad* 24 I A. 24=1 C W N 265, *Dinomoni* v *Brojo Mohini* 29 I A 24=6 C W N 386, *Tepu Khan* v *Rajani*, 25 C 52=2 C W N 501; *Malcomson* v *O'Dea*, 10 H L C 593 and *Bristow* v *Cormican*, 3 App Cas 641) the recitals in the judgment [illegible] The principle is [illegible] from their [illegible] sumed to be [illegible] dence for or [illegible] istence, date [illegible] rendered, in [illegible] is opposed to [illegible] judgment of [illegible] therein and [illegible]

the first ground must prevail" [illegible]

[illegible] 1923 A I R Cal 240=36 C L J [illegible] in this connection we cannot over- [illegible]

[illegible] correctness of the pre- vious decision but the fact that there had been a decision that is established by the production of the judgment This is clear from the decisions of the Judicial Committee in *Ram Ranjan* v *Ram Narain*, 22 I A 60=22 C 533; *Bitto Kunwar* v *Kesho Persad* 24 I A 10=19 A 277, *Dinomoni* v *Brojo Mohini*, 29 I A 24=29 C 187, *Ramprokash* v *Anand* 43 I A 73=43 C 707=24 C L J 116, and *Natal Land Co* v *Good* L R 2 P C 121 and of the House of Lords in *Malcomson* v *O'Dea*, 10 H L C 593 and *Bristow* v *Cormican*, 3 App Case 641 This fundamental distinction was not fully appreciated in the Court below, and references were made to the [illegible] of inconclu- [illegible] tness [illegible] ment [illegible] B), [illegible] inter [illegible] a previous judg- [illegible] under section 11 or section 13 [illegible] certain circumstances may be [illegible] "The cases so contemplated [illegible]

produced a judgment he had obtained against Y which decided that title was in X *Held* it was a very strong piece of evidence against the tenant as to who was the landlord *Purna Chandra* v *Ramesh Chandra* 87 Ind Cas 753 = A I R 1925 Cal 1218 Where judgments not *inter partes* were filed to show that similar grants were resumed by the grantor or his heirs on the death of the grantee *Held*, they are admissible in evidence under the provisions of section 13 of the Evidence Act *Syed Mahammad* v *Mahunaji Nim Narain*, 7 C L J 90 Proceedings in and documents filed in a previous suit are relevant evidence against a person not a party to that suit *Malan Chandra* v *Kaliram Biswas*, 23 C L J 678 Orders for the appointment and discharge of the guardian of A, a minor, cannot be received in evidence to prove the date of birth of A from the recitals contained therein *Hora Kumar Devi* v *Jogendra Krishna Roy* 38 C L J 186 Where the question is whether a maintenance grant is alienable or not, previous judgments as regards the alienability of such grants are admissible in evidence as instances in which the right to alienate a portion of the subject of the grant was claimed and its exercise disputed and disallowed *Bhima Durgay* v *Pande Fateh*, 3 C L J 521, see also *Madhab* v *Ram Sa at Kumari*, [illegible] C W N 126

A judgment in a case under s 9 of the Specific Relief Act does not come either under s 41 or under s 42 of the Evidence Act and it is relevant only under ss 13, 40 and 43 of the Act, that is to say as evidence of a transaction or instance where the right to possession was claimed or disputed and [illegible] as evidence to show that there was such a judgment or decree in order [illegible] a further claim or to determine whether cognizance should or should not be taken of a suit or whether a trial should or should not be held The use to which a decree passed in such a suit may be put in a subsequent suit between the parties is only to show that a right to possession was asserted and it was denied and a suit was instituted and was either decreed or dismissed *Chhadeck* v *Sured* 85 Ind Cas 979; see also *Radha Churn* v. *Zumuroonissa*, 11 W R 83, *Jiaulla* v *Inu*, 23 C 693

For cases on this point which were decided before the Indian Evidence Act *vide Kanhya Lall* v *Radh Charan*, 7 W R 338 (*per Sir Barnes Peacock C J*), *Jogendra Deb Roy* v *Faindra Deb Roy*, 14 M I A 376, *Mohammad Ali* v *Shams Ali*, 8 W R 422

Decree [illegible] There is some conflict of opinion in [illegible] decree obtained by a co-sharer landl[illegible] rent in a subsequent suit for rent [illegible] the recent case of *Kanta Mohan* v *Gopi Nath* A I R 1928 Cal 355 *Mr Justice Mullick* held that such a previous judgment is admissible in evidence under section 13 in a subsequent suit In delivering the judgment he observed The whole controversy before me *centred round the question whether the ex parte decree obtained by a co-sharer* landlord was admissible in evidence or not The learned Subordinate Judge has held as I have said before that it was inadmissible, and for this he relied on the Full Bench case of *Surendra Nath Pal* v *Brojo Nath Pal* 13 C [illegible] which had followed the Full Bench decision in *GujjuLall* v *Fatteh Lall* [illegible] C 171 [illegible] C L R 439 But in another Full Bench in *Teppu Khan* v *Rajoni Mohan Das* [illegible] C 522 = 2 C W N 501 their lordships observed that the *dictum* in the case of *Guju Lall* v *Fatteh Lall* and *Surendra Nath* v *Brojonath* referred to above have been materially qualified by the observations of their Lordships of the Judicial Committee in *Ram Ranjan Chakravarty* v *Ram Narain Singh* 22 C 533 = 22 I A 60 In 1925 Cal Case it was held that a previous decree obtained by a co sharer landlord would be admissible in evidence in a subsequent litigation if the subject matter of the two suits be identical; otherwise not The learned Vakil for the respondents contended that the subject matter in the suit from which this appeal arises was not identical with, but different from that in the previous suit in which the *ex parte* decree was obtained by a co sharer landlord and in support of this contention he cited the case of *Abdul Ali* v *Hari Chandra Das* 10 C W N 1081 The facts of the case in *Abdul Ali* v *Hari Chandra Das* were very much similar to [illegible] the previous [illegible] as to the [illegible] ground that [illegible] why they

13 considered that the subject matters in the two suits were not identical It is difficult to understand how it can be said that the subject matters in the two suits were different The amounts claimed were no doubt different and the claimants were not the same But the real dispute in the two suits was as to what the amount of rent was Their lordships of the Judicial Committee in *Ram Ranjan* v *Ram Narain* 22 C 533 at p 542 held that the judgment in a previous suit would be evidence for the purpose of showing what the amount of the rent was It is to be observed also that in a case that was decided in this Court subsequent to the decision in *Abdul Ali* v *Raj Chandra Das*, 10 C W N 1084 namely in the case of *Byom Kesh* v *Jagadishwar*, 22 C W N 304=40 Ind Cas 442 it was held that a decree obtained by a co-sharer landlord is admissible in evidence as to the rate of rent in a subsequent suit for rent brought by another co-sharer landlord On a consideration, therefore, of authorities on the point and specially of the observations of their lordships of the Judicial Committee in *Ram Ranjan* v *Ram Narain* I am opinion that the learned subordinate Judge was wrong in law when he held that the decree in the previous suit was inadmissible in evidence In my opinion the decree was admissible, and that being so the case must go back to the lower appellate Court to have the appeal re heard" It should be noted in this connection that in this case as well as in the case reported in 22 C W N 304 the co sharer landlord plaintiff relied on the previous decree of his co sharer landlord against the tenant defendant who was also a party to the previous suit But in *Kanto Mohun Mulick* v *Jadab Chandra Khara* A I R 1928 Cal 353 which was decided by another Bench of the Calcutta High Court on the previous day and in which it appears the plaintiffs appellants were the same as in the case reported in 1928 A I R Cal 355, it was held that a decree obtained by a co sharer landlord in a previous suit was not admissible in evidence as to rate of rent in a subsequent suit for rent by another co-sharer landlord But in that case the distinguishing feature was that the tenants respondents wanted to use the previous decrees obtained by the plaintiffs co-sharer landlords against the plaintiff In delivering the judgment *Mitter J* said "On the merits it has been argued by the learned advocate for the appellant that the lower appellate Court has committed an error in law in deciding the appeal on inadmissible evidence It is said that Exs A, C and D are decrees which were obtained by plaintiff's co shares against the defendants, and as the plaintiff who represents the estate of the late Babu Manik Lal Seal was not a party to the said suit the decrees were not *inter partes* and consequently are not admissible in evidence Reliance has been placed in support of this contention on two decisions of this Court in the case of *Abdul Ali* v *Raj Chandra Dass* 10 C W N 1084 and *Prem Chand Nan lal* v *Official Trustee of Bengal* 27 C W N 56 of the notes portion The first two decisions support the appellant s case The last decision which takes the contrary view, was an *ex parte* decision in an appeal in which the respondents were not represented the learned advocate for the respondent argued that having regard to the decision of the Judicial Committee in the case of *Ram Ranjan* v *Ram Narain* 22 C 233=22 I A 60 such decrees by co-sharer landlords, as were admitted and acted upon by the learned Additional District Judge in this case could be treated as evidence, however weak the value of such evidence might be But the distinction between *Ram Ranjan* v *Ram Narain* and the present case lies in the fact that the observations of the Judicial Committee were limited to cases where the subject matter of the previous judgment was identical with the subject matter of the suit in which those judgments were sought to be offered as evidence and their lordships held that under s 13, Evidence Act such judgments could be treated as evidence of a transaction within the meaning of that section Here the suit by the co-sharer was in respect of his own share of the rent in the previous suit to which the present plaintiffs were not parties Consequently the decrees A C and D did not refer to the same subject matter to which the present suit relates That was a distinction which was noticed in the Full Bench case in *Tepu Khan* v *Rajani Mohan Das* 25 C 522=2 C W N 501 (F B) and the majority of the Full Bench held that, where the subject matter of the previous judgments was not identical with the subject matter of the suit in which such judgments were sought to be introduced as evidence the earlier judgments could not be held admissible "

In *Abdul Ali* v *Rajchandra*, 10 C W N 1084, although the plaintiff landlord wanted to use the decree of his co-sharer landlord against the same tenant defendant, it was disallowed by the High Court on the ground "that if such

decrees for rent were obtained by a co sharer or co sharers for his or their share of the rent they are neither conclusive between the Plaintiff and the *raiyat* Defendant, nor are they admissible in evidence between them, the subject matter

a *pro forma* Defendant but which decree was obtained more than a year after the decision of the suit in question

Ex parte decrees for rent obtained by a landlord against the heirs of a tenant and satisfied by the latter are evidence of the existence of the tenancy at the date of these decrees *Anukul Chandra* v *Kamala Kanta Roy*, 67 Ind Cas 787 A decree obtained by a two anna co-sharer for enhancement of rent of his share is admissible in evidence in a subsequent suit for enhancement of rent by other co-sharers *Sarat Soondary Dabia* v *Anund Mohun*, 5 C. 273=4 C L R 448

Bombay cases The first Bombay case in which this point arose was the case of *Naranji* v. *Dipa Umed*, 3 B 3 In that case *Westropp C J* said at p 5 "Under the law as it stood before the Indian Evidence Act (I of 1872) came into force, those decrees were conclusive, in as much as the right to the *churda hak* was established by them as the foundation on which the arrears claimed in the suits in which those decrees were made, were recovered by the plaintiffs in those suits—*Soorjomonee Dayee* v *Sudanand Mohapatter*, 12 B L R 304 P C, *Krishna Behari Roy*, v *Brojeswari Choudhranee* 2 I A 283 If not conclusive since the Evidence Act (I of 1872) came into force, those decisions are, at least, admissible in evidence under section 13 of that enactment for the purpose of

of it will be very different where it was given in a suit to which the person against whom it is used was not a

cases almost, if not quite, conclusive, it is clear e, etc." But in a sub Sargent C J dissented the learned Judge adopted the view taken by majority of the Full Bench in *Gujju Lall* v

4 B 591 at p 599 *Ranade J* in trying "The real question at issue was f the partition deed of 1885 Though the decision in the former suit will not estop the respondents defendants from contesting the claim as being *res judicata*, still the record and the judgment in that case, showing the conduct of the parties, and the admissions would be [illegible] section 13 The interpretation placed upon the 6 C 171 seems not to ss is questioned in ctor of Gorakhpur v ich judgments from Except where they are judgments not *in rem*, or where they relate to public matters, judgments *inter partes* have been always held not to be *res judicata*, but they cannot be

wholly excluded for other purposes in so far as they explain the nature of possession, or throw light on the motives or conduct of parties or identify property. The cases show that such judgments may have very high value as evidence and may even shift the burden of proof—*Neamut Ali* v *Gooro Dass*, 22 W R 365. In a subsequent case it was said "The judgments thus rejected were not *inter partes* but were in suits brought by other creditors against the same defendants in which the existence of the partnership claimed in this suit was asserted with success. The admissibility of such judgments would, apart from authority be a question of some difficulty but it appears to me that the present case cannot be fairly distinguished from that of *Lakshman Govind Shet* v *Amrit Gopal* 2 Bom L R 386 24 B 591 recently heard and decided by *Parsons* and *Ranade JJ* who dealt most exhaustively with this question" *Per Jenkins C J* in *Govindji Jhaver* v *Chhota Lal Velji*, Bom L R 171. Assuming that to be so I think it right to point out that for a judgment to be admissible, it is not in all cases necessary that it should be either a judgment *inter partes* or a judgment *in rem* as will appear from the observations of the Privy Council in the cases of *Ram Ranjan* v *Ram Narain* C 33 and *Bitto Kunwar* v *Kesho Pershad*, 24 I A 10—19 A 277 (P C) and the remarks thereon in *Tepu Khan* v *Rajani Mohun Das* C 522. Speaking generally it may be said in this connection that though a judgment not *inter partes* may not be proof of facts there stated, it is admissible for the purpose of explaining the character in which possession of the estate has been enjoyed and matters of that class." *Per Jenkins C J* in *Ganesh Dharnidhar* v *Dhundiraj* 5 Bom L R 230. The Plaintiff, a Mahomedan, brought a suit against his brother, brother's wife and the widow of a deceased brother to recover possession of a house on the strength of a registered sale deed passed to the plaintiff by his deceased father. Subsequent to the sale to the plaintiff, certain mortgagees of the father brought a suit on the mortgage against the plaintiff his father and mother. In the said suit the sale to plaintiff was held to be a sham transaction and the plaintiff had to pay off the mortgage. In the suit brought by the plaintiff for the recovery of the house on the strength of the sale deed the defendant relied on the judgment in the suit on the mortgage to show that the sale was a colourable transaction. The first Court allowed the claim but the Judge in appeal dismissed it on the ground that the purchase by the plaintiff from his father was not proved to be *bona fide*. On second appeal by the plaintiff a question having arisen as to the admissibility in evidence of the judgment in the suit on the mortgage *Russel A C J* said "We have had addressed to us very lengthy arguments upon the question of whether that judgment is admissible at all or not and in my opinion it is impossible to hold that the judgment in that case comes within either the word 'transaction' in section 13 or 'particular instances' in that section. But although this is so the proceedings in that suit would come within the words 'particular instances in which the right was claimed' for I think that we are bound by the decision of *Sir Charles Sargent* in *Panchhodlas* v *Bapu Nathar*, 10 B 439 (442) where he says that 'rights and customs' in section 13 must be understood as comprehending all rights and customs recognized by law and therefore including a right of ownership. Further, for my part I cannot distinguish the present case from the case of *Lakshman* v *Amrit supra*, which was followed in *Govindji* v *Chottalal supra* and see also the case of *Dharnidhar* v *Dhundiraj*, 5 Bom L R 230 a decision of the Chief Justice and *Mr Justice Batty*. It appears to me, therefore, that proceedings in the suit of 1886 should be admitted as relevant evidence in the present suit for it must be remembered that the present plaintiff and the defendants either by themselves or their predecessors were parties to that suit of 1886. In the same case *Beaman J* observed "The question is whether that judgment not being *inter partes* is admissible and if so, what is its precise probative value? I should add that the plaintiff alleges that the sale was made to him by his father who was the judgment debtor in the suit of 1886. The relevancy of judgments of Courts of Justice is regulated by sections 40—43, Indian Evidence Act. Section 40 merely enacts that the existence of any judgment, order or decree which by the provisions of section 13 Civil Procedure Code, constitutes *res judicata* is a relevant fact. Section 41 without attempting any precise or exhaustive definition aims at and probably does let in all judgments *in rem* proper. Section 42 provides that judgments orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry. Section 43 declares all judgments, orders decrees other

than those specified in sections 40, 41, 42, to be irrelevant unless the existence of the judgment is itself a fact in issue, or is relevant under some other section of the Act.... It is not contended that the fact of the judgment is itself a fact in issue, but it is contended that the existence of the judgment is relevant under some other provision of the Act In order to bring it in, a defendant has

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It certainly is not a fact in issue, but it is contended that it is relevant under section 13 To satisfy the requirements of that section the question must be

served the purpose What class of cases the section was intended to meet is as plain as possible not only from its language but from the illustrations And those are cases in which the right or custom in question is regarded as capable of surv

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the Court should or should not decree it I confess I do not find it easy to understand how that language can without absurdity be applied to such a case as this Let us substitute it for the illustration "The question is whether a sale-deed is fraudulent, p

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purposes of section 13, cannot be allowed to use its contents *qua* judgment virtually thereby converting it into a *res judicata* That is the distinction which I have set myself to bring out clearly and I hope simply and intelligibly." *Mahamad* v. *Hasan*, 31 B 143 In a suit for damages for malicious prosecution, the

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contrary to that Court's decree The judgment although not *inter partes* is a relevant fact under section 42 of the Evidence Act and under section 13 is also a very important piece of evidence *In re Enya Sidhya*, A I R 1927 Bom 654=29 Bom L R 715=102 Ind Cas 546.

Allahabad cases In the *Allahabad High Court* the question was fully discussed in the case of the *Collector of Gorakhpur* v *Palak Dhari Singh*, 12 A 1

death P brought a suit against D, whom the Collector as manager of the Court of Wards had accepted as the minor son of K, and against the Collector as

Ayyar, J in *Rama Swami* v *Appavu*,
a certain person was or was not the heir
nor a fact within the meaning of s 13
Sargent C J. and *Mr. Justice Nanabhai*
B 439, that the majority of the Full Bench of the Calcutta High Court in *Gujju Lall Fatteh Lall*, 6 C 171, put too narrow a construction on the word 'right' in s 13 and that 'right' there includes not only incorporeal rights but a right of ownership There are no words in s 13 which could not be applied to a right of ownership, but it is difficult to see what could, within the meaning of s 13, clause (*a*), be a 'transaction by which the right' of a man to have it declar-

or that he is not
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word 'right' in
same. In my
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3. Legislature in framing s 13 that a party to a suit could not give evidence of particular instances in which a custom, for example, was exercised or recognised, ... recognised or had exercised
... such party could not give in
... been claimed and recog-
nised without showing that the former suit was *inter partes* ... For the reasons already stated I am of opinion that the record of the previous suit in which the ... but not the judg-
... the extent already
... same case *Straight*
... at the judgments
in which they were
... action took place
they are the best evidence. *Garth C. J* remarks, (in 6 C 171) 'by a somewhat ... might also be called *transac*
... the commencement
... known *Duchess of*
... t were a natural and
proper expression in connection with such a matter, thus —'what has been said at the bar is certain' ... between two
parties in judicial ... In my
opinion the suit of ... was a
'transaction' in w ... muman
Singh was asserted and recognised, and the judgments and decrees of 1874 are the best evidence of that transaction I should also have no difficulty, if it were necessary to do so, in holding that the defendant is entitled to put forward the suit of 1873 as an 'instance' in which the right of which I have spoken was claimed and recognised As I have remarked before, the question is not as to the existence of the judgments and decrees of 1874 as a fact in issue or a relevant fact under some other provision of the Evidence Act, but whether ... the defendant was assert
... evidence"
... is stated by
Gajju Lall
... ing of the
Statute (I of 1872) was that a judgment such as that of *Mr Justice Turner* and my brother *Brodhurst* of 1874 would be admitted in evidence" Before this case, in *Shadal Khan* v *Aminullah Kahn* 4 A 92 at p 96, *Duthoit J* said "The ... has been recently
... 6 C 171 and
... rty set up a
cases in which a similar
of the Evidence Act.
Ind Cas 142 In a suit
for foreclosure one of the defendants contended that he was a minor at the date *of executing the mortgage*, and so not competent to enter into a contract In
... judgments in proof of the defen
Held that the judgments were not
... passed not being instances in which
... the defendant was ... or exercised or in which its
... *Musammat Dulari*
... though not conclu-
... show the conduct
of parties or particular instances made by the parties or their predecessors in title or to identify property or to show how it had been previously dealt *with* *Gobinda Krishna* v *Abdul Qayyam*, 25 A 546=A W. N. 1903, 137
... nment for creating
The author applied
Code to set aside
it to be relied on
r s 153 A Penal
Kali Charan v
85=A. I. R. 1927
All 604.

S. 1

Madras Cases In *Subramanayan* v *Parmasuaran*, 11 M 116 123 the Madras High Court concurred with the majority of the Full Bench of the Calcutta High Court. So also in *Ramasuami* v *Appavu*, 12 M 9 where a suit was brought by the trustee of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple and where judgments in other suits
under the same right had been decreed
were held relevant under s 13 of the Evider
in which the right claimed had been as
contended that such judgments not being 'transactions' or 'facts', they are not admissible under s 13 of the Evidence
matter of a public nature within the meanin
concur with the majority of the learned

Act, and that the
but the judgmen
in that case; the question for determination in the previous suits was whether payments then claimed, and which are in contest in the present suit, were claimable as of right, and in one case whether they are so claimable from a particular class of persons, viz Christians; and it appears to us that, when a right of the character now in question is at issue, such judgments are admissible in evidence as evidence of particular instances in which the right or custom was claimed' and in which its exercise was disputed asserted or departed from, and was further
dealt with unde
there is ev denc
of such villages—that from those who hold lands in a large number of villages in the vicinity of the temple (see *Exhibit F*) the payment claimed is demanded as of right, and—that such payments have been made after suits from time to time brought and determined in reference to the liability of persons occupying lands in these villages, and this being so, we are further of opinion that the decisions in the former suits are decisions which relate to 'matters of a public nature' within the meaning of s 42 of the same Act.
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claimed a
of the Evi
the finding
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claim upc
evidence of custom in the sense of payments extending over a long series of years the existence of a right may, in connection with other circumstances possibly be inferred and the dismissal of the appellant's suits for the reasons

nger by *Ammalayyanger* w
suits brought by him in 183
layyanager then (deceased)
as *Varadayyanger*, the adopt
It has been objected on be
are inadmissible as evidence

... 11 M 116 Copies of judgments and decrees ... erence to the decision of the majority ... in *Gujju Lal* v *Fatteh Lall* 6 C 1 ... of Judge ... As pointed out by this Court in *B ju ... ma* v *Avulla*, 15 M 19 (23) the sole object for which it was sought to use the former judgment in *Gujju Lal* v *Fatteh Lall* 6 C 171 was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favour on the same right and it was held that the opinion expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act The case is clearly different where the previous judgment is produced not in order to prove an adjudication between third parties but in order to prove a statement made by a predecessor in title of the party against whom the document is sought to be used *Cf Parbutty Dassi* v *Purno Chunder Singh* 9 C 586 and *Thanar* v *Kondan* 15 M 378 Such is the case here and we have no doubt that the judgments in question are relevant under section 35 of the Evidence Act." A judgment is relevant under section 13 of the Indian Evidence Act only as instance of an assertion of a right against third parties The remarks in the judgment cannot be treated as evidence They are the mere opinion of a person who is not before the Cour ... upon the ground of that opinion and hence are nc ... v *Kumara Raja* 1) M L T 330 ... A judgment follow... a person to ... ining to an individual and is inadm ... Evidence Act. *Venkata Rangappa* v *Subbaraya Gounda* ... it judgments not *inter partes* will be admissible under section 13 of the Evidence Act as affording instances of a local custom or usage being recognised *Sundaram Ayyar* v *Theeli Larappa* 40 Ind Cas 159 Section 43 says that judgments orders or ... oned in sections 40 41 and 43 are irrelevant ... order or decree is a fact in issue or is ... e Act (e g section 13) *Secretary of* ... 67 Ind Cas 971=44 M 778=41 M L J 223=14 L W ... 6 (F B) The fact that the ancestor of a man failed in a contested suit to prove the relationship of his line with the deceased fifty years ago when such an issue was much more susceptible of proof than it is now is evidence against the existence of the right of that line to claim as heirs of the deceased within the meaning of s 13 of the Evidence Act. *Secretary of State* v *Subraya Karantha* 18 M L T 504=2 L W 1175=(1915) M W N 962 In *Natesa Gramani* v *Venkatarama Reddi* 30 M 5 0 the question was whether water in *poramboke* lands belonging to *mirasdars* can be said to be *Sircar* water and taxed as such "Very little evidence was tendered on either side The zamindar called the *Karnam* who said that the *porambokes* were the property of the zamindar but did not speak to any act done in assertion of his ownership The defendants on the other hand relied on a judgment of the District Munsif of *Chingleput* in original suits Nos 468 to 473 of 1855 suits between zamindars and some *mirsadars* to recover possession of certain *poramboke*s in the village in which it was held that the waste lands in this village are the property of the *mirasdars* We think the judgment was evidence against the zamindar in the present suit under section 13 of the Indian Evidence Act" In *Seetha Pathi* v *Venkanna* 45 M. 332=66 Ind Cas 280 at p 284 *Kumaraswami Sastri J* said I think the correct principle has been laid down by ... *Kashi Nath Pal* v *Jagat Kishore Acharjee* 20 C W N 643=93 ... held that although a judgment not ... nces as a fact in issue ... recital in the judgment ... rties

Oudh cases The question for decision was ... r the appellant was the legitimate daughter of one K and R The respondent contended that R was not the legally married wife of K and in proof of it produced a compromise and ... R and another person by which R obtained only a small ... and the decree passed a ... of the Evidence Act *Farbat* ... passed in a previous suit ... equent suit, is nevertheless

admissible in evidence under section 13 of the Evidence Act to show the fact that the judgment was passed, and, therefore, it is necessary evidence of the following facts, who the parties to the previous suit were, what the land in dispute was; and who was declared entitled to retain possession For this purpose, and to this extent, it is ad
one when the fact of possession at
Mohammad, 65 Ind Cas 398=8 O

whether a certain person is a legitimately born son, application for mutation with regard to revenue paying properties would be admissible under ss 13 and 50 of
re ld be
re Cas
4 vious
case in which a member of the family had brought a similar suit for possession and obtained a decree was held admissible and relevant on the question of the

and
the
W.
N. 73 Judgments relating to a particular right, although not *inter partes* but dealing with the same question are clearly admissible under s 13 of the Evidence Act

suit against the appellants for possession of some lands in a village on the allegation that they had acquired title to the land in suit as well as the other land of the village by adverse possession They filed a judgment in a suit brought by their father for a declaration of his title to the lands of that village, the title being based upon mortgages alleged to have become irredeemable. The decision was that he was entitled to 22 bighas and the rest of the claim was dismissed In the course of that judgment the Court recorded an opinion that the plaintiff was proved to be in possession of the whole land now in suit but dismissed the claim except as to 22 *bighas* on the ground that the plaintiff though in possession had not proved title The judgment was *inter partes* *Held* that the question of possession of the land with regard to which the suit was dismissed was not *res judicata* A bare expression of opinion in a judgment upon a question of possession not given effect to by the decree is not a recognition of a right within the meaning of section 13 of the Evidence Act and is not admissible in proof of possession either at the date of the judgment or at any other time *Karuna* v *Gobind*, 7 Ind Cas 122

Patna cases Judgments not between parties to the suit pronounced by a

mined o
the quest
1928 Pat
Section 1
Jhingur v

to the *goddi* of a *Dharmsala* to
A decree having been made in
defendant for
held that the
Evidence Act,
to the *goddi* o
finding that a particular person was not of sound mind based on the letter of a medical man is not admissible, either under s 13 or section 43 of the Evidence Act, in a subsequent suit to prove that the person, whose mental condition is in question, was not of a sound mind where the previous suit was not between the same parties and no formal deposition on oath of the medical men was recorded *Sher Mahammad* v. *Fatteh*, 6 P R, 1902.

Nagpur Cases A Judgment though not *inter partes* may be admissible as evidence of title *Yeshevant* v. *Daulat*, 89 Ind Cas 663. Under section 13 ... tent jurisdiction in a ... either recognised or ... d Cas 699 But the ...

"Where a judgment was not in
nor, between the parties to a subsequ
... ant for the purpose of the ... swing the question in the ... before the Bench that ... by their Lordships of the ... which reference is made ... In *Bilia Kunwar* v. *Kesho Prosad*, their Lordships of the Privy Council ...
suit
suit
appl

of that fact in another case. It is urged that many Courts of India have decided the question under consideration in the affirmative If this is the case the pronouncement in *Gopika Raman* v *Atal Singh, supra,* shows that the decisions are incorrect I remark however, that in the rulings brought to the notice of the Bench either there is doubt whether there is decision of the question or the references to this question are in the nature of *obiter dicta* Such is the nature in *Baleshwar Bagarti* v *Bhagirathi Dass,* 35 C. 701 at p. 716 and *Secy of State* v *Ahmed* at p 801 of 44 Mad In the *Madras* case the question whether the decision in the previous suit was evidence was not referred to the Full Bench. In *Inder Singh* v *Fatteh Singh,* 1 Lah 540=59 Ind Cas 734, the question was emphatically answe
in order to prove th
existence of right
property was deal
section 11 or 13
in so far as they
or conduct of part
ancestors and also embody an authoritative statement of the facts which the investigation then held before the Court brought to light, such Judgments have very high evidentiary value and may even shift the burden of proof *Gopal* v *Sitaram,* 97 Ind Cas 694=9 N L J 215

Privy Council Cases Concerning the effect of previous judgments their Lordships of the Judicial Committee of the Privy Council decided cases on

R 338,) that the decree in a former suit was not a judgment *in rem,* but a judgment *inter partes*

A zemindar claimed the proprietary right and possession of *mouzas* within

was one of the year 1817, and another of 1843, to which the zemindar's predeces

am of opinion that the documents produced by the defendants may be accepted as evidence in this case, as showing ancient possession, and that the title on which the defendants now rely was openly asserted as early as 1195, B S, corresponding to 1788 A D and at subsequent dates irrespective of the findings come to in those decrees The orders passed in these decrees themselves would

S. 13. not be evidence against plaintiff's title; but they may be accepted to show an
cient possession an ... ted rightly or wrongly many
years ago' The ... 'As regards the admissibility
of the judgments to ... we observe that the lower
Appellate Court has only used those judgments as evidence that there was litiga
... e It uses those
... was suing the co-
... those suits the
... s extent, we think
... he *zemindar* was
... it of 1817 a decree
for rent of the *mouzas* now in question was given at the rate of Rs 35 *per annum*, aga ... of opinion
that althoug ... s
competent
sion at and prior to that date, now nearly 80 years ago Taken with the other
evidence in the case, the respondents have thus established possession at a time
... was and
... 60=
... 530
... erely
... n of
... ll as
... were
... ring
... land
in dispute was, and who was declared entitled to retain possession For this
purpose and to this extent such orders are admissible in evidence for and against
any one, when ... be ascertained
Dinomani Chot ... see also *Hosain*
v *Abjal*, 40 C ... 1 Ind Cas 456

In a previous suit by H, a co-sharer of the plaintiff against the defendant
to which the plaintiff was no party, H had recovered a decree for posses-
sion of H's share Subsequently a partition of the property was made by
a deed between H, defendant, and plaintiff to work out the decree but without
expressly referring to it *Held*, that the decree was not conclusive in plaintiff's
suit to recover his share from the defendant and might, had it stood alone be
... *Kumar*
... C
... act
... in
... ar
... *ider*
Gopika Raman v *Atal Singh*, A I R 1929 P C 99 (102) A judgment *inter
partes* holding that a partition of a certain estate was proved is only admis-
sible under the provisions of ss 13 and 43 as establishing a particular transac-
tion in which the partibility of the estate was asserted and recognised The
reasons upon which the judgment is founded are no part of the transaction and
cannot be so regarded nor can any finding of fact there come to, other than
the transaction itself, be relevant to prove partition in a subsequent suit.
Gobinda v *Sham Lall*, A I R 1931 P C 89=1931 M W N 435=35 C
W. N. 521

... gnizing the
... relevant as
... another place
... cannot be
... L J 737=
... t or custom is
... e ognised or
... judgments are
... v *Bibi Sona*
... 115, *Nizam* v

Abdul, A I R 1930 S... *Beuat*, S.
7 W R 210; *Nallathal* ... *Jhanda*
10 A 585; *Indra* v ... C 233;
Harnabh v *Mandil*, 27 ... v *Bai*
Santok, 20 B 53; *Dalg*...

in evidence of a transaction the parties are often apt to refer to the recitals therein as relevant evidence and the distinction between the deed as a transaction and the recitals contained in the deed is frequently overlooked In the case of *Dwarka Nath Bukshi* v *Makunda Lall Choudhury* 5 C L J 55, which was a case in which a deed of sale and a mortgage deed though not *inter partes* containing recitals that a particular land belongs to a particular *howla*, was sought to be admitted in a suit in which the question was whether the land belonged to that *howla* or not, so far as can be made out of the facts from the report of the case, they were documents executed ...
whose share the Plaintiff's father ...
purp rting to rely upon the c...
Vythilinga v *Venkata Chala*, 16 M...
section 11(b) and section 13 of the Evidence Act, and observed that they may be very weak evidence or even of no weight at all, but they could not be re...
b...
de...

observed "We know of no ...
between persons who have no power to bind a person whose right is sought thereby to affect can be admitted ...

where the Court observed "It is argued that these documents are not admissible in evidence and the Courts below were not competent to take them as

S. 13 of the parties to the suit was mentioned as owner of the boundary land but recent decisions have finally settled the point At one time it was attempted to make such documents admissible in evidence under section 11 clause (2) of the Evidence Act ... was made to rest on section ... the Evidence Act It is not ... We are of opinion that a document between strangers to the suit in which mention is made of one of the parties or their predecessors as holding the land lying on the boundaries of the lands belonging to the executants of the documents is not admissible in evidence ' See also *Brojo Mohan* v *Gaya Prosad*, 30 C W N 761; *Damodar* v *Jadunath*, 91 Ind Cas 449, *Kumuda* v *Dilsook*, 45 C L J 138, *Abdul Karim* v *Chhalle*, 91 Ind Cas 688 (c), *Hakim Ali* v *Amrit*, 109 Ind Cas 264, *Abdul Ghani* v *Faquir Mahammad*, A I R 1929 Lah 78=111 Ind Cas 261, *Lajpat Rai* v *Faiz Ahmad*, A I R 1927 Lah 448=8 Lah 651, *Sarat Chandra* v *Saralabala*, 105 Ind Cas 61 The case of *Imrit Chamar* v *Sirdhari Pandey*, 15 C L J 7=17 C W N 108, which laid down that recital of boundaries in the lease was admissible against a person not a party took the contrary view There have been later decisions which have not accepted this later view and the trend of the recent decisions is not to admit evidence which have been offered in the case and the reception of which evidence is objected to either under section 13 of the Indian Evidence Act or under ... in *Kumuda Kumari* v *Dilsook Ray* ... o *Radha Nath Banerji* v *Jadu Nath* ... v *Sarbeswar Nag*, 29 C. W N 463 ... erson cannot be made admissible in ... of the decision of the ... *Jeherbai*, 49 I A. 36=41 ... taken ... re be ... *Behari* ... ssible ... held ... cases ... I am not prepared to differ from this decision ... ocument may also be admissible under section 13 ... word 'right in section 13 is not confined to an incorporeal right See also *Farzand Ali* v *Zafar Ali*, 46 Ind Cas 119, where ... followed and ... not followed ... L, 41 C L ... *B B Ghosh* ... nsidered in three aspects The first is, where the executant of a document is called as a witness and ... locum at ... be executed by ... nce admissible u ... ed given by the ... ted with regard ... in evidence The second aspect of the question arises where the executants are alive and do not give their evidence in the case In such cases there is a strong body of opinion that such documents are not admissible either under sect on 11 or 13 of the Evidence Act This has not been done in the present case ... any such documents ... not That such docu ... ct, has been held in ... here is no question that under the English law a statement in such documents would be admissible It is unnecessary to cite any English case other than the leading case of *Higham* v *Ridgway*, 10 East 109 Whether such evidence is admissible under the Evidence Act was considered in favour of its admissibility in several cases the ... 22 W R. 231 The ... *Dharmappa* ... ie case of ... our Court

6 C W N 252=14 C L J 467. S.

n the case of *Naluar* v *Alkhu*, 11 A.

followed in this Court in *Imrit Chamar* v *Sirdhari* 15 C L J 9=17 C W N 108 and in the case of *Ambar Ali* v *Lutfe Ali*, 45 C 159=25 C L J 619" See also *Abdul Rahim* v *Janabali*, A I R 1923 Cal 299, *Promotha* v *Bijoy* A. I R 1927 Cal 234, but see *Promatha* v *Krishna* 28 C W N 1092; *Kumud Kumari* v *Dilsook*, 45 C L J. 138, *Ghulam* v *Kalim* A I R 1928 Lah 428=10 Lah L J. 370 *Trimbak* v *Ganesh*, A. I R 1923 Nag 22

In *Kiran Chandra* v *Srinath Chakravarti*, 31 C W N 135, the plaintiffs sued for ... Zemindari in the

d of rights as

elied on three

by descendants

was the title

deed on which the defendant's claim was based as purchasers at an execution sale and the third showed that delivery of possession under the purchase was

see

first

the

descendants of the original grantee as rent-free *brahmottar* land, and the other two documents are connected with the title of the defendants One of them is in fact the title deed upon which the defendant's claim was based as purchasers at an execution sale The other document shows that delivery of possession under that purchase was taken"

Where in a suit between two persons the question is whether or not the adjoining piece of land is *nazul* land, the recitals made by successive vendors of one of these persons whereby they purported to transfer the house with all the

paid off and the plaintiff purchased the sup

rate of Rs 24, although there was no proof of such enhancement *Held*, that the mortgage deed was admissible in evidence as it was a transaction by which the right of the defendant to the land was asserted and for the definition of that

Abdul Munshi v *Yakub Talukdar*,

on is whether a certain person is a

with regard to revenue paying

and 50, Evidence Act as assertions

irza Abid, 73 Ind Cas 428=A I R 1924 Oudh 19 Assertions of title by a person dealing with property to

section 13 of the Evidence

or after dispute have little

Cas 389=1921 M. W N

en admitted in evidence as

evidence of a transaction the parties are often apt to refer to the recitals therein as relevant evidence, but the recitals are not evidence especially if they are mere assertions by a person who is alive and who might have been

garden plaintiff produced certain documents dealing with the garden in question

officer in the discharge of his official duties and therefore furnish strong evidence of the authenticity of the facts stated therein *Harihar Partap* v *Bisheshwar Baksh*, 3 Luck 326 = 5 O W N 299 = 109 Ind Cas 422 = A I R 1928 Oudh 307, *Wasiq Ali* v *Athar Ali*, 110 Ind Cas 4 = A I R 1928 Oudh 409 Although an entry in the *wajib-ul-arz* is a
means conclusive particularly
not parties thereto *Syed Tojam*
752 = A I R 1926 All 43 An entry as to a custom recorded in a *wajib ul-arz* against the authenticity of which nothing is shown, is of great importance *Chaudhury Abdul* v *Mt Tahira Banoo*, 12 O L J 167 = 2 O W N 357 = 89 Ind Cas 51 = A I R 1926 Oudh 377 A *wajib-ul arz* being part of a Revenue record is of greater authority that a *riwaj i am* which is of general application and is not drawn up in respect of individual villages *Gurbaksh* v *Partapa*, 2 Lah 346 = (1922) Lah 232 = 66 Ind Cas 133 In a suit for pre emption, the plaintiff in proof of the custom produced an extract from the *wajib ul arz* of 1872, which was headed *dustur i haq i shafa* and provided that a co sharer who

Cas 810

Draft record of right *The draft record of right cannot be used as evidence* of the presumption of the correctness of the entry made therein but the draft record is admissible for the purpose of showing what was the entry made in the earlier proceedings before the publication *Hardeo* v *Kapil*, 108 Ind Cas 417 = A I R 1928 Pat 353

Order of a President of District Board A recitation in the orders of a President of a Union Board is not admissible under s 35 or 13 in evidence unless such president has been examined with regard to that recitation *Doraisami* v *Kannappa Chetti*, A I R 1931 Mad, 487

Road Cess papers An entry in a road cess return in which a former proprietor of an estate admitted the existence of a *lakheraj*, although not binding on the auction purchaser of the estate at a revenue sale, is evidence under section 13 of the Evidence Act *Monmohini* v *Adwaita*, 19 Ind Cas 549 Under
me of the
turn not
plaintiff
Manraj,

the meaning of

under section 13 of the Evidence Act to show the past history of
lend support to

where they can by other evidence be sufficiently connected with those facts.

said: "Ancient documents . . . purporting on the face of them to show

They are admitted in such cases as forming part of every legal transfer of title and possession by act of parties . . . . . Care is first taken to ascertain their

at the documents come

any presumption or

act which they accompany; and where long-continued enjoyment, and user of a right, has been proved, extending as far back as the duration of human life will permit, a deed or writing which is consistent with such usage and enjoyment, and expl
affording
and acted
ments wc
by lapse
as give i
of, and w
presumption as to the existence of the right according to that deed." *Starkie's Ev.* pp. 67, 68.

Admissible evidence—Illustrative cases. In a dispute relating to the

4 ... of the right of that ... of the Evidence ... =2 L W 1175= (1915) M W N ... he plaintiff to an easement is relevant and as such admissible under s 13 of the Evidence Act *Giris Chandra* v *Ku* ... the purchasers of a te ... defendant's tenure, a pe ... is made of ... nder section 13 *Jogesh Chunder* v *I* ... a suit for partition between the ... he widow of a deceased co parcener ... a particular plot of land belonged to her husband such statement is clearly admissible evidence ... v *Iaidullinga Mudaliar*, 33 Ind Cas 446 In a suit ... a recital of the ... it, was ... fore suit ... stitution ... laintiff's ... v *Nitta* ...

Inadmissible evidence—Illustrative cases Statements made in conveyan or mortgage that property is limited by certain boundaries are not admissib against person not party to the deed either under section 11 or under section of the Evidence Act *Abdulla* v *Kunja Behari*, 12 Ind Cas 149=14 C L 467=16 C W N 252 ... canno in the absence of proof ... been executed in accor ... the provisions of ss 13 c ... *Panda* v *Sundar Narc* ... possession of certain lands as plaintiff's *nislar brohmattur*, on behalf of th plaintiff, the will of the ... the recital the *brohmattur* title *Held* ... will wa not admissible under s ... on (13 (a *Satindra Kumar* v *Krishna Kumari*, 36 Ind Cas ... 13 of th Evidence Act, is of no avail where the transactions were in respect of land other than the disputed land as there was not any transaction or particula ... recognised, asserted o ... 467 Certified copies o ... of, not as constituting ... naries of statements made ... and as evidence of ... *m* 11 M 116 ... or *bhaoli* system of rent ... ined in a *hebanama* executed by the deceased grandfather of the tenant ... that the *hebanama* was not admissible in evidence under s 32(7) read with s 13(a) of the Evidence Act *Bansi Singh* v *Mir Amir Ali*, 11 C W N 703 Recitals of the claims contained in possessory orders passed under section 145 of the Criminal Pro Code, whether *inter partes* or not are not admissible in evidence to prove title under section 13 of the Evidence Act *Ram Sunder* v *Haribala* 37 Ind Cas 911

14 Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

Facts showing existence of state of mind, or of body, or bodily feeling

Explanation 1—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

**Explanation 2*—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.†

Illustrations

(*a*) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen

‡(*b*) A is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin is relevant

The fact that A had been previously convicted of delivering to another ... counterfeit is relevant

... hich B knew to be ferocious

... Y and Z, and that they had

(*d*) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious

person

(*e*) A is accused of defaming B by publishing an imputation intended to harm the reputation of B

The ... will on the part of ... repu- tation by

The facts that there was no previous quarrel between A and B, and that ... as showing

... as solvent,

supposed to be solven

relevant, as showing

(*g*) A is sued b ...

A is owner, by the order of C, a contractor

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A

... of property which he

the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found

... to s. 14,

by ... s 1 (*l*)

... (*b*) to s.

by

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant as showing that the fact that A knew of the notice did not disprove A's good faith

(i) A is charged [illegible] him In order to show A's intent the fa[illegible] ay be proved

(j) A is charged [illegible] Threatening letters previously sent by A to B may be proved, as showing the intention of the letters

(k) The question is, whether A has been guilty of cruelty towards B his wife

Expressions of their feelings towards each other shortly before or after the [illegible]

[illegible] A's death was caused by poison [illegible] ring his illness as to his symptoms are relevant facts

(m) The question is, what was the state of his health at the time an [illegible]

[illegible] the state of his health at or near the time in [illegible]

(n) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured

The fact that B's attention was drawn on other occasions to the defect of that particular carriage is relevant

The fact that B was habitually negligent about the carriages which he let to hire is irrelevant

(o) A is tried for the murder of B by intentionally shooting him dead

The fact that A on other occasions shot at B is relevant as showing his intention to shoot B

The fact that A was in the habit of shooting at people with intent to murder them is irrelevant

(p) A is tried for a crime

The fact that he said something indicating an intention to commit that particular crime is relevant

The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant

Scope of the section 'Section 14 seems to me to apply to that class of cases which is discussed in Taylor on Evidence 6th Ed ss 318 to 322,—that is to say, cases where a particular act is more or less criminal or culpable, according to the state of mind or feeling of the person who does it, as, for instance in act ons of slan[illegible] on where malice [illegible] dence is admis- [illegible] mity against the [illegible] nce is admissible [illegible] use he had other similar coins in his possession, or had passed such coins before or after the part[illegible] ge The illustra[illegible] w with sufficient [illegible] But I think we [illegible] to other cases [illegible] ual facts, and not [illegible] We have no right to prove that a [illegible] that he [illegible]

[illegible]

for which he is on trial, in other words, evidence of such collateral offence

cannot be received as substantive evidence of the offence on trial, though **S. 1**

reduced to legal certainty by a conviction) to prove the existence of another

missible to prove the main fact or the connection of the parties therewith, is receivable, after evidence *aliunde* on the points has been given, to show the state of mind of the parties with regard to such fact; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction or his intent thereto In general, whenever it is neces-

racter, and the acts tendered must also have been proximate in point of time to that in question It is plain that the principles thus formulated are of no assistance to the prosecution *Amrita* v *King Emperor*, 19 C W N 676 (692), see

received from the mother on representation of their desire to adopt it, and whose

4 18 L J M C 215—*Cod le Cas 99* See also *R* v *Rhodes*, (1899) 1 Q B 77 where it was held that such evidence w is admissible even when such acts were subsequent to the transaction in question, if they show a connected or entire scheme or system of operation "The matter may be roughly stated thus on connected conduct on other occasions is never admissible to prove the a tis

other state of mind The rule

With regard to criminal charges

Bra j J summarised the law as follows —A careful examination of the cases where evidence of this kind has been admitted shows that they may be grouped under the three heads —(1) where the prosecution seeks to prove a system or course of conduct, (2) where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident

or by the prisoner

of *ales* v *Kerr* (1908)

2 I alleged

he had contracted barber's itch, owing to

dirty materials Evidence was allowed to be g

had contracted such a complaint at the same shop, in order to show th

defendan

This ite of mind or feel

ing of r a relevant fact and

of actual facts *Pritchard* v *Emperor*

Emperor 86 Ind Cas 970=29 C W

674 When the intention of the

both or or and subse-

ne M Fa

ed simply

evidence

is partici

pation either in act or design, in commission or perpetration, in an independent crime cannot be received as substantive evidence of the offence on trial

in ection 14

Emperor 18

with assault

ok liberties

evidence of

s of proving

a thing to have been intentional by showing that it formed one of a series of similar occurrences *Cun Ev 126*

or any

e of such

though

iciple in

admitted.

mission

ie nature may have

5, see also *Perkins*

1, 232 In *Reg* v

Y for obtaining

g evidence

a shortly

mistake It is not conclusive for a man may be many times under a similar mistake or may be many times dupe of another, but it is less likely he should be so oftener than once, and every circumstance which shows he was not under a mistake on any one of these occasions strengthen the presumption that he was not on the last and this is amply borne out by authorities Where the crime charged is receiving stolen goods the possession of counterfeit money, or the like, the knowledge of the accused person becomes one of the material facts in issue, and other acts of similar nature are admissible Thus in *Com* v. *Russel*

156 Mass 196=30 N E 763, *Baker J* said 'The admission of such evidence is necessary, because gui
evidence and can rarely
conduct Similarly in
said "It seems clear upon principle that when the fact that the prisoner has done the thing charged is proved and the only remaining question is whether at the time he did it he had guilty knowledge of the quality of his act, or acted under a mistake, evidence of the class received must be admissible See also *R* v *Bleasdale*, 2 C & K 765 *R* v *Mogg*, 1 C & P 364, *R* v *Lloyd*, 7 C & P 318, *R* v *Bholu*, 23 A 124 Such evidence which is more often resorted

to the jury not to show that because the defendant has committed one crime therefore he would be likely to commit another but to establish the *animus* of the act and rebut by anticipation the obvious defence of ignorance, accident, mistake or other innocent state of mind *Makin* v *Att Gen of N S Wales*, (1894) A C 57, *R* v *Bond*, (1906) 2 K B 389, *R* v *Armstong* (1922) 2 K B 555, *Phip Ev 167*

States of mind or bodily feeling, how proved Facts are either physical or psychological Physical facts can be perceived by senses whereas the facts which are psychological can only be subject matter of consciousness These psychological facts are also called internal facts These are thoughts and feelings, love, hatred anger, intention, will wish knowledge, opinion, are all perceived by the person who feels them When it is affirmed that a man is

affirmed that a man has a given intention, the matter affirmed is one which he, and he only, can perceive; when it is affirmed that a man is sitting or standing,

Fitzmaurice 29 Ch D App 483 These facts cannot be perceived by senses But nevertheless it can be testified by the party himself or can be proved by presumptive evidence It is the law in *Albama* in the United States that a person wheth
it may be,
other witnes
has been eve

on false representations, or the
gift, or to any other state of
testify to it *Greenl Ev* § 328 (

14. testimony, or any other whatever, to the fact of a person's intent or motive, is of course receivable only on the assumption that the intent or motive is a fact permissible to be proved under the substantive law involved in the case. This assumption conditions the admissibility of all evidence and of this sort in particular. Her ... n's intent or motive is not ... *Wigmore* § 581. But when ... a very little credit. *Phip Ev* 31, *Whart* s 508.

So far as presumptive ... of mind of being aware or ... be evidenced either (1) by o... are ... conduct of persons indic... ites of ... tion S... tward circumstances.

Two other questions arise in this connection, namely, (1) whether a person may testify to another person's intent or state of mind in general, this involves the principle of the adequacy of the sources of knowledge; (2) whether a person's testimony to another's intent or meaning ... by reason of the Opinion Rule. The ... evidence on the first ground is based on ... directly see or hear, or feel the state of another person's state of mind, hence ... testimony is based on conjectural and therefore on inadequate data. "This argument" says *Prof. Wigmore*, is finical enough, and it proves too much, for if valid it would forbid the jury to find a verdict upon the supposed state of a person's mind. If they are required and allowed to find such a fact, it is not too much to hear such testimony from a witness who has observed the person exhibiting in his conduct the operation of his mind" *Wigmore* § 661, *see also* ... *Libel Act*, 31 Geo. ... ly stated by ... t has been ... own breast, ... argument, ... it. A man's intentions may be manifested ... known, may be sworn to with as much ... witness undertakes to swear to a thing of ... ill value is at what it is worth.' As regards the second point i e exclusion of such evidence by virtue of Opinion Rule, it must be borne in mind that in ordinary human dealings, the formation and expression of estimates as to another's mental state is constant and necessary. There is no good reason why testimony about it, based on personal observation of the c... so far as the Opinion Rule is c... and re-state to the jury ... erved to convey the impre... (vide *Frost's Trial*, 22 H... 470, *Watson's Trial*, 32 H... *Earl of Thanet's Trial*, 27 ... 963.

So apart from ... y the operation of the Opinion Rule, it is settled that where there is a question whether a person said or did something, the fact that he said or did something of the same sort on different occasion may be proved if it shows the existence on the occasion in question of any intention, knowledge, good faith, malice or other state of mind or of any state of body or bodily feeling, the existence of which is in issue or is or is deemed to be relevant to the issue, but such acts or words may not be proved merely in o... speaking was likely on the occasion in qu... *Dig Ev* Art 11. The Court can ... of the requisite state of mind or bodily ... tate is a material fact in issue or a ... an accused person immediately after the occ... showing his state of mind, but where ... me body else said to the accused, the better statement must be proved by direct oral

evidence of a person who heard is under section 60 of the Evidence Act *Kakar Singh v. Emperor* 81 Ind Cas 717

of

or
which we may infer the moving cause In point of time, conduct is closely

(2) *External facts* (prospectant) pointing forward to the probable coming into existence of the quality, for example, the victim's gold, as pointing forward to the defendant's probable desire to rob him, or the reputation of A's insolvency, as pointing

retrospectant indication, and n
sorts, namely *prior or subs*
time

alsc
(1)
to c

States of mind, knowled

...instance, where there is a question of fraud, malicious intention, or negligence *Cun Ev 120*

Intention meaning, of Motive is that
to act in a certain way Intention must
mental condition termed 'intention' is manife
action It determines the nature of an act
action It may be dependent on surrounding circumstances, or to causes beyond
the person must have a motive, though it
discover it So every sane person must have
or not, unless his action is accidental or

motive is important A man's
loaf is stolen The intention w
although the motive—to save a sta
it is difficult to conceive that the intention can be good In a great many instances motive and intention are so closely related, motive being parent of the intention, that it matters little of which we speak But still it is desirable

hd not
would
he did
do the
act which the law declares to be a crime? In the latter case the plea could generally be a good one In the former case it would always be bad It would only mean that he had formed a wrong opinion as to the legal aspect of

conduct or as to the consequences to himself that might flow from it. For instance, a man is charged with killing a person by firing a gun at him. He says that he did not intend to kill him. If he means that the gun went off by accident, this is a good defence independent of s. 80 of the Penal Code, as it shows that he never fired the gun. If he means that he fired at the man to frighten him, and did not believe the gun would carry so far, this, if a reasonable belief, would negative the criminal intention necessary under section 299 but would be no answer to a charge under s. 304A which involves no intention to injure. If he means that he fired at him mistaking him for another person whom he had no right to kill, this is no defence whatever, as it is merely a description of the offence defined by s. 301. If he means that he fired at him in his house at night, believing him to be a burglar, this would be a good defence under s. 79, as it shows that he has committed no offence. If he means that he fired at him, intending to wound but not intending to kill him, this again would be no defence, if the natural result of hitting the man would be to kill him (s. 299 ... n it is act, but did not intend that the or... ded in merely to say that he expected ... the particular instance for his con...

Theory of evidencing intent. To prove intent, as a generic notion of criminal volition or wilfulness including the various non innocent mental states accompanying different criminal acts, there is employed an entirely different ... ly from the point of view of the ... ogical process which ... ances of the same ... them all. Without formulating any accurate test, and without attempting by numerous instances to secure absolute certainty of inference, the mind applies this rough and instinc... ...element might ... ur with ... he true ... let from ... is act ... he same ... in his ... rtainty) ... hooting ... another ... explana... currence ... s the fa... possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, i. e. a deliberate discharge at A. In short, similar results do not usually occur through abnormal causes; and the recurrence of ... only with ... fa th ... hough ... nying ... ind of ... him a ... *gmore* ... *is*, L. ... en the ... only fact of the prisoner having done the thing charged is proved, and ... remaining question is whether at the time he did it he had a guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar ... acting under a mistake ... istake, or may ... so oftener ... der a mistake ... he was not ... on the last.'

S. 1

It will be seen that the peculiar feature of this process of proof is that the act itself is assumed

on any feature of common purpose or general scheme as a necessary requirement for the other acts evidentially used It is not here neces

all the ac e act in qu stior t of a scheme was done with

Intention mens rea criminal knowledge etc ... and intention ... ey together ... The doc- ... nated with *Lord Coke,* who enunciated the maxim *actus non facit reum nisi mens sit rea* (The act itself does not make a man guilty, unless his intention were so or the intent and the act must both concur to constitute the crime) *Donough Ev* 101. When the maxim originated criminal law practically dealt with common law offences, none of which were defined The law gave them certain names, such as treason, murder, burglary, larceny or rape, and left any person who was interested in the matters to find out for himself what these terms meant To do this he had to resort to the explanations of text-writers and the decisions of judges There he found that the crime consisted, not merely in doing a particular act ... but in doing the act ... led mental state was ... one was a criminal

in each case the accused had the particular *mens rea* which proved him to be a criminal Under the Indian Penal Code such a maxim is wholly out of place Every offence is defined, and the definition states not only what the accused must have done, but the state of mind with regard to the act when he was doing it It must have been done, knowingly, voluntarily, fraudulently, dishonestly, or the like. And when it is stated that the act must be done with a particular knowledge or intention, the definition goes on to state what he must have known, ... *Law* §§ 8, 9 The rule is thus ... 1895) 1 Q B 918 "There ... a knowledge of the wrong- ... every offence; but that pre- ... ords of the Statue creating ... h it deals, and both must be considered"

Intention—Method of proving The criminal law merely defines the crimi- ... of criminal intent ... and the like; its

knowledge, or of design has a bearing ... or design enter by the criminal law as ... other words, there is no special evidenc ... e, or design ... then whatever evidence ... but no new or pecu- ... tore § 242 In illustra- ... B by publishing an imputation intended to ... fact of previous publications by A respecting ... A towards B, is relevant, as proving A's

4 criminal intention to harm B's reputation by the particular publication in question. Here previous ill feeling shows motive of the publication. See also illustration (j). So also where the charge is of breaking and entering into a house with intent to steal obviously "intent" there signifies "design" or "plan" and whatever would otherwise be receivable to show design would also be here receivable—in particular the conduct throwing light on the design of the person's entrance. This is further illustrated by illustration (i). So on a charge of uttering counterfeit note knowing them to be spurious knowledge is an ingredient of the criminal intent and whatever evidence would be otherwise suitable to show knowledge would [illegible]
separ[illegible]
and [illegible]
proof [illegible] more of these as ingredient it forms no separate title of proof for each of the ingredients is to be proved in the way proper to itself. *Wigmore* § 212. There [illegible]
which is distinct from any of those above [illegible]
different evidence. This is the element of [illegible]
negative of inadvertence, accident. (*Vide Section 15*). The accused in a case of forgery and conspiracy had previously given evidence in a Court as to the genuineness of the document. *Held* that though the statement could not be [illegible] value [illegible]

Ali v *Emperor*, A I R 1929 Cal 559

Intention—Presumption from act. Every person is presumed to intend the natural and ordinary consequences of his act. If the tendency of the publication was injurious to the plaintiff the law will assume that the defendant by publishing it intended to produce the injury which it was calculated to effect. *Haire* v *Wilson* 9 B & C 643. So it often occurs in human experience that the mere fact that a particular act has been done affords the best evidence of the [illegible] eak and enter a [illegible] umption from his [illegible] uishment of the [illegible] was to be found [illegible] which money or [illegible] strong evidence [illegible] *tler* 69 Ia 18= [illegible] *ng C J* expressed [illegible] tention is to be gathered from his acts. A man must be held to have intended the natural and reasonable consequences of his act. That is one of the fundamental principles [illegible] e. Where a man does an [illegible] consequences, you are [illegible] *Donough Cr Ev* 105 [illegible] *mming J* in *Harrat G* [illegible] the same case *Mukherji J* [illegible] ly the rule of English [illegible] ences

law that a man must be presumed to [illegible] of his act to the Indian criminal la[illegible] Penal C[illegible]

repeti[illegible] fy the logical demand. Yet in order to satisfy this demand, it is at least necessary that prior acts should be similar. Since it is the improbability of a like result being repeated by mere chance that carries probative weight the essence of this proba[illegible] erroneous [illegible] a bill [illegible] ause [illegible] occur [illegible] own favour in the same year and in the same book of accounts go to exclude the explanation of casual error, and leave deliberate intent as the more probable explanation. In short, there must be a similarity in the various instances in

order to give them probative value,—as indeed the general logical canon requires

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offenc

It is hopeless to attempt

or too much depends on

inciple *Wigmore* § 302

ove intent the strength of the

on a given person's connec-

ssible to negative accident

or inadvertence, and to infer deliberate human intent, without forming any

Thus, if A's cellar window is found

morning after a high wind, he may

force of the wind blew the glass in; but

again finds a window broken in the

vailed the night before, he gives up the

lenation, and concludes that a

cause of the breakage, although

of the doer It is thus clear

the like—may be negatived by

anonymous instances of the previous occurrence of the same or a similar thing After assuming or proving the accused's connection with the deed charged, then, to negative innocent intent, resort is had to the anonymous instances; and they may have equal force for that purpose, whether they are connected with the defendant or not This mode of proof is not infrequently resorted to The only limitation upon this mode of proof is that the defendant's doing of the act in issue must be shown by other evidence at some stage of the trial, and the anonymous instances should not be received until the trial Court is satisfied with the amount of evidence introduced or pledged for showing that connection *Wigmore* § 303

Theory of Evidencing Design or System When the very doing of the act charged, is still to be proved, one of the evidential facts receivable is the person's design or plan to do it This in turn may be evidenced by conduct of sundry sorts as well as by d

conduct offered consists merely in

that something more is required

evidencing intent The object h

intent at the time of the act charged, but to prove a pre-existing design, system, plan, or scheme, directed forwards to the doing of that act In the former

the present state of mind at

features that the various acts are naturally to be explained as caused by

Thus, where the

alone is in issue,

ll tend to negative

ed—as, where the

id the object is to

plan of working off a quantity of counter-

in this instance, the fact of two previous

quate significance In *Balke* v

4. *Assurance Co* L R 4 C P D 91, 106 *Lindley M R* said; "I agree, that in order to prove that A has committed a fraud on B it is neither sufficient nor even relevant to prove that A committed fraud upon C D and E Stopping there, I admit that proposition But let it be shown that the fraud on B is one of a class of other transactions having *common features*, then I disagree altogether with that proposition The answer to the objection that evidence of *frauds on other persons cannot be admitted* is that this transaction is one of a class that there are features in common, the features in common being a false

[illegible]

... cases the act charged is assumed as done and the mind asks only for something that will negative innocent intent, and the mere prior occurrence of an act similar in its gross features—i e the same doer, and the same sort of act but not necessarily the same mode of acting nor the same sufferer—may suffice for that purpose But when the very act is the object of proof, and is desired to be inferred [illegible] features that will suggest [illegible] grade of similarit[illegible] occasional error in [illegible] limitations where o[illegible] are to be observed in the use of this class of evidence of design (1) Anonymous acts are not available, as they are for evidencing intent, for the whole *purpose of the evidence is to fix a design upon the accused*, as making it likely that he carried it out and thus that it was he who did the act charged. (2) The object being to argue to the act charged from a design or plan to do it the prior acts are received to show that system, since, however, it may require a number of acts and circumstances to furnish the desired mass of conduct illustrating this design or system, and since the production of only parts or fragments of it would in effect violate the principle and remain in evidence merely as affecting the accused's character the trial Court must pass upon the offer beforehand, to see whether if offered in its entirety it satisfies the proper test and is sufficient to go to the jury, and must, if the offer is sanctioned, require an assurance that it will be forthcoming in its entirety *Wigmore* § 304

[illegible] of being aware The not [illegible] precisely identical, but the [illegible] so far as concerns the modes of evidencing these mental states That feature is most nearly expressed by the term *consciousness*, i e presence in the mind of an impression as to a given fact Thus a person's knowledge of a city's streets may be inferred from his conduct in finding his way through them unerringly; his consciousness of guilt may be inferred from his conduct in fleeing from arrest; his belief in a [illegible] in trust- [illegible] usually asso- [illegible], the term [illegible] on present or future action, consciousness when thought of as bearing on past action, and knowledge when thought of in connection with the reality of external objects *Wigmore* § 300

External circumstances as evidencing knowledge, belief, or consciousness There are, in a broad analysis four kinds of circumstances (events or *things*) which may point forward to the probability that a given person received a given mental impression (i e obtained knowledge, formed a belief, or was made conscious);

(1) [illegible] the like, S.
(2) [illegible]
(3) [illegible] probably to an express communication,

(4) The intrinsic quality of the occurrence, as leading either to actual perception by his senses, or to express communication

Throughout all these four modes there run two considerations, affecting some modes more strongly than others. (a) the probability that the person received an impression of any fact at all; and (b) the probability that from the particular occurrence he would gain an impression as to the specific fact in question Doubt may arise upon either of these points and the various modes above are stronger or weaker in one or the other of these considerations The four modes may now be examined more in detail

(1) *Direct exposure of the fact to the senses* Here there is seldom any doubt as to the element (b) above the question usually is whether the fact in question [illegible] all [illegible] was [illegible] is that A read it But actual possession by A is not necessary, the posting of a placard in a street through which A habitually passes is some evidence that A ultimately came to see and understand its contents Occasionally the element [illegible] A is charged with selling [illegible] indicating A's knowledge of B's [illegible] brought before A, and the [illegible] informed him as to the further specific fact, namely, B's age

(2) *Express communication* Little difficulty can arise here There may be a question as to whether the communication came from a source which the person was fairly bound to consider authentic, but this would be a question of [illegible] the [illegible] nica- [illegible]; but [illegible] bative [illegible] that [illegible] linary

[illegible] depends on the situation

[illegible] s here combine the [illegible] the elements (a) and

charge of the apparatus, not only is the probability involved, but also the pr[illegible] revealed to him specifically [illegible] of violence by the deceased, in order to have any value to show the slayer's [illegible]

[illegible] of the act [illegible] act may be [illegible] for certain [illegible] ssession of [illegible] fences, such [illegible] her similar [illegible] of proving [illegible], 2 C. & K

307, *Maule J.* said "If a person were charged with having wilfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was because he had ac ... In R v Cooper 3 Cox Cr 517, ... with the intent of ... by such means was offered ... to have stated on other occasions that he had obtained money by the same means that are stated to have been used in this case, is it not a fair inference to make to the jury that his object was to obtain money here?" *Sarjent Ballantine*, for the accused said in reply ... obtain money at this particul

... s intention was on the second occasion, ... proof of *knowledge and that of intention*" whether on this occasion he did an act with the *object One step in the proof* would be to show that a certain result would follow; and if it can be proved out of his own mouth that he was aware that such a result would be produced, it is one ingredient in the necessary proof that he contemplated it ... was that I attempted to procure abortion, the same or without it, if it could be before and that he knew that evidence against him *Or if*, had been used by the prisoner ... le to show that *he* knew the

Intention and Drunkenness Involuntary drunkenness, by operation of s 85 of the Penal Code, places a man exactly *in the same* position as if his aberration of intellect arose from any of the usual forms of unsoundness of mind ... requires it to be ... would have ... de, *Mayne's* ... his address ... intends the ... observe that ... it were so ... drink is the occasion of a large proportion of the crime which is committed but, although ... expense for crime, yet when the crime is such ... of its constituent elements ... considering whether he formed

... l Code drunkenness if it is volu... unkenness does not, of course, palliate any ... accounts as throwing light on the ques... n *R* v *Ram Sahai*, (1864) W R Gap No 24 This section was in accordance with the English law as obtained at that time In *R* v *Monkhouse*, 4 Cox C C 55, *Coleridge J* said: "Drunkenness is ordinarily neither a defence nor excuse for a crime, and where it is available ... to prove it, and it is not ... ible, unless the *intoxication* ... from committing the act ... *forming any specific inten*... *son B*, *R* v *Thomas*, *C*

... the law assumes a particular ... cannot be ... say ... that ... ther ... his

S.

mind, he would not be allowed to plead that through intoxication he imagined that his life was in danger. But where it is incumbent on the prosecution to ... the circumstances ... for instance, if a ... it to be such, the ... necessarily to be assumed, though it might be inferred, from the mere fact of passing the coin Suppose the fact to be established that the man had several good rupees in his ... would have to be made ... that he had the means ... be clearly admissible to show that he was in a hurry ... the coin, and I can see no reason ... be admissible for the purpose ... about just as much as drunkenness ...

In England recently the liability of a person for voluntary intoxications has ... Till ... doctr ... self ... rend ... p 897; see also *R* v *Davies*, 14 Cox Cr. C 563 In *R* v *Meade*, (1909) 1 K B 395=78 L J K B 476, the Court said "It is not expedient to confer upon voluntary drunkenness a wider immunity than the partial immunity it has enjoyed since 1819. The presumption that every one intends the natural consequences of his acts, may be rebutted *in the case of a man who is drunk* by showing his mind to have been so affected by the drink that he was incapable of knowing ... proved, the presumpt... rebutted The languag... rule, and it did not ... murder to man slaught... or a drunken ... 1909 cited in *Roscoe* ... drunk ... Nothing ... *R* ... *Beard*, ... to a criminal charge ... the offence charged, ... that the defendant ... city, though it may establish a more ready tendency to some violent passion (than if defendant were sober), does not rebut the presumption of the existence of an intent to produce the natural consequences of his acts" *Roscoe, Cr Ev 1152*

Dealer with a Partnership ... The modes avail... one who has ... (1) exposure ... to see it, (2) ... as the first ...

receive evidence of the advertisement in the Gazette, but that unless it were proved that the party ... the evidence would be of little avail ... sible at all without proof that ... which such evidence was received was a case where a person ... inserted a notice in a provincial Sunday paper, and the Court held that it was admissible in evidence because it was probable that the party had seen it, since he took in the paper and ... See also *In Lane* v. *Blizard* 1 Stark

Prosecution without probable cause Where in an action for malicious prosecution or defamation, or for false arrest, the issue arises whether the prosecutor had reasonable grounds and acted in good faith, a bad reputation of a plaintiff is a circumstance bearing on this state of mind, and is admissible *Vide, Fabrigas* v *Mostyn*, 20 How St Tr 94; *Rodriguez* v *Tadmire*, 2 Esp 721, *Downing* v *Butcher*, 2 Mo & Rob 374; *Wigmore* § 258

The question is wheth ... knew that he was insolv ... bankruptcy, but bearing post mark before it, and containing refusals to lend him money, are admissible (after the fact of his insolvency has been proved independently) to show his knowledge of the matters referred to, but not the truth of the facts *Vacher* v *Cocks*, M & M 353, *Thomas* v. *Connel*, 4 M & W. 267, *Phip Ev* 68 Execution of a document will imply ... *Cooper* 20 Ch D 611; *Phip Ev* 4th Ed 127 ... ument will be implied where it is a party's duty ... 9 Ch D 329, *Phip Ev* 4th Ed 128 On a question whether a captain of a ship knew ... that it was ... tep Dig ... contents ... 306; ... 463 ... that ... he ought ... formation ... escribed ... erty Act ... efinition ... of these ... defined ... nstances of the case, upon a legal presumption, so *strong that it cannot* be allowed to be rebutted, that the knowledge must exist, though it may not have been ... *T P. Act* 2nd ... to an agent is ... l of notice is

Whatever puts a party on enquiry, amounts in law to notice, provided the ... the facts by the ...

Greenshields, 9 Moo P. C. 18; *Mancharji* v. *Kongoseoo*, 6 B H. C R 69; *Hakeem* v *Beejoy*, 22 W R 8; *Jugul Kissore* v *Kartic*, 21 C 116; *Bhikhi* v *Udit*, 25 A 366; *Kondiba* v *Nana*, 34 I A 138

'o whether registration is sufficient Court mere registration does not W N 11, *Monindra* v *Troylockho*, n by *Chief Justice Sir Arthur Collins* Court in *Shan Man Mull* v *Madras* Bombay and Allahabad High Courts . *Chenoasapa*, 9 B 427, *Chintaman* v A L

has been set at rest by the decision of the P *Khedampal*, 25 C W. N 49=48 C 1 (P C) cannot in all cases be imputed from the mere fact of registration of a document Whether registration is or is not notice in itself depends upon the facts and circumstances of each case, upon the decree of care and caution which an ordinarily prudent man would necessarily take for the protection of his own interest by search into the registers kept under the Registration Act *Ibid*, but now see Act XX of 1929 s 4

Knowledge— is obviously impossible to speak s that which the principles of testim it is, and that by the ows. ctly l his re in strictness concerned *Wigmore* § 650

Good faith 1897) a thing shall be deemed done honestly, whether it is dor acts apparently collateral may be proved, if they show good faith or prudence or the knowledge or information on which a person has acted when such fact is in issue These instances occur most frequently in cases of assignments for the benefit of creditors, the good faith of the holder of a bill or note, and of vendors and solvency e the *Free-* nce, tent The illustration (*i*) is based on the case of *Sheen* v *Bumpstead*, 2 H. & C. 193=32 L J Ex 271 In that case which was an action brought against the defendant for false representation as to the trustworthiness of W, the plaintiff as part of the representation had

the state of mind of the defendant at the time he made the representation A plaintiff may ive evidence a however, prove ose the plaintiff was insolvent, r and obvious remark to the jury that the defendant must have known what was the common after the plaintiff

is not that strong evidence—morally at least—from which the jury may infer that what was the common opinion of trade
shared by the defendant and that in making
faith" *Norl Ev* 136, *Woodroffe Ev* 193
examples of good faith Illustration (*g*) is based on the case of
Chartier, 1 Com B 13 In that case *Maule J* observed 'The evidence was material and was properly admitted It intended to show that the defendant was not seeking to evade payments of goods ordered for his benefit but that he had actually paid the person with whom alone he had contracted It showed that the defendant conducted himself like a party who was dealing with C as a principal and not as an
ments for the benefit of
circumstances surrounding
to support it is then a vital part of the proof to rebut the presumption of fraud *Deus* v *Cornish*, 20 Ark 332 Illustration (*h*) is based on the leading case *R* v *Thurborn* 1 Den Cr C R 387 In that case *Parke B* said "The rule of law on this subject seems to be that if a man finds goods that have been actually lost or are reasonably supposed by law to have been lost and appropriates them with intent to take the entire dominion over them really believing when he takes them that the owner cannot be found, it is not larceny But if he takes them with the like intent though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny In
d rules questions of
ed whether the person
l by evidence of his
previous acquaintance with the ownership of the particular chattel, the place where it is found
would
be apparent, in other
presumed that the
do, at the time of taking
conclude that he took it, —
The mere taking it up to

eor believed
n
e deceased
owing that
he had reasonable ground to fear violence and to show that he acted in self defence *R* v *Hopkins* 10 Cox Cr 229 In *Allison* v *United States*, 160 U S 203 *Chief Justice Fuller* said 'Here the threats were recent and were communicated, and were admissible in evidence as relevant to the question whether defendant had reasonable cause to apprehend an attack fatal to life or fraught with great bodily injury, and hence was justified in acting on a hostile demonstration and one of much less pronounced character than if such threats had not preceded it. They were relevant because indicating cause of apprehension of danger and reason for promptness to repel attack, but they could not
prosecution as
son threatened,
with an actual
the absence of
inference was that these
sistent inference could not
Long C J in *Thomason*
v *Territory* 4 N M 150 a New Mexico case where he said 'If there is even slight evidence to indicate that the act of killing was done under a present reasonable apprehension to himself of great bodily harm, prior threats should not be excluded ' Evidence of communicated threats is intended to shed light upon the mental attitude of the prisoner toward the deceased when homicide
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he believed at a certain

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time is worth very little without some kind of confirmation from external conditions *Derry v Peek* 14 App Cas 337 In each case good faith as defined by the Indian Penal Code should be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question *Bhawoo v Mulji* 12 B 377 (393), *Emperor v Abdul*, 31 B 293 (298), *Arfan Ali v Emperor* 41 C 66, *Davey v Corey* (1901) A C 477

In a case where an accused is charged with murder, he can assert that he has committed the crime in self defence In such a case the state of his mind at the time of the killing becomes a material fact An important element in determining his justification is his belief—in an impending attack by the deceased So reasonable fear of such an attack repels the conclusion of malice And the character of the deceased for violence has much to do in determining the reasonableness or unre

Negligence whether proved by habit Negligence is in one aspect the not doing of a particular act but in another and more correct aspect it is the doing of one act in a manner which amounts to negligence in that some other ac
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engineer and fireman, had some times passed the crossing during the preceding year without those precautions observed It would seem to be axiomatic that a man is likely to do or not to do a thing, or to do it or not to do it in a particular way, as he is in the habit of doing or not doing it But this must be understood of acts which are done or omitted to be done without any particular intent or purpose to injure any one, it ca
intentionally
object in
purpose
any intention whatever and through mere
give these signals on that occasion we think the enquiry was properly ma
to what — had not
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If negligence can be inferred from repair of machine high way or the like aft
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4 of the injured person To improve the
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again, by fencing or covering, or at any rate making safe the particular thing from which it arose That, however, is no evidence of, and I protest against it being put forward as evidence of negligence A place may be left for a hundred years unfenced, when at last some one falls down it, the owner like a sensible and humane man, then puts up a fence; and upon this the argument is that he has been guilty of negligence, and shows that he thought the fence was necessary because he put it up. This is both unfair and unjust It is making the good feeling and right principle of a man evidence against him"

Ill-will, malice, etc The term ill-will as used in the Act, is not the exact equivalent of the term
the criminal intention
In a case of defama
the libel If for any reason this presumption is rebutted, it becomes necessary
for the person ... to show actual malice In *Heldutch* v *McIlwaine*
said "It is for the defendant to prove
f the defendant does so the burden of
the plaintiff; but unless the defendant
tual malice' By the ex
rely the criminal intention
but a more positive mental
technical

nsaction is material

Roscoe Ev. 880, see also *R* v *Mason*, 8 Cr A R 121 (1912)
riminal acts leading up to the
one
nd of the accused is admissible
Trien
commit the crime for which
a person is upon trial are constantly received as evidence against him, as
other he has
intention
he has
ch threats
wards the
he emotion
itself is evidential as an independent circumstance to show the act So also
where an emotion of hostility at a specific time is shown, the existence in the
same person
admissible
What, that I
stances
of each case,
Court
The
defama
tory
ways,
(1) a
ound
for
at the
time of uttering the defamation charged, other utterances of the defendant may

be offered, and the question arises whether and on what terms they are admissible The probative value of other utterances as showing malice at the time charged rests on a double argument (A) that the other utterance indicates malice at the time of utterance, and (B) that malice then indicates malice at the time charged Wigmore §§ 105, 396 401 In *Barrett* v *Long*, 3 H L C 395 (414) *Parke B* said "We are all of opinion that under such a plea the publication of previous libel on the plaintiff by the defendant is admissible evidence to show that the defendant wrote the libel in question with actual malice against the plaintiff A long practice of libelling the plaintiff may show in the most satisfactory manner that ...
the particular
inadvertence,
practice, the m
more or less
that in questio
The length o
may of course
the admiss
clear
of oth
him' ... Charlton v Barret
Peake N P 22 ...

v, Westby 6 C
slander is only ac
Davies, 7 C &
rejected on the gr
words, and yet th
founded upon th
Lemaitre, 5 M &
"This ap
damages,
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of mot ...

was rejected

Good will The term 'good will' is peculiar to the Act, and there is no equivalent for it in the English law, nor is used at all, except in a different sense The answer to a charge of 'express malice' would probably be the absence of express malice or some sort of defence that implied it. This moreover, seems to be the meaning of the last clause of the illustration *Donough Ev* 123

State of body or bodily feeling etc This section also provides for the admission of evidence regarding the state of body when that is in issue or relevant It would be in issue in all crimes of violence, or 'offences affecting the human body,' within the meaning of the Penal Code It would be relevant in all questions of insanity, legitimacy, life insurance, inheritance, and identity of persons *Donough Cir Ev 127* Illustration (*k*) shows how persons' expressions of feeling towards each other at or about any particular time may be used to show what those feelings were and (*l*) and (*m*) show the same thing in regard to states of body *Cun Ev 131* So whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also *original evidence* If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence And the question whether they are real or feigned, is for the jury to determine *Greenl Ev* § 162 (a) cited in *Taylor* § 580 Thus the representations by a sick person of the nature and effects of malady under which he is labouring are receivable as original evidence whether they may be made to the medical attendant, or to any other person, though the former are naturally entitled to greater weight than the latter, in as much as a physician is far more capable than a man unacquainted with the symptoms of diseases, of forming a correct judgment respecting the accuracy of the statement *Aveson* v *Kinnaird*, 6 East 188 *R* v *Blandey* 18 How St Tr 1135, *Grey* v *Young* 4 M C 31; *Gilchrist* v *Bale* 8 Watts, 357 cited in *Taylor* § 580 Illustration (*m*) is based on *Aveson* v *Kinnaird*, 6 East 188 So also answers of patients to enquiries made by medical men and others are evidence of their state of health provided they are confined to contemporaneous symptoms and are not in the nature of a narrative as to how, or by whom such symptoms were caused *Gardner Peerage Case* Le March, 169, *R* v *Nicholas*, 2 C & K 246, *R* v *Gloster* 16 Cox 471, *R* v *Gutridge*, 9 C & P 471 The reason for the admission of such evidence is thus given by *Mellish L J* "Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions there you may prove what he said, because that is the only means by which you can find out what his intentions were" *Sugden* v *St Leonards* L R 1 P D 154 This use of such statement is often spoken of as admissible under the *res gestae* notion or as 'original' evidence, i e not an exception to the Hearsay Rule But this seems clearly unsound There is one sort of evidence of mental condition which is in truth merely indirect or circumstantial, and therefore not subject to the Hearsay Rule, e g where the sharpening of a knife on the morning before a homicide is taken as evidence of a design to kill, or where the repeated infliction of blows indicates malice or where running away is taken as indicating fear But where a distinct assertion, in the form of words, predicating a mental state is offered,—as "I have a pain in my side" or "I have the intention of going out of town,' or "I do this for such and such a reason,'—this language is no less an assertion of the existence of a fact than is an assertion of any other sort of fact; in the neat phrase of *Bowen L J* 'The state of a man's mind is as much a fact as the state of digestion," and therefore such assertions, being taken on the credit of the declarant as testimonial evidence of the fact asserted, are met by the Hearsay Rule To admit them, then is to make an exception to the Hearsay Rule The different kinds of facts that may be the subject of such assertions may be roughly gouped as follows· (1) assertions of pain, or other physical condition; (2) assertions of plan, design, intention, (3) assertions of feeling, emotion, motive, reason (4) sundry assertions by a testator *Greenl Ev* § 162 *a*, *Wigmore* §§ 1714 to 1740 It is usually said that such declarations are receivable though they form the only proof of the given condition (*Tay* § 500), but this has been doubted and it has been considered to be the *manifested condition* and not the *sickness* itself which is the true *res gestae* to be explained (*Thayer*, 15 *Ir L T*. 141—143) *Phip Ev* 3rd *Ed* p 51. *Mr. Cunningham* thinks that statements in illustrations

as to the circumstances in which he came to be poisoned should be admissible

Such Statements are exceptions to Hearsay Rule It has already been stated that such st[illegible] to the Hearsay Rule. I[illegible] 32) presents itself in a [illegible] on the consideration that, though the person's testimony on the stand may still be both actually and conveniently practicable yet the probability of their receiving from him testimony which shall be in value equal or superior to certain hearsay statements is small, thus, while there is hardly a necessity in the strict sense, ther[illegible] Applied [illegible] there is a [illegible] own cont[illegible] possible to obtain by circumstantial evidence (chiefly of conduct) some knowledge of a human being's internal state of pain, emotion motive, design, and the like; but in directness, amount, and value, this source of evidence must usually be decidedly inferior to the person's own contemporary assertions of those conditions It might be argued, however that the person's own statements on the stand would amply satisfy the need for his testimonial evidence The answer is that statements of this sort on the stand where there is ample opportunity for deliberate misr[illegible] or testing it by [illegible] at times when [illegible] of trustworthin[illegible] of Court and [illegible] is a fair necessi[illegible] of evidence eit[illegible] death, insanity [illegible] dent; and this has not been questioned *Wigmore* § 1714; see also section 21 clause (2)

In *Aveson* v *Kinnaird*, 6 East, 195, which appears as illustration (*m*) of section 14 *Lord Ellenborough* in admitting such statements observed "A witness has been received to relate that which has always been received from patients to explain,—her own account of the cause of her being in bed at an unreasonable hour with the appearance of being ill What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing The declaration was upon the subject of her own health at the, time which is a fact of which her own declaration is evidence, and that too made unwares before she could contrive any answer for her own advantage and that of her husband, and therefore falling within the principle of the case in *Skinner* to which I have alluded' (The case referred to by him was *Thompson* v *Trevanion*, Skin 402) So "the evidence is admitted on the presumption arising from experience, that when a man does an act his contemporary declarations [illegible] unless there be some reason for misrepresenting [illegible] *Carter*, 8 H N. 42 "Wherever the bodily [illegible] are material to be proved, the usual e[illegible] [illegible]inal and competent evidence These expressions are the natural reflexes of what it might be im[illegible] [illegible]xplanatory or cor[illegible] [illegible]istration of justice [illegible] upon which the [illegible]ast. 'Anything in nature of narration must be excluded" *Per Swayne J* in *Insurance Co* *Mosley*, 8 Wall. 397 So "such declarations made with no apparent mot[illegible]

misstatement, may be better evidence of the maker's state of mind at the time than the subsequent testimony for the same purpose" *Per Holmes J* in *Elmer* v *Fessenden*, 151 Mass 359

State of body In *Annesley* v *Anglesea*, 17 St Tr. 1139, where the question was whether the claimant was the
vast amount of evidence was gone
condition of *Lady Altham* during
, shortly before the claimant's birth in a
belief to that effect
cession, a question
of legitimacy
d to be the heir to a
dukedom and
son of *Lady Jane*
Douglas and
the objector
to the bodily
points consu
situation of *l*
These were
Slaunton, Not Tr, where four prisoners were charged with conspiring to cause the death of a woman of weak intellect by a slow process evidence was admitted regarding her bodily state at various intervals down to the date of her death "The object of his evidence" said *Hawkins J* "is to show that those who were about her and saw her from week to
condition to which she was being re
The
physical strength of a person may be
was
peculiarly capable or peculiarly incapable of doing the act in question. *Goodtitle* v *Braham*, 4 J R 498

Owner of vicious animals "Whoever" says *Lord Denman* "keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by t
ement of negligence

Jhonson, 36 L J. C P
(the knowledge of the
f the animal is relevant,
'36 Particular acts of
viciousness are also relevant, for the same reason Vide *illustration* (c) So
l to show the owner's knowledge
P 3, see also *Thomas* v *Morgan*,
Hudson v. *Robert*, 6 Ex 697,

Receiving stolen property—Proof of knowledge The act of possession is in this class of cases (except rarely) concealed, and the question is as to the
possession
other times
view of the
er possession be such
f the stolen character of
warned the defendant

it may be assumed that the receipt of st
likely to result in a warning, chiefly bec
up and reclaim them, but also in part because a purchase not made in
offer

in the transactions, i e that the same person comes to dispose of the
Wigmore § 324
ing stolen goods
edged, within five
l brought to the

defendant by the same person was admitted " ... guilty knowledge" See also *R.* v *Davis*, 6 C. & ... & Rob 524=1 Cox. Cr 12, illustration (*a*) ... C 264 such evidence was held inadmissible. ... judgment said · "Here the evidence merely went to show that the prisoner was in possession of other property which had been stolen in December, and not that he had received such property knowing it to be stolen. Now the mere possession of stolen property is evidence, *prima facie*, not of receiving, but of stealing; and to admit such evidence in the ... *prosecutor, in order to make out that a prison*... knowledge, what had been stolen in March, ... December previous stolen some other property from another place and belonging to other person" The result of *R.* v *Oddy*, was a legislative change of the law in 1871 by Stat 34 & 35 Vict C 112 By section 19 of that Act "evidence may be given that there was found in the possession of such person property stolen within the preceding period of twelve months for the other purpose of proving that such person knew the property for which he is indicted to be stolen" But illustration (*a*) to the section makes no reservation as to ownership or time, so that it would seem that though the stolen property belonged to other persons than the prosecutor, and without

Jones, 14 Cox Cr 3

Forgery and Counterfeiting The Chief form of offence connected with forged and other counterfeit documents or money are (1) making the false ...

the inference of knowledge from such particular transactions, it would not make the evidence inadmissible" See also *R.* v *Ball*, R & R 132; *R* v *Ball*, 1 Camp 324, *R* v *Millard*, R & R 245; *R* v *Phillips*, 1 Lew Cr C 105, *R* v *Smith*, 4 C & P 411, *R.* v *Forbes*, 7 C & P 224, *R.* v *Ball*, 7 C & P. 429 In *R.* v *Froster*, Dears Cr. C 456, to prove a guilty uttering on December, 12, an uttering of a similar piece on December 11 was shown, see also *R.* v *Goodwin*, 10 Cox Cr 534 In *R.* v *Whiley*, 2 Leach 985, *Thompson J.* observed "As to the cases put by the prisoner's counsel of uttering bad money,

... the knowledge ... 30; *Blake* v *Albion Life Assurance Society*, 4 C. P. D ... 204. In *Mason's Case*,

10 Cr App 169, which was a case of uttering a forged deed, evidence of possession of two other sets of forged deeds a fortnight and five months later was admitted See also *R.* v *Foster*, 24 L J M C 134 The possession of other forged or count ... different way to show knowledge The mere fact of ... may be relevant to show ... g a knowledge of ... tels wrapped in paper or counterfeit paper is kept ... also found, and thus the prior knowledge applies equally to the article in question *Wigmore* § 311

Illustration (d) Th ... case of *Gibson* v *Hunter* 2 H Bl 286 H drew ... n) or order and indorsed in F's name, ... ued G and in order to show that G knew this particular 1 as fictitious person, ... ered the fact of the former instance of such bills with irregularities and suspicious circumstances of such a nature that they must have made G aware of the fictitious ness of F's name, and it was admitted

Illustrations (i) and (... These two are illustrations of intention The case in (i) is that of *R* ... that of *R* v *Robinson*, 2 East P C 111 ... Nort *Ev* 137 The difference ... with intent to kill, (o) of murder outright ... admit other acts of the de ... to negative innocent intent and thus to establish the crimi ... officer and the like) No fixed ... ther act must bear, it ... ame ... ident

364 In *R* v *Voke* ... intent to kill The defence was accident. The fact of the accused ... way after the firing and concealed himself beside the road ahead and then firing again at the same person, was received to prove intent

Explanation I Illustrations (*a*), (*o*) and (*p*) refer to Explanation I The rejection of general facts rests on the ground that the collateral matter has been too remote, if, indeed, there was any connection with the *factum probandum*. *Nort. Ev* 139 The meaning of this explanation is that the state of mind to be proved must be, not merely a general tendency or disposition towards conduct of a similar description to that in question, but a condition of thought and feeling having distinct and immediate reference to the matter which is under ... The fact that a man is generally dishonest, generally malicious ... not bear with sufficient ... on or as to any particular ... ing his conduct what is ... ves and state of mind with immediate reference to that particular occasion or matter Illustrations (*a*) and (*b*) make th ... goods with guilty knowledge ... obability of his having been dishonest ... is increased ... he is found in posse ... ht on his ... ssession ... it, he was ... man, who ... stolen from ... *Ev* 122 ... in *Holling* ... Does the ... ilar act in a ... has done the same thing in the ... sion? To admit such speculation ... t danger" ... t of these illustrations, it is difficult to see why a m ... letting defective carriages for hire

should be irrelevant in an enquiry as to his negligence in this respect on any particular occasion Surely the evidence of habit would have some probative value The same view has been taken by the Bombay High Court in regard to the second illustration, cl (*o*) It has been observed that on the issue of whether A actually shot B or not the fact that he had previously shot at him would have *some probative force So too would proof of a general malignity* of disposition by evidence that 'A was in the habit of shooting at people with intent to murder them, yet this evidence is excluded, even as proof of A's intention, either as too remotely connected with the particular intention in issue, or as raising collateral questions which could not be resolved in the case' *per West J* in *Reg* v *Prabhudas*, 11 B H C R 90 at p 92

"It is presumed that if evidence of 'habit' is not admissible as a 'state of mind' under section 14, it might be admissible as conduct' under s 8 Habit after all is only previous conduct which is provided for in section 8"—*Donough Cr Ev 2nd Ed* p 133

...it of the uniformity ...een to be such a ...A, to a particular ...casion in a given

regularity of action, there can be no doubt that this fixed sequence of acts tends strongly to show the occurrence of a given instance But in the ordinary affairs of life a habit or custom seldom has such an invariable regularity Hence, it is easy to see why in a given instance something that may be loosely called habit ...ient regularity ...ice and in most ...lepend largely ...that arise in connection with such evidence, both of them, however, depending on other exclusionary rules (1) The idea of habit is sometimes difficult to distinguish from that of character—for example where negligent habit is charged, and if it is interpreted in the ... against the use of ... (2) Assuming the ... to be made by ... inference to a habi... character of a pe... probabilit... ...nadmis... sible *Pe*... difficulty ... (Dispositi...

another or more correct aspect, it is the doing of one act in a manner which amounts to negligence in that some other act is omitted which ought to have ... should not be used as ...of careful action *Joy* v ...ifficulties here seem to be ...ever be anything more than casual or occasional If it is, are we not really predicating a careless ...

well founded, and that such evidence is often of probative value and i at attended by the inconveniences of character evidence *Wigmore* § 97

... was only one explanation to the section By ... Amendment Act, 1891 (3 of 1891) these two ... the one original explanation Only slight verbal alterations were made in the original explanation and it was numbered as ' Explanation 1 The Explanation 2, is new This amendment was ... n of the Calcutta High Court in the ... 14 C 721 (F B) In that case ... whether in the trial of a person charged ... property, evidence could be given of ... empting to receive stolen property, ... The Full Bench decided on the 20th July 1887, that ...

the accused person has been previously ... but the fact that he has a bad character ... given that he has a good character in which case it becomes relevant *Explanation* —This section does not apply to cases in which the bad character of any person is in itself a fact in issue * By Act III of 1891, the said section has been amended in such a way as to render the previous conviction of an accused person irrelevant when it is sought to prove the conviction with the object merely of showing that the accused is a man of bad character and is therefore more likely to have committed the offence with which he is charged The fact that a person has been previously convicted of an offence has of itself little probative force to establish the fact that he has committed another offence and it is not expedient to admit evidence which can only prejudice the accused *Statement of Objects and Reasons of Act III of 1891* The result of this amendment of the law is that the rule as to the relevancy of a previous conviction is to be contained in section 43 of the Act The existence of the judgment convicting the accused is only relevant if the fact of the conviction is a fact in issue or is relevant under some provisions of the Act Explanation 2 has been added to section 14 so as to allow a previous conviction to be proved in order to show a guilty knowledge or intention *Statement of Objects and Reasons of Act III of 1891* As having regard to the character of the offence under s 400 I P Code, previous commissions of dacoity are relevant under s 14 of the Evidence Act so convictions previous to the time specified in the charge or to the framing of the charge ... the time ...

... section 4 (a) of the Bombay Prevention of ... the evidence that the accused was previously convicted of similar offe... *Aloomiya* 25 B ... *Jacob, J* dissenting) ... 139 the appellants were convicted, under section 401 of the Indian Penal Code of belonging to a gang of persons associated for the purpose of committing thefts The question was whether evidence of previous convictions of some of the accused of theft was admissible for the purpose of proving association for that purpose and bad character In rejecting the evidence the Court observed "It is sufficient to add in reference to the case now before us that the character of the accused was not in issue ... is not admissible ... v *Th* ... *King Em*... ent th... Court obs... a ... ciation for purpose of ... convictions whether for offence ... e find ... always been admitted, ... its and ... it would seem that of su... uld be

* In page 725 of I. C. this explanation is not given after section 54 although in the Act this explanation is given after section 14

more cogent than those for isolated thefts Such evidence must of course be weighed A single instance of theft for instance would count for little or nothing Ther
to show habit,
against the we
Empress v. *Nal*
four unreporte
such evidence".

bad character, is inadmissible under section 14 of the Evidence Act *Emperor* v *Haji Sher Mahomed*, 45 B 958 – 75 Ind Cas 67 = 25 Bom L R 214 The reason for admitting such evidence is thus given by *Faucett J*, in 46 B 958 "Such evidence clearly falls under section 1
a disposition on the part of the accu

doubt produce evidence
description to that in
question, but not of the exact description in issue A person may be a habitual surreptitious night thief, but this goes very little way towards showing that he has a disposition towards dacoity
of bad character which is excluded by
See also *Public Prosecutor* v *Boncge*
1001 = 9 Cr L J 567, *Emperor* v *Del*
Emperor v *Pachu Das*, 47 C 671,
is being tried for the offence of belonging to a gang of thieves, evidence that he was previously convicted of dacoity is relevant and admissible But if the conviction took place long before the second prosecution no weight can be attached to such evidence for the purpose of proving that the accused has a habit of committing thefts *Moti Ram* v *Emperor*, 89 Ind Cas 527 = A I R 1925 Bom
ourse that
the guilt
144 But
purpose of
affecting the punishment imposed *Queen Empress* v *Nga Ian*, (U B R 1892—1896) Vol I, 82

Seditious speeches—Intention Where certain speeches form the subject

in respect of the speech
nam v *Emperor*, 32 M 3
14 of the Evidence Act,

question is one of the intention of the accused in publishing these articles Did they intend to excite
enmity to the governmen
of certain government me

or it may be proved
nection with what such
on another or other

conspiracy as to a diary kept by her, that she kept it to show to her husband was admitted to evidence her feelings towards her husband. But in *Walton* v. *Webster*, 7 C. & P. 198, letters by a wife, offered to show her happiness with her husband, —

Stat
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do not prove it, but wherever it is material to prove the state of a person's mind,
you may prove
find out what
Tr. 442, *Wilde J.*

in itself a material fact of which such statements are the fair exponents But where those declarations are vouched to prove the fact that he had declared and embodied those intentions in a certain will they have no other title to confidence than the statements of any other person who had seen the will and could speak to its contents In this aspect they become mere hearsay" See also *Keen* v *Keen*, L R 3 P & D 107; *Wigmore* §§ 1718 1722, 1729, 1730, 1735, 1736

ably, defeated We do not mean to say that fraud can be established by any less proof, or by any different kind of proof from what is required to establish any other disputed questions of fact, or that circumstances of mere suspicion which lead to no certain result should be taken as sufficient proof of fraud, or

some bearing in proving fraudulent intention by negativing the probability of
good are made
under by the
ordina time with
good f ential to
produc se which,
involv re to b
consid
transfers are made, (3)
On the whole, while se
may vary in each cas,

here no fixed rule can be laid down *Vide Wigmore* § 333. The fraudulent intent of the transferor may be indicated by other circumstances not of the above sort,—such as the debtor's remaining in possession after the mortgage or sale the pendency of suits at the time of the sale and other circumstances suggesting their own significance and not raising any difficulty of principle *Wigmore* § 33

Illustrative Cases—Admissible Evidence A writing made some time after the committing of an offence under section 124 I P Code is admissible in evidence under s 14 of the Evidence Act *Emperor* v *Phillip*, 30 Bom L R 315=108 Ind Cas 30=29 Cr L J 320=A I R 1928 Bom 78 Former judgment more than 25 years old and convicting accused of dacoity is admissible in a case under s 401 I P Code for showing criminal tendency to commit theft and not habit of committing theft *Motiram* v *Emperor*, 89 Ind Cas 729= A I R 1925 Bom 193, see also *Bonai* v *Emperor*, 38 C 408=15 C W N 461, *Emperor* v *Naba Kumar* 1 C W N 146; *Emperor* v *Haji Sher Mahomed* 25 Bom L R 214=75 Ind Cas 67 In a trial for an offence under ss 235 and 243 I P Code of being in possession of counterfeit coins and instruments and materials for counterfeiting coin, evidence of the possession by the accused of counterfeit coins and instruments for their manufacture at his house in another district is admissible *Misri Gossain* v *Emperor*, 61 Ind Cas 647=22 Cr L J 407 On a charge against the accused of cheating by falsely representing that they were the servants of a wealthy lady and were entrusted to act on ... in the arrangements for loans, to be made to ... she possessed, and thereby ... in connect... transactu... complain... prove the ... A 273 ... ...ution to show that the acts charged a... ... of a series of similar acts committed by him, or ... ...t is concerned at or about the time in question Evidence of such other acts, whether previous or subsequent to the frauds charged against the accused is relevant for the purpose of showing whether or not the intention of the accused was honest or fraudulent *Girdhari* v *Emperor* 269 P L R 1914 In cases where the other evidence has established association for purposes of habitually committing theft, evidence of previous convictions whether for offences against property or for bad livelihood is admissible, not as evidence of character but as evidence of habit and of such evidence, convictions for bad livelihood would be more cogent than those for isolated thefts *Bonai* v *Emperor*, 9 Ind Cas 455=15 C W N 461=38 C 408

Illustrative Cases—Inadmissible Evidence Where the accused is charged under s 409, Penal Code, for embezzling three specific sums *Held*, that evidence of collateral offences in respect of other sums was not admissible *Pritchard* v *Emperor*, A I R 1928 Lah 382 Where in a particular trial under section 420, I. P Code evidence was let in with regard to a previous act of fraud which was alleged to have been committed by the accused person on the witness who spoke to the fact that on a particular occasion he was cheated by the accused in respect of a certain sum *Held*, that the evidence is clearly inadmissible in law and it cannot be brought in with the aid of s 14 or 15 of the Evidence Act *Gokul* v *Emperor*, 29 C W N 483=86 Ind Cas 970=26 Cr L J 906, see also *R* v *Abdul Wahid* 34 A 94 In a case of murder by administering sweetmeats the facts that the accused offered sweetmeats to boys and poisoned one of them is not evidence under section 14 of the Evidence Act *Kashi Ram* v *Emperor*, 73 Ind Cas 262=6 N L J 144 In a prosecution under section 209 of the Penal Code for having knowingly made a false claim in a suit against certain persons, evidence relating to other suits brought by the accused against other persons may be admissible against the accused under sections 14 and 15 of the Evidence Act, for the purpose of showing ill will or animus of the accused, and as systematic cause of fraud or a systematic series of fraudulent claims and for the purpose of rebutting the defence that the particular suit was brought in good faith or any suggestion that it was brought under some ... ke or misapprehension But evidence relating to simil... ... other persons is not admissible against the ... instituted by the accused are part of ... ...of a conspiracy between

S.

them Evidence which goes merely to the character or disposition of the accused as a person likely to have committed the offence is generally inadmissible against

iot become inad-
e accused of other
N 491=19 Cr.
was charged with
nas in excess of
tion evidence was

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was inadm
Evidence

Cas 781=1912 M
of instances of acts of
acts of misconduct
The defendant can

justify the libel as true in substance and in fact by proving its truth, not the truth of other acts and occasions having nothing to do with the act in question, unless it is intended to show that those acts were parts of the habitual and

ojshau,
restrain
having
dence to
the rule

being that a man must be taken to have intended the reasonable and natural consequences of his own act *Uunna* v *Jauala* 35 C 31 Where in a prosecu tion under s 304 I P Code it was taken part in a similar occurrence just p rash driving of his motor car certain

Bom L R 324=A I R 1930 Bom 157

15 When there is a question whether an act was accidental or intentional, *(or done with a particular knowledge or intention), the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Facts bearing on question whether act was accidental or intentional

Illustrations

(a) A is accused of burning down his house in order to obtain money for

ach of which he
fires A received
ng to show that

It is A's duty to make entries in a book showing the amounts received by him He makes an entry showing that on a particular occasion he received less than he really did receive

The question is, whether this false entry was accidental or intentional

The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

*These words in s 15 were inserted by the Indian Evidence Act 1872 Amendment Act, 1891 (3 of 1891), s 2

(c) A is accused c
The question is,
The facts that, . . . delivered
counterfeit rupees to C, D and E are relevant, as showing that the delivery to B was not accidental

Scope of the section Section 15 of the Evidence Act is an application of the general rule laid down in section 14 *Emperor* v. *Debendra*, 36 C 573=13 C W N 973=9 C L J 610 It lays down that where there is a question whether an act was accidental or intentional *or done with a particular knowledge or intention*, the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned, is relevant It is wrong to say that this section only deals . . lent The bracketed words were added by s 2 . . st not be overlooked in construing section 15 *Emperor* v *Panchu Das* 24 C W N 501 at p 525 F B But in the same case *Mookerjee J* took a different view At page 516 he observed "There was no room for any hypothesis that the death of the woman, whoever might have caused it, was either accidental or unintentional The medical evidence makes it incontestable that the act amounted to deliberate murder No question consequently arises whether the act was accidental or intentional or was done with a particular knowledge or intention In so far as the charge of theft was concerned, there was also no question, whether the act was accidental or intentional or was done with a particular knowledge or intention" *Fletcher J* agreed with *Mookerjee J* in that case According to *Sanderson C J* also this section has no application where *there is no question of an act being accidental or intentional* So evidence of other crimes is admissible if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental *Per Lord Harschell* in *Makin* v *Att Gen of New South Wales* 75 L J K B 693=(1906) 2 K B 389, see also *R* v *Bond*, (1906) 2 K B 389, *R* v *Heesom*, 14 Cox 40, *R* v *Stephens*, 16 Cox 387, *R* v *Armstrong* (1922) 2 K B 555 In *Gunwant* v *Emperor*, 38 Ind Cas 723=13 N L R 35, which was a case under ss 467, 471, and 193 of the Indian Penal Code in respect of a receipt of Rs 4,200 discharging a debt, the complainants were allowed in the lower Court to file certain certified copies intended to prove that four different documents namely (1) a will, (2) a receipt, (3) a deed of lease, and (4) another receipt written by the accused K were suspected to be false documents and were not acted upon by Court As regards the admissibility of these documents the Court observed. "There was no question here whether the writing, attestation, or production of the receipt for Rs 4,200 was accidental or intentional Each was admittedly an intentional . . . . knowledge of the . . . ents were . . ded . . far . the . of a . bject . hed . . . . decided is whether . knowledge or in . ilar acts be let in . of the kind of . *Crown*, 12 P R . had been charged under s. 420 I P. Code, for having received from the two complainants certain sums of money on false pretences that he had been authorised to recruit unskilled . . . . . he would be able . . . hat the . . ole of . . having . . d not . . llowed

to show that in the course of this recruiting business the accused had defrauded other persons from whom he had received sums of money on false pretences of a similar kind

In general whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake or other innocent condition of mind, evidence that the defendant has
same specific kind as th
Amrita Lal v. Emperor,
systematic act mentioned here should not be confused with design or system. (Vide p 236.)

'Section 14 provides that facts showing the existence of any state of mind, such as intention or knowledge, are relevant when the existence of any such state of mind is in issue or relevant and section 15 provides specifically for allowing evidence of similar occurrence in each of which the person doing the act was concerned, whenever there is a question whether the act is done with a particular knowledge or intention' *Per Fawcett J* in *Emperor v Harjivan valji*, A I R 1926 Bom 231 = 50 B 174 = 28 Bom L R 115 This section
ement is
test to be
merely
, 30 Ind
Bond, 75

he words
show the
glish law
a nature
disposing
nature
Reg v
harge of
obtaining money on false pretences In that case *Lord Coleridge, C. J* said
...en the fact that the prisoner has done the
remaining question is, whether at the time
he quality of his act, or acted under a
ved must be admissible' This amendment
seems to have been overlooked by *Jacob J* in *Emperor v Mhmiya Hussain*, 28 B 129 = 5 Bom L R 805, where he states that this section invites consideration of the question of intention only as opposed to accident *Woodroffe's Ev* 8th Ed p 208 This case probably goes further than any other case, and the amendment which has been proposed of section 15 seems to provide sufficiently for the class of cases in which the peculiar nature of the offence makes this question the crucial test' In *Reg v Ollis* 69 L J Q B 918 *Bruce J* stated the law to be as follows "A line of cases has established the rule that when it becomes material to establish that an act charged in the indictment and proved to have been done, was intentional and not accidental, evidence is admissible of similar acts done by the same

...son (*Rex v Gray*, 4 F &
313), of false pretences
J Q B 83), of coining
te, 1 Bos & P N R 92
credit by fraud (*Rex*
as necessary to negative

prisoner at the time of the offence charged against him, and, therefore negativing accident or mistake on his part in the last occasion'

Of course, such evidence is not admissible merely for the purpose of showing that the character of the accused was such that he was a person likely to commit the acts of cheating with which he is charged That is a totally different question and the distinction between the two classes of cases is well brought out by *Channel J* in *Reg v Fisher*, 26 L T R 122: "The principle" said the learned Judge 'was perfectly clear and if attended to the difficulty disappeared That principle was that the prosecution must not prove facts was of bad character and there- But if proof of the facts went to ence charged it was admissible the accused, that it showed that he , in a charge of embezzlement mistake, evidence could be given to show other instances of the same kind, because such evidence tended to show that he was not making a mistake on the occasion charged Whenever it could be shown that the question involved was whether there was a mistake or whether there was a system evidence might be given although it proved other offence that the prisoner's actions were systematic and fraudulent

In *Reg* v *Rhodes* 68 L J Q B 83=(1899) 1 Q B 77 the prisoner was indicted for obtaining eggs by false pretences and it was proved that he had falsely represented by advertisement in newspapers that he was carrying on a *bona fide* Dairyman's business Evidence was admitted that subsequent to the transaction in question he had obtained eggs from other persons by means of similar advertisements and the Court for the consideration of Crown case Reserved held that such evidence had been properly admitted In delivering the judgment of the Court, *Lord Russel L C* observed "It seems to me quite clear that if the transactions with *Elston* and *Chambers* had taken place before that with *Boys* and at a period not too remote the evidence of *Elston* and *Chambers* would have been admissible against the prisoner Is that evidence admissible although the transactions were subsequent to the offence charged? That depends as it seems to me on the question whether or not the case put forward for the prosecution was that the prisoner was not carrying on a real business but that the business in which he was engaged was from first to last a bogus or show business If the prosecution merely alleged isolated transactions of a fraudulent character against the prisoner with no connection between them I should certainly say that evidence of transactions which took place after the offence charged was not admissible more especially if such transactions took place two months after the offence But here as I have said, the charge to be made out was that of carrying on a bogus business and on the whole, I think the evidence was admissible on the ground that it showed part of a scheme to defraud persons by

In the same case H can only be shown do not see how in any other way If the t en prior to the offence charged lear that they would have be , if they were immediately after the act complained of If they formed part of the same system of fraud I think it can make no difference The only difficulty in the case is, I think, the long interval of time that elapsed between the act charged and the other acts Very often the only *nexus* between such transactions is their proximity in point of time That however, is not the case here, and had there been no other connecting link, I should certainly have thought that the transaction two months after was at any rate too remote But when it appears that the in and that it the charge was the evidence

becomes admissible

So to come under this section it must be established that the act forms ... of the ... the ... ance

some common ... nces had its own ... nces *Per Mookerjee* ... So "whether they were evidence or not depends upon whether they were evidence of similar transactions" *Per Reading C J* in *Rex* v *Baird*, 84 L J K B 1785 To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question and not of a different ... proximate in point of time ... C W N 676 at p 692; see ... v *Rhodes*, (1899) 1 B 77 Section 15 of the Evidence Act covers both previous and subsequent similar occurrences *Raghunath* v *Emperor*, 22 C W N 494=46 Ind Cas 696=19 Cr. L J 776

In a case of cheating, it is open to the prosecution to show that the acts charged against the accused were parts of a series of similar acts committed by him or in which he was concerned, at or about the time in question *Girdhari* v *Emperor*, 26 P W R 1910 Cr; see also *Emperor* v *Debendra* 36 C 573=13 C W. N 973=9 C L J 610, but see *Gokul* v *Emperor* 29 C W N 483=29 Cr L J 906=86 Ind Cas 970 In the case of *Blake* v *Albion Life Assurance Co*, 4 L R C P D 97 at p 106 *Lord Lindley* observed "Nothing could, at first sight, seem mor... appearance of fraud; that the transaction precluded from doing ...

answer to the objection that evidence of frauds on other persons cannot be admitted is that this transaction is one of a class, that there are features in common, the features in common being the false pretence and a knowledge of ... it that ... 5 L J ... cases ... in my opinion, that the case which the prosecution seeks to prove is that the prisoner has in his mind a scheme or plan, say for obtaining money by fraud, and the other acts, of which evidence is sought to be given, when proved will show the existence of the plan, and, therefore the guilty mind of prisoner"

Evidence of the commission by the accused of previous or subsequent offences—General Principle of In *Makin* v *Att Gen of New South Wales*, 75 L J K B 693, 708, 710 712=(1906) 2 K B 389, 409, 414 417, *Lord Chancellor, Lord Herschell*, said 'It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried On the other hand, the mere fact that the evidence adduced tends to show the commission of ... issue before th... whether the ac... were designed or accidental, or to rebut a defence which would be otherwise open to the accused" In *Rex* v *Bond*, 75 L J K B 693=(1906) 2 K B 389, *Mr. Justice Darling* and *Mr Justice Bray* called attention to the fact that *Lord Herschell's* last words quoted above must have been intended to apply only to a defence which is really in issue, and that the words of the *Lord Chancellor* should be read with that limitation *Per Bankes J* in *Rex* v *Fallon* (1913) 3 K B 168=82 L J K B 1070 In *Rex* v *Bond, supra, Mr.*

secondly, where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake, and thirdly, where the prosecution seeks to prove knowledge by the prisoner of some fact In their judgments in that case it was pointed out by several of
of the Court that a single prior
not be admissible as evidence of
recent case of *Director of Public Prosecutions* v *Ball*, (No ...) ...
692, *sub nom* *Rex* v *Ball*, (1911, A C 47) the *Lord Chancellor*, in speaking ... Further
of the grounds upon ... ter) had
evidence was then ... object was
previously carnally k...
to establish that they had a guilty passion towards each other and that therefore the proper inference from their occupying the same bed room and the same bed was an inference of guilt, or—which is the same thing in another way—that the ... to fail' The ... dence suggests ... but the second ... admissible to

Evidence of death by poisoning The question is whether the administration of poison to A, by Z, his wife, in September 1848 was accidental or intentional The facts that B, C, and D (A's three sons) had the same poison ... March 1849, and April 1849, ... though Z ... rder D ... A ... ing the evidence *Pollock C B* observed I am of opinion that evidence is receivable that the death of the three sons proceeded from the same cause, namely, arsenic The tendency of such evidence is to prove, and to confirm the proof already given, that the death of the husband whether felonious or not, was occasioned by arsenic In this view of the case I think it wholly immaterial whether the deaths of the sons took place before or after the death of the husband The domestic ... receiv... four ... thing ... ring ... uling
a tendency ... 394) A C
in this case ... *Heso*
57 and has ... *Crim*
14 Cox 40, ... See also
Sess Pap 1451, *R* v *Klosowski*, 137 Cent Crim Ct Sess Pap 4.1 ... In *R* v *Roden*, 12 Cox 630 (a trial for murder of a child by suffocation in bed) In *R* v *Cotton*, 12 Cox 400 (poisoning a child) evidence was admitted of the ... the same poison The prisoner and his mother by poison The prisoner's former ... his present wife was then their servant The ... her his second marriage and died in December ... ltural purposes, and there was evidence of administration by the prisoners of articles of food in which arsenic might be contained, ... evidence
that three h... nce ...
tally poison ... he was
not suppos... mptoms
evidently ar... to prove
that the administration of the poison to the mother was wilful, evidence was ... wife, and to ... F 346, ... n which ... aracter ... *Gen* ... and agreed with ... nd F 1102 and that
R v *Winslow*, could not therefore be treated as of much importance

Cr 2111 On an indictment for murder by poison of S, evidence was admitted of ... ices, and fro ... d; and it be ... t of the pr ... was also ad ... J and L by ... *leesom* 14 Cox 40, see also *R* v *Flannagan*, 15 Cox 403, where *Brett J* took a similar view 2 Russ Cr Ev 2112 In *R* v *Armstrong* (1922) 2 K B 555 = 91 L J K B 904, *where the accused was charged with the murder of his wife by* administering arse ... person with arsenic ... ted to rebut the def ... kept by the accuse ... 1191 = 12 Cr L. J

Causing death by other means On the trial for the murder of an infant, it was proved that the prisoners had alleged that they had received only one child to nurse before, and had give ... take the child, with whose murd ... their own for the payment of £ 3 ... other infants had been received ... upon payment of sums inadequate ... also that the bodies of several inf ... to that of the infant in question in ... occupied by the prisoners On ... vant to the issue and was rightly a ... (1894) A C 57, 2 Russ Cr 2112 Appellant was charged with the murder of B M a woman with whom he lived and with whom he had gone through a form of marriage She was found drowned in her bath Evidence was admitted that ...

defendant, by his cross-examination of prosecutor, had endeavoured to show that the gun might have gone off the first time by accident

... vi- ... ies ... he ... ies ... ns ... is ... he ... l charged the ... ig does not ... of innocent ... ground for ... representa- ... l test The ... mmon sense ... er which the ... the circum- ... are equally ... is the repeti ... he prohibi ...

been made innocently, we may assume that any given one might have been innocent, but cannot concede this when we notice the recurrence.

'When the very act of making the representations is to be proved and a system or design is to be argued from, the evidence is to be restricted by the r... ous rule applicable to that purpose, i e, there must be shown a connection of features

What is to ... where the ... is wholly ... ing on a c...

F... In *Hall's case* ... *Ina* ... bewitched by ... *Sara* ... her bewitching ... the ... was true, for many people had seen h... fas... the fasting was a fraud in that h... sec... was offered covering last two weeks of ... it ... the information charging him a... therefore objected to In admitting this evidence, *Holt L C J* said "It is an evidence of his cheating since that time and that one of the information (i e not charged) but it is an evidence also to prove that his pretended fasting before was a mere deceit for he then pretended to have fasted ten weeks before he came hither, and afterwards pretends to continue fasting in the same manner, if that be proved to be a fraud, it is strongly to be inferred that this pretended fasting was so too' In *R* v *Roberts* 1 Camp 399 the charge was criminal conspir... by representing themselves as wealthy people ... by the accused to other tradesmen was admit... Q B 77 where prisoner was indicted for obtaining eggs by fraudulently pretending by repeated advertisement that he was carrying on a substantial business, it was held that evidence was rightly admitted that persons other than the prosecutor had subsequently been deceived by similar advertisements, issued by the prisoner In admitting such evidence *Lord Russell C J* said 'On the whole I think the evidence was admissible on the ground that it showed part of a scheme to defraud persons by the pretence of carrying on an honest and *bona fide* business ... The ... were therefor... repeated by the advertisement ... L ... v *Russell* ... L ... been ... company acted fraudulently in obtaining a premium from A through their agent B who had represented to A that if he would insure B would procure him a loan from the company The fact that premium had previously been obtained by the same agent and by ... and benefit of the company, ... fraudulent character of ... D 94=40 L J C P 663, *Tay* § 340 *Phip Ev* 142 Upon a trial of an indictment for obtaining money by false pretences by means of worthless cheques evidence of other and similar frauds by the prisoner given in support of an indictment for a similar fraud upon another person in respect of which the prisoner was acquitted, is relevant and admissible as illustrating a course of conduct showing an intention to defraud *Reg* v *Ollis* 69 L J Q B 918=(1900) 2 Q B ... Upon a trial of a... of fraud evidence ... charged ... system of ... *Rex* v *Wyatt*, 73 L J K B 15=(1904) 1 K B 188, see also *R* v *Walford*, 71 J P 215, *R* v *Mean*, 69 J P 27 So evidence of the same kind of practice is admissible when only separated by a short interval of time as tending to negative accident or mistake, and to show system *Rex* v *Walford*, 71 J P 215 Upon the trial of an indictment charging the prisoner with having obtained goods and credit by false pretences, and also with having obtained credit by fraud other than false pretences evidence cannot be admitted that on two previous occasions the prisoner had obtained goods from other persons on credit by false pretences in as much as it does not tend to show that he is guilty of the offences charged in the indictment *Rex* v *Fisher*, 79 L J K B 187=(1910) 1 K B 149 On a trial of an indictment for endeavouring to obtain an advance from a

pawn-broker upon a ring by the false pretence that it was a diamond ring evidence was admitted that two days before the transaction in question the prisoner had obtained an advance from a pawn broker upon a chain which he represented to be a gold chain, but which was not so, and had endeavoured to obtain from other paw

be a diamond ring, but

Francis, 43 L J M

411=30 L J M C 11,

pretences He was employed by his master to take order but not to receive moneys, and he was proved to have obtained the specific sum from B by representing that he was authorised by his master to receive it Evidence of his having, within a week afterwards, obtained another sum from another person by a similar false pretence, such obtaining not being mentioned in the indictment in any way, is not admissible for the purpose of proving the intent when he committed the acts charged in the indictment *Reg* v *Holt*, 30 L J M C 11 In *R* v *Stinson*, 12 Cox C C

an order to be given

of quality, for a book

orders of the same sort was received to show the intent

In *R* v *Saunders*, 1 Q B D 19, which was a case of false pretences by advertising to give work and requesting money by mail to pay for the preliminary instructions, the fact that a number of other persons have been induced afterwards by him in the same way to forward money on such advertisements was received to show intent In *R* v *Smith*, 20 Cox C C. 804, the charge was

The accused

Evidence of his

ent of M was

convicted on an

purchasing a

ud The fraud

evidence to show his intention By the first transaction the prisoner obtained a

sactions and we are of opinion that neither of those cases was of a similar character, and that the evidence of those two transactions was not admissible

Setting fire to b

Gray, 4 F & F 1102

in a note to this case

this case in *R* v *Stan*

doubts its authority The

fire had originated near the kitchen, where the accused stayed as servant

prosecutor's shop

evidence is not without precedent and authority, moreover, ... *Donellan* for the murder of *Sir Theodosius Broughton* by administering him some poison, evidence was given that a certain tree which hung over a deep and dangerous brook near a spot where *Sir Theodosius* was accustomed to fish had been sawn almost in two by some unknown person. This was proved to show that some one entertained a design against the life of *Sir Theodosius* for he was accustomed to stand on the tree while engaged in fishing, and the natural presumption was that whoever cut the tree did so with the design of precipitating the deceased into the water. Those facts were given in evidence on the trial of *Donellan for murdering Sir Theodosius afterwards* and were received though quite unconnected with the prisoner, in order to show that some one entertained a design on his life and that the probability was that he had not come to a natural death. Of course the accused's doing the act complained of must be proved by other evidence direct or circumstantial. See also the observation of *Telang J* in *R v Jagiram*, 16 B 414, where he expresses the view that such evidence is admissible. Here the principle recognised is that the recurrence of a similar fire may tend decidedly to negative innocent intent even though the author of the other fires is not shown, thus the prosecution having negatived innocent intent in the present fire by whomsoever set, the accused may be shown to have kindled it. On an indictment for setting fire to a rick of straw it appeared that the rick had been set on fire by the prisoner having ... had been on ... a gun in ... It was ... rick on the

previous day it ... mitting the
evidence said ... of another felony
that circumstance ... evidence is otherwise
receivable. In many cases it is an important question whether a thing was done accidentally or wilfully. It is only by the conduct of the prisoner that ... But on ... act of the ... d ... ually ... could be ... v *Regan* ... turn the ... fact was

admitted that on the same day articles were found on fire at four ... in different parts of the house.

Embezzlement Illustration (*b*) is founded on *R* v *Richardson* 2 F & F 343. On an indictment for embezzlement where the entries of sums were correct but the castings up incorrect, a series of similar errors in casting up ... both ... ferred were ... accidental ... 378, *R* v ... 514. In ... only with a view ... crime ... nother ... prisoner

but only by way ... guilty
did the act of which he was accused but innocently and without ... ed in him for the ... not with a ... t was done ... & F 79, ... n *R* op ... ibezzlement ... y perhaps

that the entry was a mistake; but the probability of such mistakes would be

greatly lessened by proof that other false entries of the same kind had been made at or about the same time by the same person "

Extortion and black-mail In *R* v *Cooper*, 3 Cox Cr 517, the prisoner was charged for feloniously accusing H C S of an assault with intent to commit an unnatural offence, with the intent to extort money *Cresswell J held* that evidence of declarations of the prisoner on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guard house, and accuse him of an unnatural crime, was admissible The evidence was not offered by way of proving simply that the prisoner had been guilty of the same crime before The question was whether on this occasion he did an act with the design of effecting a certain object One step in the proof was to shew that he would be likely to know that a certain result would follow, and if it could be proved (
result would be produced, it w
contemplated it 2 Russ C
argument as here applied, seemed somewhat forced, such knowledge being a matter of common understanding and not needing to be proved It is clear, however, that the intent argument is entirely applicable; *i e* the doing of similar acts at other times tends to negative the supposition that the demand on the occasion charged was made in good faith (for example with a genuine desire to obtain compensation for supposed injuries) This use of such evidence is generally sanctioned *Vide Barnard's Trial* 19 How St Tr 8?5, *R* v *Winkworth* 4 C & P 444, *R* v *Egerton* R & R 375, *R* v *Boyle & Merchant* (1914) 3 K B 339, but see *R* v *McDonnell*, 5 Cox Cr 153, *Wigmore* § 352, 2 Russ Cr 1168

Rape [illegible] -riety of
admitting [illegible] be some
limitation [illegible] There
[illegible] nly purpose is to
[illegible] assault on another
[illegible] general desire to
satisfy the test that is involved in this crime and no particular woman is essential for this *Wigmore* § 357 But mere liberties taken by the defendant with the [illegible] *R* v *Lloyd* 7 C & P 318
[illegible] ommit rape the evidence of
[illegible] ht and having intercourse
[illegible] *Rodley's Case* 9 Cr App
[illegible]
ten years tl
which the pri
of subsequer
sible *Wiles J* said I shall allow all the matters to be proved in order to show the real nature of the case It has repeatedly appeared to me in cases of this sort that a man by a threat of violence deters the child from complaining and thus acquires a species of influence over her by terror, which enables him to repeat the offence on subsequent occasions, and this seems to me to give a continuity to the transaction which makes such an evidence properly admissible"

Abortion In *R* v *Dale*, where an instrument or appliance is used which might be properly employed for innocent treatment of woman *Charles J* ruled
[illegible] ipted to cause
[illegible] guilty intent
[illegible] er a drug with

[illegible] uments upon
[illegible] s admitted on
another woman three months later, to procure a miscarriage It should only
facts "Such evidence should be admitted with great caution
be admitted where the prisoner has suggested that the administration of the drug
or the use of the instrument was legitimate or accidental on his part, and not
where the defence is a denial of the act itself And proof of only one other
similar case, without any special connection with the case charged in the

5. certain mysterious
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evidence is not without precedent and authority, moreover, for on the trial of *Donellan* for the murder of *Sir Theodosius Broughton* by administering him some poison, evidence was given that a certain tree which hung over a deep and dangerous brook near a spot where *Sir Theodosius* was accustomed to fish had been sawn almost in two by
show that some one entertained a
for he was accustomed to stand on the
natural presumption was that whoe
precipating the deceased into the wate
the trial of *Donellan* for murdering *Sir Theodosius* afterwards, and were received though quite unconnected with the prisoner, in order to show that some one entertained a design on his life and that the probability was that he had not come to a natural death. Of course the accused's doing the act complained of must be proved by other evidence direct or circumstantial. See also the observation of *Telang J* in *R* v *Tajiram*, 16 B 414, where he expresses the view that such evidence is admissible. Here the principle recognised is that the recurrence of a similar fire may tend decidedly to negative innocent intent even though the author of the other fires is not shown, thus, the prosecution having negatived innocent intent in the present fire by whomsoever set, the accused may be shown to have kindled it. On an indictment for setting fire to a rick of straw it appeared that the rick had been set on fire by the prisoner having fired a gun very near it. It was proposed to prove that the rick had been on [illegible] gun in
It was
on the
[illegible] the
felony

that circumstance does not render it inadmissible, if the evidence is otherwise [illegible]. In many cases it is an important question whether a thing was done both. So, where [illegible] of the prisoner that is a civil case in which the issue arises and the foregoing princi[illegible]. But on applicable. In almost everyone of the foregoing classes of cases there are instances of the application of the principles in civil litigation. The salient feature is the nature of the issue and the kind of evidence offered, not the penal or the civil form of the proceeding. *Wigmore* § 371

Copyright infringement In Copyright infringement cases the defence often is that the passage in question is taken from a common source. But the hypothesis of other sources is not available as an explanation where the same errors—either of fact or of [illegible] plaintiff's books. Accordingly the r
evidencing to a high degr
by B from A. *Spiers* v *I*
is unsatisfactory on the question whether the defendant did use the p
work [illegible] k that are contained
in the [illegible] hich the ordinary and
famili[illegible] used the plaintiff's
[illegible]
extensive copying of other passages not otherwise shown to have been copied. This argument is always open, and its use has constantly been sanctioned, there can merely be a question of its weight in a given instance. *Longman* v *Winchester*, 16 Ves Jr 269, *Lauman* v *Tegg*, 2 Russ 385, *Lewis* v *Fullarton*, 2 Beav 6, *Wigmore* § 373

ILLUSTRATIVE CASES

Illustrative cases—Admissible evidence Accused were prosecuted for misappropriation by defalcation of accounts made in 1925 and 1926, evidence was adduced by the prosecution of similar acts done by the accused before 192[illegible]. *Held* that the evidence was admissible under section 15 to rebut the probable pl[illegible]

Naka reported this matter to the municipality The accused was charged under s 77 (2) of the Bombay District Municipal Act for introducing the said goods within the Octroi limits without paying dues *Held* that the evidence that the accused had been connected with similar cases as the one under charge was admissible to show his knowledge and intention *Emperor* v *Hayinam Tahi* A I R 1926 Bom 231-50 B 171-28 Bom L R 115 The accused on the 7th June 1909 administered *dhatura* poison to A and B both of whom died from the effects thereof and on the following day administered the same poison to C and D The former got ill and recovered but the latter died *Held* that the events which occurred or were said to have occurred on the 7th and 8th of June were relevant to the case of charge of murder of D as forming incidents in series of similar transactions occurring about the same time and tending to show system and intention and to negative the idea of accident *Lala* v *Emperor* 9 Ind Cas 731=32 P L R 1911 see also *Kasiram* v *Emperor* 73 Ind Cas 262= 6 N L J 141 Where in a trial upon a charge under section 399 of the Penal Code the accused pleaded that their presence at a particular spot, armed and in compa
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the accused were parts of a series of similar acts committed by him or in which he was concerned at or about the time in question Evidence of such other acts whether previous or subsequent to the frauds charged against the accused is relevant for the purpose of showing whether or not the intention of the accused was honest or fraudulent Evidence merely to prove that the accused person's character is such that he is likely to commit the act with which he is charged is not admissible *Girdhari* v *Emperor* 26 P W R 1910 Cr -6 Ind Cas 964 In a charge against the accused of cheating by falsely representing that he was the Dewan of an estate and could procure employment for the complainant and thereby obtaining a

dishonest
9 C L J
C 402

Illustrative Cases—Inadmissible evidence Where the accused was charged under s 409 Penal Code for embezzling three specific sums *Held* that evidence of collateral offences in respect of other sums was not admissible *Pritchard* v *Emperor*, A I R 1928 Lah 382

substance and in fact by proving its truth not the truth of other acts and occasions having nothing to do with the act in question, unless it is intended to show
conduc
130
previo

but had falsely charged and got convicted some other persons as murderers *Gangaram* v *Imperator*, 62 Ind Cas 54 = 22 Bom L R 1274 = 22 Cr L J 529 Two persons A and B were tried on 21st July 1919 for the offence of murdering D a woman of the town, on the 10th December 1914 of conspiring to rob her, of theft of property from her house and for abetment of murder and theft At the trial the prosecution wanted to adduce evidence (1) of the association of the two accused, (2) of their association in cases spoken of by other women of the town in connection with the charges of theft which they made against them and generally of a series of incidents from 1914 to 1918 that they used to go about together under different names A taking B with him as his *durwan* and introducing himself as a Babu to rich prostitutes of the town and this being followed by their subsequent disappearance and discovery of loss of money and ornaments *Held* that the evidence was not admissible *Emperor* v *Panchu Das*, 24 C W N 501 (F B) In a case under s 420 of the I P Code the question of the guilt or innocence of the accused depends upon proof of actual facts and not upon the state of the accused's mind Therefore evidence as to any previous act of fraud (committed by the accused) is not admissible under any provision of the law *Gokul* v *Emperor* 29 C W N 483 = 26 Cr L J 906 = 86 Ind Cas 970 (But see *Emperor* v *Debendra* 36 C 573 = 13 C W N 923 = 9 C L J 610, and other English cases) In a trial of an accused person for giving false evidence in respect of an alleged forged document "to judge of the intention and knowledge of the scribe and attesting witness by the opinion of other Judges on other documents written and attested by these persons in suits and proceedings to which they were not parties is a use of section 15 of the Evidence Act which was never intended by the Legislature *Gunumut* v *Emperor*, 38 Ind Cas 723 = 13 N L R 35

16 When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Existence of course of business when relevant

Illustrations

(a) The question is, whether a particular letter was despatched

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place are relevant

(b) The question is, whether a particular letter reached A The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant

Principle Of the probative value of a person's habit or custom as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt Every day's experience and reasoning make it clear enough *Wigmore* § 92 Customs may, like any other facts or circumstances, be shown where their existence will increase or diminish the probabilities of an act having been done or not done, which act is the subject of contest *Per Flanlam J* in *Walker* v *Barron* 6 Minn 508, 518, (*Am*) In another American case *Sargent C J* said, 'It would seem to be axiomatic that a man is likely to do or not to do a thing or to do it or not to do it, in a particular way, according as he is in the habit of doing or not doing it' *State* v *Rail Road*, 52 N H 528, 532 *In Mathias* v *O Neal*, 94 Mo 527 = 6 S. W. 25, (*Am*) evidence of a book keeper's custom of handing over collateral notes, to the teller, as indicating that it was done in this instance was admitted The reason of such admission is thus given by *Sherwood J* It is really immaterial, under the authorities cited, whether he was able to do more than to verify his entries and prove his invariable custom These things being proven the pre[illegible] therefrom that the usual course of business [illegible] instance Every one is presumed to govern [illegible] and consequently that he acquits himself of h[illegible] ev[illegible] it is established that one act is usual [illegible] of another, the latter

being proved, the former will be presumed, for this is in accord with the experience of common life It is simply the process of ascertaining one fact

deference of

ne notion of

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action, there can be no doubt that this fixed sequence of acts tends to show the occurrence of a given instance But in the ordinary affairs of life a habit or

circumstances of each case *Wigmore* § 92

Scope of the section In commercial transactions the presumption is that the usual course of business was followed by the parties thereto *Henry* v *Bensita*, 37 Fla 609 "Where the maxim of *omnia praesumuntur rite et solemniter esse acta* (all acts are presumed to have been done rightly and regularly)

a taken place on Tuesday

sday, is strong evidence

C & B 973 So to prove

any general course of

business or office, whether

have been done there b

will be followed in a partic

public offices, e g the Post Office *Phip Ev* 102 There is no presumption that

is based on this case

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Loan Assn, 47 Pac Rep 13 (Wash) it was said "The evidence that a letter left at the *Tremont House* and addressed to B actually reached him is of the same

by post, it is *prima facie* proof, until the contrary be proved that the party to whom it is addressed received it in due course See also *Saundersons* v *Judge*, 2 H Bl 509, *Woodcock* ... *Shipley* v *Todhunter*, 7 C & P 680 (686), *Ab* ... *Lowen*, 1 Camp 175, *Plumer's case*, R & ... L Cas 351, *Household Fire* v *Grant*, 48 L J ... J K B 177, *Huston* v *Levering*, 6 Wheat 102

that it was delivered to a cler

letter, took all letters deliv

Camp 193, *Trotter* v *Mc Lean*, 13 Ch D 571; *Phip Ev.* 3rd Ed 97, *Skilbeck* v *Garbett*, 7 Q B 846, *Ward* v. *Londesborough*, 12 C B 252; *Percy Super Ch* v *Whyte*, 106 L T Jo 308 But without any proof that it was properly addressed, stamped and posted, there is no presumption of its receipt *Best* v *German Ins Co* 68 Mo (Aps) 520 (U S) So where a person refuses a registered letter or notice he cannot afterwards plead ignorance of its content *Lutf Ali* v *Pran Mohan*, 16 W R 223, *Jogendra* v *Dwarka Nath*, 15 C 681 *Girish Chandra* v *Keshore Mohan* 23 C W N 319; *Louis Dreyfus* v *Hunan Das*, 50 Ind Cas 191

A telegram properly addressed is delivered to a telegraph company The presumption is that it was received by the addressee *Oregan Steam Co* v *Ott* 100 N Y 446, *Gerding* v *Harlem* 21 N Y S 630 To prove that a certain indorsement had been made on a (lost) licence entered at the custom house it is relevant to show that the course of the office was, not to permit the entry without such licence *Butler* v *Allnut*, 1 Stark 222, *Pupson* 3rd Ed 97, *Taylor* § 183 A; *Van Omeron* v *Dowick*, 3 Camp 44, *Waddington* v *Roberts* L R 3 B 579

In an action against the acceptor of several bills of exchange which were made in November, 1850, and became due on February 5th and March 12 1851 the defence is that they were accepted by the defendant while an infant It is proved that the defendant came of age on March 11th, 1851 The presumption is that all the bills were accepted *before* he attained his majority *Roberts* v *Bethel*, 12 C B 779 The reason of this presumption is thus expressed by *Jervis C J* 'There is nothing on the face of the bill to show when it was accepted Why then is it that this evidence is sufficient? It is because it must be presumed that the bill has been accepted during its currency, and consequently before the commencement of the action, because it is the usual course of business to present bills for acceptance before the time for the payment of them has run out and within a usual time after the drawing of them I decide this case upon this broad ground, that we are to presume, unless the contrary is shown that a bill of exchange has been accepted not on the day of its date, but within a reasonable time afterwards It is not to be presumed that the acceptance took place after the maturity of the bill That view disposes of the case as to all these bills—as to five of them because they became due before the defendant attained the age of twenty one as to the sixth, because a reasonable time for its acceptance had elapsed before the defendant's majority "And *Maule J* added "Although it is not usual to accept a bill on the day on which it is drawn, it is usual to do so at some early opportunity after that day Therefore, where the drawer and acceptor are both living in the same town the presumption is that the bill is accepted shortly—within a few days—after it is drawn, it being manifestly the interest of the drawer to have a negotiable instrument made perfect as early as conveniently may be The date of the bill, therefore though not evidence of the very date of the acceptance is reasonably evidence of the acceptance having taken place within a short time after that day regard being had to the distance the bill will have to travel from the one party to the other Upon the same principle upon which that presumption rests it may be presumed in this case that the bills were accepted before they arrived at maturity ' It is alleged in a bill for relief that a certain agreement was in writing The presumption is that it was signed *Rist* v *Hobson*, 1 Sm & Stu 553

Course of business meaning of—The expression "course of business" must mean the ordinary course of a professional avocation or mercantile transactions or trade *Ningappa* v *Bhurmappa*, 23 B 63 (66) The usage in a private house, however methodical, cannot carry the same weight as the ordinary routine of office *Ibid*

Regularity in Public Office It has already been stated that the fixed method and systematic operation of the Government postal service have long been conceded to be evidence of the due delivery to the addressee of letters notices etc duly placed for that purpose in the custody of the authorities The only requisites to raise a presumption of due delivery are that the letters are duly stamped addressed and posted *Walter* v *Haynes*, Ry & M. 149, *Skilbeck* v *Garbett*, 7 Q B 846, *Percy Super Club* v *Whyte*, 106 L T Jo 308 This presumption is so universally conceded that the strength of the evidence of this kind has been even raised to a presumption (*vide* illustration (*f*) to section 114, *Mahapatlo's Case*,

10 L J Ch 39) Of course it is always open to show circumstances which would rebut that pre a requirement nt, has given ri he strength of this presumption is so great that provisions have been made in certain Statutes for the serv ... Indian which expor ouch, 2 Camp 44 *Taylor* § *180* An envelope produced bears the post mark and date of a certain off letter was mailed and sent at this time 15 Conn 206 (Am), see also *Fletche* *Collin* 7 M & W 515, *R* v *Johnson*, 7 *Sangels* v *Thompson* 2 Camp 623 *R* v *Plumer* R & R 264, *Butler* v *Mountgarrel*, 6 Ir L R N S 77 *Taylor*, § 179

Course of business in private firms The habit of a private house doing systematically a similar service being equally relevant the principle has been applied to an exp s transmission of telegra *g* v *Scott* 112 Cal 369(plication of the se of business to of a notice or usiness followed urther evidence whereas in the case of private business the system alleged to have been followed must be proved like all other facts The course of business of an individual firm may under the circumstances not appear sufficiently fixed to be of that probative a) was placing posting 61, the house to send circulars on every change in the firm was admitted In the course of his judgment *Lord Wenger* said That does not show that a particular person received a circular except upon the presumption that a jury may make upon the general habit In *Woodcock* v *Houldsworth*, 16 M & W 124 *Parke B* said He has certainty or 1 H L C *Babcock* 3 accustomed to ... case of injury at a high evidence was admitted highway *Hall* v *Bro* preceding month was admitted to show a specific sale In admitting such evidence the Court observed Where there is a question whether a particular act was done, the existence of any course of business according to which it ... *Shaw*, 28 H N 73 a receipt for rice was was admitted *Isher*

In *Lucas* v *Novosilieski* 1 offered ...

workmen *Birch* 3 Camp 10 which was ed over to his employer over the receipts daily was have been consigned to

S In *Vaughan* v *R Co* 63 N C 11 (1m) where the question wa whether goods have been received by a railway company evidence of its customer to weigh and mark goods was received in showing that they would have been found marked In *Hine* v *Promeroy* 21 Vict 211, 214 (1m) the question was whether an attorney had directed a process server to take N and M as receiptor Evidence of h uniform course of business to give no instructions as to receiptors was admitted as corroborative In *Howard* v *Sherwood*, L R C P 148, the question was whether the defendant s servant who had warranted a horse sold to the plaintiff had authority to do so To how probable non-existence of such authority, evidence was offered of a usage among horse dealers not to warrant under the circumstances

Refusal of a registered letter The use of a post mark in evidence involve at least three distinct principles In the first place, the question arises, may it be inferred from the presence of what purports to be the official mark that the mark was genuinely affixed by an officer of the Post Office concerned? This is a question of authentication and may be answered in the affirmative, though there had been some fluctuation of judicial opinion on the subject. In the second place the question arises whether if the post mark be taken as genuine it is evidence that the cover bearing it was stamped on the date the impression bears The answer is in the affirmative In the third place, the post mark is evidence that the place or office mentioned therein was actually the place where it was affixed The mere fact of a notice bearing a certain date is no proof that it must have been posted on the same date An article posted and delivered may be inferred to have been delivered in due course of post *Gobinda* v *Dwarka* 20 C L J 455 = 19 C W N 489

Telegrams—Times of delivery The documents kept by the Post Office showing the terms of receipt and delivery of telegrams are not admissible in evidence as public records in as much as they are kept only a short time are not accessible to the public are not the result of public enquiry and do not deal with a general public right but are merely kept for the purpose of regulating the pay and the work of the post office servants *Heyne* v *Fischel*, 110 L T 264 = 30 T L R 190

ILLUSTRATIVE CASES

Admissible evidence—Illustrative cases A notice was sent by the plaintiff firm to the defendant firm by registered letter which was posted to the correct address of the latter, but was returned with the word "refused" endorsed upon it by the Post Office *Held* that under section 16 of the Evidence Act the presumption was that the letter had reached the *Kothi* of the defendant firm *Louis Dreyfus & Co* v *Chimand* 50 Ind Cas 195 = 2 S L R 142 see also *Jogendra* v *Dwarka Nath* 15 C 681 *Balram* v *Bai Pannabai* 11 Ind Cas 351 = 13 Bom L R 378 The question is whether a letter was sent on a given day The post mark upon it is deemed to be a relevant fact. *R* v *Canning* 19 St 370 *Gobinda* v *Dwarka*, 20 C L J 455 = 15 C W N 489 = 26 Ind Cas 967 In a suit by one banking firm against another firm for the recovery of the balance of an account between them it was held with reference to the keeping of the firm s account books and their periodical transaction to the principals that it was reasonable to presume that that which was the ordinary course was pursued in that case *Dwarka* v *Baboo* 6 M I A 88 (90)

Inadmissible evidence—Illustrative cases An endorsement on the cover of a registered letter that the cover had been tendered to the addressee on a certain day and had been refused by him, is at best a record of the statement by the peon and would be admissible either under section 32(2) or section 33 of the Indian Evidence Act, if the requirements of those sections are fulfilled If it be not admissible under sections 32(2) or section 13, in th c the events recited therein by the peon must be proved by calling him a *Govinda* v *Dwarka* 26 Ind Cas 962 = 20 C L J 455 = 19 C W To prove the posting of a letter written by A to B —evidence by on ks that he habitually copied all letters written by A then return seal, and that afterwards, when A gave back, the witness or anot them, *held* in the absence of ev d to show that A had retur letter to the clerk this is no ting *Toosey* v *Wills* Tr 97 So also wh erk, proved that the letter

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ceive it (*Re London etc*
e also *Ram Dass* v *Official*
posted to H at Bristol,
" is insufficient *Walter* v.
Haynes, Ry & M 149

ADMISSIONS.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Admission defined

Admissions, meaning of An admission is defined by *Stephen* to be "a statement, oral or written suggesting an inference as to any fact in issue or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding" Ste. D. E. Art 15 "An admission" says

relevant fact made by a party to an action, or by a person deemed to be entitled to make such statement on his behalf An admission is a relevant fact as against such party" *Solicitors' Journal* Vol XX p 894 The definition given in the section eliminates the implied statement as to the existence of a probative or *res gestae* fact arising from the acts of a party, "admission by conduct" so called In English law the term admission, means any statement made out of the witness box by a party to the proceedings, whether *civil* or *criminal*, or by some person whose statements are binding on the party against his own interest. *Wills' Ev 2nd Ed* 149 "In our law" says *Mr Taylor* "the term admission is usually
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admission been tendered in evidence to establish the charge or any misapplication of the money by the noble defendant, it would clearly have been rejected The law was thus stated by *Lord Chancellor Erskine* "This first step in the proof" (namely, the r

in now on trial may be affected
it by the pay-master would in itself
convict him of a crime" *Lord*
, *Taylor* § 721 citing *verbatim from*

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made by an accused person is an admission only, or amounts to a confession, a reference must always be made to the terms of the statement. Every statement, oral or documentary which suggests any inference as to any fact in issue or relevant fact, made by an accused person is an admission under ss 17 and of the Evidence Act, which is provable against the person making it, unl

6 In *Vaughan* v *R Co* 63 N C 11 (*fm*) where the question was whether goods have been received by a railway company evidence of its customer to weigh and mark goods was received as showing that they would have been found marked In *Hone* v *Promeroy*, 24 Vict 211, 214 (*fm*) the question was whether an attorney had directed a process server to take N and M as receiptors Evidence of his uniform course of business to give no instructions as to receiptors was a limited as corroborative In *Howard* v *Sherwood*, L R C P 148, the question was whether the defendant's servant who had warranted a horse sold to the plaintiff had authority to do so To show probable non existence of such authority evidence was offered of a usage among horse dealers not to warrant under the circumstances

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ILLUSTRATIVE CASES

Admissible evidence—Illustrative cases A notice was sent by the plaintiff firm to the defendant firm by registered letter which was posted to the correct address of the latter but was returned with the word 'refused' endorsed upon it by the Post Office *Held* that under section 16 of the Evidence Act the presumption was that the letter had reached the *Kothi* of the defendant firm *Louis Dreyfus & Co* v *Chimandas* 50 Ind Cas 195=2 S L R 147, see also *Jogendra* v *Dwarka Nath* 15 C 681, *Balaram* v *Bali Pannabai*, 11 Ind Cas 351=13 Bom L R 328 The question is whether a letter was sent on a given day The post mark upon it is deemed to be a relevant fact *R* v *Canning* 19 St 370 *Gobinda* v *Dwarka*, 20 C L J 455=15 C W N. 489=26 Ind Cas 962 In a suit by one banking firm against another firm for the recovery of the balance of an account between them it was held with reference to the keeping of the firm's account books and their periodical transaction to the principals that it was reasonable to presume that that which was the ordinary course was pursued in that case *Dwarka* v *Baboo* 6 M I A 88 (90)

Inadmissible evidence—Illustrative cases An endorsement on the cover of a registered letter that the cover had been tendered to the addressee on a certain day and had been refused by him is at best a record of the statement by the peon and would be admissible either under section 32(2) or section 33 of the Indian Evidence Act, if the requirements of those sections are fulfilled If it be not admissible under sections 32(2) or section 33, in that case the events recited therein by the peon must be proved by calling him as a witness *Govinda* v *Dwarka* 26 Ind Cas 962=20 C L J 455=19 C W N 489 To prove the posting of a letter written by A to B —evidence by one of A's clerks that he habitually copied all letters written by A then returned them to A to seal and that afterwards, when A gave back, the witness or another clerk posted them *held* in the absence of evidence to show that A had returned that particular letter to the clerk this is no proof of posting *Toosey* v *Williams*, M & M 129, *Phip Ev* 97 So also where A's clerk, proved that the letter had with several others

that the plaintiff ha l said to the defendant "You always promised to marry one, and you don t keep your word' held that this was "material evidence

Stein (1877) 2 C P D 265 (270), I

Admissions are statements, i e assertions in words and it is their inconsistency with the party's other assertions that discredits the latter Hence conduct cannot

has been suggested that an an infirmative fact diminish present evidence, should he take the stand as a witness and to his position in the case if he does not So far as the suggestion emphasizes the truth that there is, in principle, no distinction between statements of a party and the other facts introduced by him to the tribunal, it seems sound and helpful An admission however presents no necessary implication of inconsistency or other injury to the cause of the declarant Undoubtedly former statements are frequently used to show inconsistency between the declarant s present position and one which he occupied at an earlier time Such statements are not strictly speaking admissions A former admission may be used to prove the truth of the fact stated Such a statement may be used as a mere verbal act to show inconsistency But such is not the only use which may be made of it It may be used as true or as contradictory Either party, in proving his own case may, instead of introducing evidence to a certain effect show that his adversary has unequivocally

Chamberlayne's Ev § 1286 (N)

There are two kinds of admissions according is first formal admission, which may be and may be made by a party in his pleading, by stipulation or by statement in open Court Secondly there is a statement of a fact at some previous time inconsistent with a fact to be established at the time of trial a statement which, when of evidence direct or circumstantial, an inference or inferences as to the trut

§ 64 As to the formal admissions little need be said They simply fix the relation between the parties as to the facts They help to define the issues concerning which evidence is to be heard but they are not in themselves evidence As to the second kind of admissions, those which may be called evidential

lusiveness, that tantial evidence, case they are likely in themselves to carry conviction *McKelvey's Ev* § 65

Direct Admissions Direct and express admissions are practically the same They are direct statements of main facts in issue As regards this kind of admissions there is nothing to be said, except that to be available, the statements which constitute the admissions must be proved in the ordinary way The form in which the admission is made is immaterial so that it amounts to a statement of fact, and is not a statement of opinion or promise *Driscol* v *City of Taunton*, 160 Mass 486 (*Am*) The proof of a direct admission is usually by the introduction of testimony, oral or written, as to the language constituting the admission The statement constituting the admission may be oral or written Its form is immaterial So, also, are the place and circumstances attending its making It may have been heard by witness over a tel phone *Wolfe* v *Railway Co* 97 Mo 473=10 Am St Rept 331 (*Am*)

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the direct admission is the statement which by omission becomes evidence of some fact When we go still further from the direct admis on, we finally reach the field of a lmissions by conduct, or in what are frequently spoken of as implied a lmissions, and which are simply c reumst intial evi lence According to Bo t 'implie l admissions are those which result from some act or failure to act of the party *Bouvier s Law Dict* They may also arise from ac quiescence An implied admission is prove l by intro lucing testimony as to such con luct as shows as acknowledgment of the truth of the fact in question There are various cases of implie l admissions strictly speaking In most instances when actions or conduct are introduced as bearing upon the truth of a fact it is as circum stantial proof of the fact itself and not as proof of an admission The term 'implie l admission is often really the *element of admission is frequen* A lmis- sions by conduct are not inclu le a lm s sion is a statement oral or documentary An admission by con luct has been dealt with in section 8 Such admi sions are admissible *not* as an except on to the Hearsay rule They are usually original circumstantial evidence of the fact to which they relate *Best Ev I 58* citing *West Chester v McElure*, 67 Pa St 311 (*Am*) Presumpti has been seen in th nature of admission
actions and repres
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which treats as admissions by a party, statements made in his presence and denied by him provided the circumstances were such as to make a denial necessary *Ibid*

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made against the person s interest The simple and broad rule for receiving them is, in the language of *Chief Baron Pollock* that if a party has chosen to talk about a particular matter his statement is evidence against himself (*Darby v Ouseley* 1 H & N I) and the theory of their use seems to be that they are to a party what prior inconsistent statements are to a witness viz, a means of discrediting ... other times made a smaller or ... the stand that he saw the plaintiff ... r statement of his that he saw fift ...

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to get a prior statement of the party against the statement now advanced by him in his pleadings or through his witnesses, and thus discredit the present claim by its inconsistency with the former one *Greenl Ev* § 169, see also *Phip Ev* p 221

' Mr *Gulson* while allowing that admissions are evidence of the truth of the fact admitted, considers them not to be exceptions to the Hearsay rule, because the inference of truth involved is independant of the personal credibility of the declarant, but regards them rather as relevant facts, evidentiary of the facts

I v 221

' But even from this point of view, they have two kinds of probative value
"(a) One is the ordinary value o ...
value depending on his capacity to
bias or interest or lack of it, and so on
satisfied, but that is a rule of law

... probative value as those of any

... hey have additionally the same
Just as a witness testimony is
discredited when it appears that on another occasion he has made a statement inconsistent with that testimony so also the party opponent is discredited when it appears that on some other occasion he has made a statement inconsistent with his present claim against him The witness speaks in *Court through his* ...

his part includes the whole
testimony relied on by him T
party opponent may be used against him as an admission, provided it exhibits

Indirect Admissions Indirect admissions are in the nature of circumstantial evidence An illustration of indirect admission may be found in the following A sues X for damage done by X's cattle on A's crop and for the purpose of showing an admission on the part of X that his cattle had caused the damage A offers the testimony of a witness to the effect that X had told witness that he had offered A a certain amount of money to cover the damage From

damages although not equivalent to a direct admission that the cattle caused damage, is nevertheless very nearly so An illustration of an admission somewhat further removed in character from a direct admission is found in a case where A sued X for the loss of his sheep charging that X's dog had killed them and as a proof of the fact of the

evidence that X had killed his

any more sheep *Anderson* v *H*

the direct admission is the statement which by omission becomes evidence of some fact When we go still further from the direct admission, we finally reach the field of admissions by conduct, or in what are frequently spoken of as implied admissions, and which are simply circumstantial evidence According to Bouvier "implied admissions are those which result from some act, or failure to act of the party *Bouvier's Law Dict* They may also arise from acquiescence An implied admission is proved by introducing testimony as to such conduct as shows an acknowledgment of the truth of the fact in question There are various cases of implied admissions strictly speaking In most instances when actions or conduct are introduced as bearing upon the truth of a fact, it is as circumstantial proof of the fact itself, and not as proof of an admission The term "implied admission is often ... really the element of admission is frequen... Admissions by conduct are not include... sion is a statement oral or docu... has been dealt with in section 8 Such admi... Hearsay rule They are usually... which they relate *Best Ev* 158 ci...

which treats as admissions by a party, statements made in his presence and not denied by him, provided the circumstances were such as to make a denial necessary *Ibid*

may ... admissions the r... made on evidence An extra judicial adm... offered in purposes of the case on trial in ... for the course of judicial proceedings in a c... the of record or in connection with ... ugh classed as extra judicial *Chamberlayne's Ev* § 1255

Principle on which admissions are received "Whatever a party says is evidence against himself what a party himself admits to be true may be presumed to be so' *Per Parke B* in *Slatterie* v *Pooley*, 6 M & W 664, see also *R* v *Turner*, (1910) 1 K B 346 'Another class of evidence says Mr ... consists of ... admits to ... be taken

administered to a witness in order to impose an additional obli... conscience, and so to add weight to his testimony, and he is cross examined to

...bative value, but not being ...ility explains the proposi- ... equivalent to affirmative ... pt to stress this distinction ... sis of any instruction on

... statements of ... been stated that ... on principle not ... tements used as admissions do happen to state facts against interest, admissions are generally treated as obnoxious to the Hearsay rule, and are only allowed as exceptions to it (*Vide Taylor Ev* § 723) In such cases, as the statements are against the interest of the persons making it, their trustworthiness is supposed to be guaranteed That this is a mere local error of theory and in no sense represents a rule anywhere obtaining may

... been enforced for the use of a party's admissions (*Vide Woolway* v *Rowe*, 1 A & E. ... ion of that ... e they are ... which is not ... it satisfies

... must contravene, to the knowledge ... interest In case of an admission, ... obative weight, it would not, however, be essential to admissibility To secure that, it is sufficient that the statement should be the voluntary act of the party and cover a probative or *res gestae* fact. (*c*) The declaration against interest is secondary ... the declarant is shown to be dead, absent from ... some other sufficient cause. The admission, o... and is competent though the declarant be prese... (*d*) An admission may be made at any time The declaration against interests is incompetent if made *post litem motam.* (*e*) The admissibility of a declaration against interest is governed by the rules of sound reason That of admission is determined largely by procedure. *Chamberlayne's Ev.* § 1235.

Admissions whether subject to rules of testimonial qualifications such as personal knowledge, infancy, Opinion Rule etc.—"A primary use and ... claim by ... l whether ... stimony of ... that gives ... a party's ... v although ... r 277; R. ... r. Taylor

"whether oral or in writing, contain matters stated as mere hearsay, it may be questionable whether such matters can be received in evidence. If rendered against the party making the statement, they are clearly entitled to very little weight, and unless connected with a further admission, that he believes them to be true, they would seem, like hearsay declarations against interest, to be inadmissible *Lord Trimblestown* v. *Kemmis* 9 Cl & F. in 780, 784" *Taylor* § 737 *Mr. Justice Chamber*, in the case of an

answer in Chancery, read against the party in a subsequent suit at law, thought that portion of it not admissible for' he added, 'it appears to me, that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and that he does not thereby admit as evidence all the facts which may happen to have been stated by way of hearsay only in the course of the answer to a bill filed for a discovery But where the answer is offered as the admission of the party against whom it is read, it seems reasonable that the whole admission should be read to the jury, for the purpose of showing under what impressions that admission was made though some parts of it be only stated from the hearsay and belief *Greenl, Ev* § 203, *Taylor Ev* § 737 But *Stephens J* in *Kitchen* v *Robbins*, 29 Ga 713 766 (*Am*) expressed contrary view where he said 'Are no admissions good against a party unless founded on his personal knowledge? The admissions would not be made except on evidence which satisfies the party who is making them against his own interest that they are true, and that is evidence to the ... do not come in on the ground that the party making ... wledge but upon the ground that a party ... ll unless they are true The fact that he makes them against his ... reasonably explained only on the supposition that he is constrained to do so by the force of evidence The source from which a knowledge of fact is derived, is a circumstance for the jury to consider in estimating the value of the evidence but that is all" *See also Wigmore* § 1053, *Bishop of Meath* v *Marquis of Winchester*, 3 Bing N C 183 (203) *Bulley* v *Bulley* L R Ch App 739 (747) But such considerations do not apply when a party wants to use testimonially his own admission in his own favour under clauses 1 to 3 of section 21 In such cases personal knowledge seems to be necessary In *R* v *Walker* 1 Cox 97 where the question was whether, A was an infant at the time of making a certain contract, an admission by A that R was so was received against him although founded on hearsay See *P* v *Symonds* 4 Cox 277 *Re Peston* 53 L T 706 As to statements by an agent containing hearsay or opinions *vide The Actaeon* 1 Speaks E & A 780, *The Solway* 10 P D 137 cited in *Phip Ev* 196 216

On the same principle the admission of an infant party would be receivable *O Neill* v *Read* 7 Ir L R 434 See also *Dharamaji Vaman* v *Gurrar Shrinivas* 10 B H C R 311 Theoretically, the admissions of a lunatic party would stand upon the same footing, although the weight to be given them might be *nil Wigmore* § 1053 The opinion rule also does not limit the use of a party's admission *Doe* v *Stell*, 3 Camp 115 But a bare statement that a party is informed without addition of his belief in the information will not amount to an admission *Trimblestown* v *Kemmis* 9 C & P 780, *Roe* v *Ferrars* 2 B & P 584, *Phip Ev* 196

... —Admission is usually applied ... cases which do not involve ... ally used in Criminal Court as ... in a criminal case may make admissions, just as a pa... ying things inconsistent with the present points of proof Admissions in the sense of inconsistencies are not peculiar to civil cases *Greenl Ev* 170 Admission in a civil suit that a document is genuine cannot in a forgery case be regarded as confession at all *Per Rankin C J* in *Ambar Ali* v *Emperor* A I R 1929 Cal 539 'A confession says *Prof Wigmore* "is one species of admissions namely, an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him or of some fact essential to the charge" *Wigmore* § 1050, *Taylor Ev* § 724, *Steph Dig* ... ements and a 'species of admissions ... 3 (259) =A I R 1927 Cal 17 ... of admissions, it has not bee... *Lal* 6 A 509 (539) But ... on in the Evidence Act *R* v ... *Tagrup* 7 A 646, *Empress* v *Pandhari* ... 589, *Empress* v *Dabee Pershad* 6 C ... fession is only an

7. answer in Chancery, read against the party in a subsequent suit at law, thought that portion of it not admissible 'for" he added, 'it appears to me, that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and that he does not thereby admit as evidence all the facts which may happen to have been stated by way of hearsay only in the course of the answer to a bill filed for a discovery But where the answer is offered as the admission of the party against whom it is read, it seems reasonable that the whole admission should be read to the jury, for the purpose of showing under what impressions that admission was made though some, parts of it be only stated from the hearsay and belief *Greenl, Ev* § 203, *Taylor Ev* § 737 But *Stephens J* in *Kitchen* v *Robbins*, 29 Ga 713 766 (*Am*) expressed contrary view where he said 'Are no admissions good *against a party unless founded on his personal* knowledge? The admissions would not be r ... ence which satisfies the party who is making them against his ... evidence to the jury that they are true Ad ... them is speaking from his personal knowledge, ... will not make admissions against himself unless they are true. ... makes them against his interest can be reasonably explained only on the supposition that he is constrained to do so by the force of evidence The source from which a knowledge of fact is derived, is a circumstance for the jury to consider, in estimating the value of the e... ence but that is all' *See also Wigmore* § 1053, *Bishop of Meath* v *Mar* ... N C 183 (203) *Bulley* v *Bulley* L R Ch App ... not apply when a party wants to use ... under clauses 1 to 3 of section 21 In such cases person... necessary In *R* v *Walker* 1 Cox 99 where the question was whether, ... infant at the time of making a certain contract, an admission by A that R was so was received against him although founded on hearsay See *R* v *Symonds*, 4 Cox 277 *Re Peston* 53 L T 706 As to statements by an agent containing hearsay or opinions, *vide The Actaeon* 1 Speaks E & A 780, *The Solway*, 10 P D 137 cited in *Phip Ev* 196, 216

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Admission and confession distinguished—Admission is usually applied to a civil transaction and to those matters in criminal cases which do not involve a criminal intent While the term confession is usually used in Criminal Court as denoting an acknowledgment of guilt The accused in a criminal case may make admissions, just as a party in a civil case, i e by saying things inconsistent with the present points of proof Admissions in the sense of inconsistencies are not peculiar to civil cases *Greenl Ev* 170 Admission in a civil suit that a document is genuine cannot in a forgery case be regarded as confession at all, *Per Rankin C J* in *Ambar Ali* v *Emperor* A I R 1929 Cal 539 "A confession", says *Prof Wigmore* "is one species of admissions namely, an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him or of some f... essential to the charge" *Wigmore* § 1050, *Taylor Ev* § 724, *Steph Dig Art* ... species of 'statements' and a 'species of admissions'" ... 1 253 (259) =A I R 1927 Cal 17 The ... gory of admissions, it has not been defined in the ... *R* v *Babu Lal*, 6 A 509 (539) But there is a distinction between an admissio... nfession in the Evidence Act *R* v *Macdonald* 10 B L R App 2; *Empress* v *Jagrup* 7 A 646, *Empress* v *Pandharinath*, 6 B 34, *Empress* v *Meher Ali*, 15 C 589, *Empress* v *Dabee Pershad*, 6 C 530 *Empress* v *Nilmadhab*, 15 C 595 A confession is only an

v *Ram Chunder*, 2 C. 341 (350) P C; *Sree Dhiram* v *Narain*, 41 M L J 525. So also an admission in pleading cannot be dissected, and if it is made subject to a condition, it must either be accepted subject to that condition or not accepted at all *Mitakhor Mulli* v *Mulji Harilal*, 19 C W N 713=19 B 599; *Sanatan Ali* v *Chand Bibee*, 9 W R 100, *Sheik Surfaraz* v *Sheikh Dhunno*, 16 W. R. 257, *Jaboonath* v *Burda Kant*, 22 W R 220, *Niamutoolah Khalum* v *Ilmmun Ali*, 22 W R 519, *Paltu Behwree* v *Wilson*, 9 W. R 190, *Baikanthanath* v *Chandra Mohan*, 1 B L R (A C) 133; *Ishan* v *Hiran* 11 W R. 525; *Tarree* v *Dwarka* 15 W R 421, *Sheikh Shurfuraz* v *Sheikh Dhunoo* 16 W. R 257

"The chief difficulty in the application of the rule lies in determining when statements are so connected together as to form a whole within the meaning of the rule The matter does not depend on the statements being contained in one single document but on the nature and degree of connection between them; and it may be said that the rule embraces these two propositions: () When a party's admission is so qualified or explained by some other statement made by him at the same time that the latter is in fairness necessary to present the true intention and meaning of the former, then the party is entitled, if his admission is given in evidence against him to have the qualifying statement put in evidence as a part of the admission () when the admission of a party refers expressly or by implication to some antecedent statement either of himself or his opponent or of any third person then the statement so incorporated or referred to forms a part of the whole admission within the meaning of the rule" *Wills Ev 2nd Ed* 159 This rule will not generally justify a party in insisting that separate letters or documents, or even distinct and separate parts of entries in one entire collection of documents, as letter-books court rolls, etc, shall all be put in evidence by the party producing and reading any one of them unless they are on the face of them connected with the one alrady in evidence, and they seem to be the rule whether the documents be of a public or private nature Where any such separate entries or distinct parts are favourable to the opposite party, he must put them in evidence as part of his own case Thus, though the defendant is entitled to have the whole of a particular entry in an account book read, he cannot insist upon reading distinct entries in different parts of the book unconnected with the one read *Catt* v *Howard*, 3 Stark 6; *Remmie* v *Hall*, *Mannings*, N P Q Index 376; *Roscœ* N P 180 Where the plaintiff called for the production of the defendant's letter book, and read letter of the defendant from it, the defendant was not therefore permitted to read from it on his own behalf, other letters not referred to in the letters read by the plaintiff *Starge* v *Buchanan*, 16 Ad & E 598, *Roscœ* N P 180 So also the answers of a party given in the course of conversation should not be proved against him without also giving in evidence the questions which drew forth these answers *Pennel* v *Myer* 2 Moo. & Rob 95, *Wills' Ev 2nd Ed* 160 But *this rule is not applicable* where the party gives in evidence a statement made bp his opponent in the course of conversation on some previous occasion *Prince* v *Samo*, 7 A & E 634, *Wills Ev 2nd Ed* Distinct matters, however, though relevant to the case cannot be introduced *Davies* v *Morgan* 1 Cr & J 587

This general principle, however, raises *two* sorts of questions, first whether the party offering the admissions must, as a preliminary condition put in the whole, or other parts, of the conversation, document, etc, secondly, whether the party whose statement it is may afterwards, by way of explanation, put in the remainder, or other parts, or other statements It does not seem to be generally required that the party offering the admission must put in at the same time any more than that which he desire to use—whether a speech or conversation (*Eaton's Trial*, 23 How St Tr 1030, *R* v *Connell* 5 State Tr N S I, 196) or a writing (*Cornish's Trial*, 11 How St Tr 423, *Sizer* v *Bust*, 4 Dm, 426); and so far as the portion of it allowed to be given is concerned, the substance is sufficient, without precise words, whether of an oral statement or a lost writing (*R* v *Edmonds*, 1 State Tr N S 785, 820, *Hardy's Trial*, 24 How St Tr 681) For the party against whom the admission is offered, he may, by way of explanation, put in only so much as is necessary for his purpose *i e*, to qualify or explain the portion put in against him *Price* v *Samon* 7 A & E 627 *Greenl Ev* § 201 But the Court may believe a part and disregard the rest The rule only requires that what is in favour of the party making the admission should be favourably and liberally considered and weighed with other evidence Of

17. *Abbott C J* in *Queen's Case*, 2 B & B 287; *Thomson* v *Austen*, 2 Dowl & R 361; *Fletcher* v *Froggatt*, 2 C & P 566, *Cobbet* v *Grey*, 4 Ex R 729 So it is a well settled rule of law that the whole of a declaration or statement contains

Bholanath v *Emperor* 26 A L J 1331=A I R 1929 All 1 In the United States the rule is thus laid down by *Mr Justice Field* in *Mutual Benefit Life Ins Co* v *Newton*, 22

which a party relies is to be taken as an en

with the qualifications which limit, modify

This rule, together with its reason, is thus stated by *Mr Best* "Where part of a document or statement is used as self harming evidence against a party, he has a right to have the whole of it laid before the jury who may then consider and attach what weight they see fit to any self serving statements it contains" *Best* § 520, see also *Bermon* v *Woodbridge*, 2 Doug 788, *per Lord Mansfield*, *Smith* v *Blondey*, Ry & M 259, *Cray* v *Halls*, cited in Ry & M 259, *White* v *Wyer*, 11 Mass 6 10, see also *Sooltan* v *Chand Bibee*, 9 W R 130, *Rajah Nilmoney* v *Ramanugarh* 7 W R 29, *Sheikh Shurfuraz* v *Shaikh Dhunoo*, 16 W R 257, *Lallah Probhoo* v *Sheonath* W R 1864 Act X 27, *Ishan* v *Haran* 11 W R 525, *Bala Jwala Das* v *Pr ant Das*, 34 C W N

Ind Cas 746 P C "Where, taking the

he party completely avoided,

agent before delivering it jotted down upon it with his master's authority a note of a counter-claim which the defendant had against the plaintiffs, and the plaintiffs sought to give the account alone in evidence as an admission of the amount of their claim it was held by *Lord Mansfield C J.* that the whole document must be taken together, since the defendant's statement was made "all in one breath and he never admitted the account as distinct and independent from the counter-claim *Randle* v *Blackburn* 5 Taunt 245 So also if part of a letter is offered as evidence, other explanatory parts may be offered, if a party is sought to be charged or affected by a letter received in evidence, his reply thereto is admissible, and where one party uses as evidence a number of a series of the letters written by the other party, the letter may introduce the entire series *Burr Jones* § 294 It is a well established principle of law that if a plaintiff wishes to rest his case solely on the admission of the defendant, he must accept the admission as a whole It is not open to him to pick out some part of it as may be favourable to him and neglect the rest *Syed Ismail* v *Hamidi Begum*, 2 Pat L T 658 If a Court takes into consideration an admission in a deed to bind a party the whole of the statement therein should be consindered Admissions must be taken

ugh a party cannot by admission make

ight to be used as an admission against him,

taken even if they operate in his favour

, 41 M L J 525=(1921) M.W N 639 An admission must be deemed to be exhaustive It must be read as it stands and it is not permissible to take one part of an admission and reject another part *Bar Bahadur* v *Raghubir*, 49 A 707=25 A L J 572=100 Ind Cas 1037=A I R. 1927 All 385 Ordinarily a Court is bound to take the whole of an admission together, but a Court is not bound to give equal weight to all portions of it, *Radha* v *Chunder Monee*, 9 W R 290, see also *Govind Pershad* v *Chatturbhuj*, 60 Ind Cas 138, *Shib Nath* v *Annada Prasad* 11 C L J 382, *Konwaer Doorga nath*

v *Ram Chunder*, 2 C 341 (350) P C, *Sree Dhuram* v *Narain*, 41 M L J 525. So also an admission in pleading cannot be dissected, and if it is made subject to a condition, it must either be accepted subject to that condition or not accepted at all *Mulathoy Mulla* v *Mulji Haridas*, 19 C W N 713=39 B 399, *Sanatan Ali* v *Chand Bibee* 9 W R 100, *Sheik Surfaraz* v *Seikh Dhunno*, 16 W R 257, *Jadoonath* v *Bunds Kant*, 22 W R 220, *Niamutoolah Khalim* v *Hurmu Ali* 22 W R 519, *Paltu Behari* v *Watson*, 9 W R 190, *Baikunthanath* v *Chandra Mohan*, 1 B L R (A C) 133, *Ishan* v *Hiran* 11 W R, 521, *Tarinee* v *Dwarka* 15 W R 421, *Shaikh Shurfaraz* v *Shaikh Dhunoo* 16 W R 257

"The chief difficulty in the application of the rule lies in determining when statements are so connected together as to form a whole within the meaning of the rule The matter does not depend on the statements being contained in one single document but on the nature and degree of connection between them, and it may be said that the rule embraces these two propositions: () When a party's admission is so qualified or explained by some other statement made by him at the same time that the latter is in fairness necessary to present the true intention and meaning of the former, then the party is entitled, if his admission is given in evidence against him to have the qualifying statement put in evidence as a part of the admission ( ) when the admission of a party refers expressly or by implication to some antecedent statement either of himself or his opponent or of any third person then the statement so incorporated or referred to forms a part of the whole admission within the meaning of the rule" *Wills Ev 2nd Ed* 159 This rule will not generally justify a party in insisting that separate letters or documents, or even distinct and separate parts of entries in one entire collection of documents, as letter books court rolls, etc, shall all be put in evidence by the party producing and reading any one of them unless they are on the face of them connected with the one alrady in evidence, and they seem to be the rule whether the documents be of a public or private nature Where any such separate entries or distinct parts are favourable to the opposite party, he must put them in evidence as part of his own case Thus, though the defendant is entitled to have the whole of a particular entry in an account book read, he cannot insist upon reading distinct entries in different parts of the book unconnected with the one read *Catt* v *Howard*, 3 Stark 6, *Remmie* v *Hall*, *Mannings*, N P Q Index 376; *Roscœ* N P 180 Where the plaintiff called for the production of the defendant's letter book, and read letter of the defendant from it, the defendant was not therefore permitted to read from it on his own behalf, other letters not referred to in the letters read by the plaintiff *Sturge* v *Buchanan*, 16 Ad & E 598, *Roscœ* N P 180 So also the answers of a party given in the course of conversation should not be proved against him without also giving in evidence the questions which drew forth these answers *Pennel* v *Myer* 2 Moo. & Rob 96, *Wills' Ev 2nd Ed* 160 But this rule is not applicable where the party gives in evidence a statement made bp his opponent in the course of conversation on some previous occasion *Prince* v *Samo*, 7 A & E 634, *Wil's Ev 2nd Ed* Distinct matters, however, though relevant to the case cannot be introduced *Davies* v *Morgan* 1 Cr & J 587

This general principle however, raises two sorts of questions, first whether the party offering the admissions must, as a preliminary condition put in the whole or other parts, of the conversation, document, etc secondly, whether the party whose statement it is may afterwards, by way of explanation, put in the remainder, or other parts, or other statements It does not seem to be generally required that the party offering the admission must put in at the same time any more than that which he desire to use—whether a speech or conversation (*Eaton's Trial* 23 How St Tr 1030 *R* v *Connell* 5 State Tr N S *l*, 196) or a writing (*Cornish's Trial*, 11 How St Tr 423, *Sizer* v *Bust*, 4 Dtn, 426), and so far as the portion of it allowed to be given is concerned, the substance is sufficient, without precise words whether of an oral statement or a lost writing (*R* v *Edmonds* 1 State Tr N S 785, 820, *Hardy's Trial*, 24 How St Tr 681) For the party against whom the admission is offered he may by way of explanation, put in only so much as is necessary for his purpose *i e*, to qualify or explain the portion put in against him *Price* v *Samon* 7 A & E 627 *Greenl Ev* § 201 But the Court may believe a part and disregard the rest The rule only requires that what is in favour of the party making the admission should be favourably and liberally considered and weighed with other evidence Of

S. 17. course, the one offering admissions of this character is not bound by the statements which are favourable to the declarant He may rebut such statements or show them to be erroneous *Burr Jones Ev* § 293

Probative force In treating of the probative force of admissions, it is necessary constantly to distinguish between those which are judicial and those which are extra judicial The judicial admission is pre eminently a matter of procedure, under the direct control of the adn
and the force and effect of an admission of this
are determined by procedural rules on the other
judicial admission is determined by logic It is not assigned or established by a rule of procedure Substantive Law goes no further in this connection than to determine that the existence of statement will be received as evidence of the fact asserted in it, either in an action at law or in a suit in equity It will not, in this connection be deemed material whether the extra judicial admissions were made before or after the suit is brought. They are rated entirely at their logical value *Chamberlayne's Evidence* § 1236

Judicial and extra judicial contrasted in probative force Logic may have its appropriate effect in case of the judicial admission when used as *probatio* rather than as *levamen probationis* When used as proof, the more deliberate and, as it is said, solemn nature of the circumstances under which the judicial admission is made may confer upon it a probative force not characteristic of the average extra judicial admission The former having been made in solemn form, in a court of justice constituting the foundation, or a part of the procedure in causes pending, in which the rights of the parties are stated, and by which the courts are called upon to pass judgment, and upon which they must solemnly decree the rights of the parties, are for those reasons entitled to greater consideration and weight than when casually or incautiously made, at a time and place, and under circumstances not calculated or intended to affect the rights or interests of others and, perhaps unmindful of all the facts and circumstances of the case *Chamberlayne's Ev* § 1236

Value and weight of extra judical admissions With all verbal admissions it may be observed that they ought to
Lang 3 A & E 702, *Curtis* v *Hunt*, 1 C
as it does in the mere reception of ora
tion and mistake; the party himself eit
clearly expressed his own meaning or t
It frequently happens, also, that the wit
of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say *Greenl Ev* § 200, *Taylor* § 861, *Earle* v *Pickeen*, 5 C & P 542 (n), *Rex* v *Simons*, 6 C & P 540, *Williams* v *Williams*, 1 Hogg Consist 304, *Hope* v *Evans*, 1 Sm & M Ch 195 "In a somewhat extended experience of jury trials, we have been compelled to the conclusion that the most unreliable of all evidence is that of the oral admissions of the party, and especially where they purport to have been made during the pendency of the action or after the parties were in a state of controversy It is not uncommon for different witnesses of the same conversation to give precisely opposite accounts of it, and in some instances it will appear that the witnesses depose to the statements of one party as coming from the other, and it is not very uncommon to find witnesses of the best intentions repeating the declarations of the party in his own favour as the fullest admissions of the utter falsity of his claim When we reflect upon the inaccuracy of many witnesses in their original comprehension of a conversation, their extreme liability to mingle subsequent facts and occurrences with the original transactions and the impossibility of recollecting the precise terms used by the party or of translating them by exact equivalents, we must conclude there is no substantial reliance upon this class of testimony The fact, too, that in the final trial of open question of fact, both
haracter, in the majority of
ly to distrust its reliability."
Greenleaf's Evidence, 12th Ed
I A 74 (79) Oral admissions
testifying to the admission
is careless in his mode of testifying, that he does not accurately remember the statements, that he is willing to misconstrue them, or that the declarant was

S.

misinformed, or did not clearly express his own meaning. *A fortiori*, where the admission is that of one deceased, the caution should deepen into suspicion, for reasons that are obvious and without corroboration is of little value *Burr Jones Ev* § 295 In *Kenney* v *Murray*, 170 Mo 674 (*Am*), the Court said: "Evidence of such declarations, it is true, is admissible, but it never amounts to direct

be contradicted are in

Hence it is obvious :

upon the circumstances under which they were made as shown by the testimony, as well as upon the degree of accuracy and truthfulness with which they are related, *Burr Jones* § 295 But where the admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature *Rigg* v *Curgenven*, 2 Wills, 395, *Greenl Ev* § 200, *Taylor* § 861 In such a case it is neither weak evidence, nor does it require corroboration. *Commonwealth* v. *Galligan*, 113 Mass 202 On the other hand, when admissions are so proved, they may have great inherent force as evidence. *Dicker* v *Fitchburg*, 22 Wis. 675

So what ... ed to be true and ... *im* v. *Mahomed*, 65 I ... Ind Cas. 876, *Vir Singh* v *Harnam*, 1 Lah. 137=56 Ind Cas 191 A statement in a document should *prima facie* be accepted as true as against the explanation unless it can be shown by independent evidence to be false *Irshad* v *Mt Kariman*, 22 C W. N 530=28 C L J 173=20 Bom L R 790 P. C Unless admissions are contractual or unless they constitute an estoppel they are not conclusive, but are open to rebuttal or explanation, or they

were mistaken or were untrue, and is not estopped or concluded by them unless ... lter his condition In such a case ... as against that person (and those ... it as to third parties he is not ... ord Denman approved and adopt- ... an, in re Simpson, 2 Ch D 72 at p 89 and *Trinidad Asphalte Company* v *Coryat*, (1896) A C 587 in effect illustrate the same principle *Rani* v *Chaudhuri*, 11 C W N 321 P C, *Girish* v *Issai*, 1 ... *Burr Jones* § ... each particul ... party may confess ... ow mistake (*Bright* ... that the response ... a jocular manner; ... of the facts *Burr* *Jones* § 296; *Sibu* v *Netai*, 9 I ... representation of fact is of ... admission is a female *Talok* *Bindoo* 20 W R 112, *Lodh S* ... admission can be withdrawn ... *Muhammad* v *Husain* 26 C 8 ... *Pershad* v *Thakur Dei*, 23 In Cas 26=A I R 1928 Lab 72

S. 17. y were m d . Lalla Prosad . . . witness admits that a statement previously made by him relative to a certain fact is a false statement, he ought to be asked in re examination by the prosecution or at any rate by the Court why he made a statement which was false The mere fact that the

sumption Junnu Lal v M ... 75 Ind Ca 1027=1924 Lah they are found untrue

... Emperor, 7 Lah L J 259=6 Lah 437=90 Ind Cas 145=A I R 1925 Lah 418 The admission of a wife in a divorce proceeding unsupported by corroborative proof should be received with utmost circumspection and caution L v L 108 Ind Cas 416 (F B), Oter v Oter, 91 Ind Cas 20=49 B 368 If a person admits a right, it is necessary implication that he also admits the legal consequences of that right Guru Charan v Surendra Krishna 22 Ind Cas 690=19 C W N 263 Where a guardian is appointed to a minor for purposes of litigation in order to look after his interest any admission made by the minor against his own interest is waste paper Pailah v Dharmraji, 32 Ind Cas 368 A statement made by a person in his own favour is inadmissible in evidence on his behalf Naqina Singh v Sunder 24 P W R 1916=33 Ind Cas 487 Title by law cannot pass by admission when the statute requires a deed Mathura v Ramkuar, 23 C W N 270=43 C 790=23 C L J 26=35 Ind Cas 305, see also Jadunath v Puglal 4 C L J 22 16 C L J 436; 22 C L J 380, Jadia v Dina 6 L W 147=(1917) M W N 583=41 Ind Cas 595, Balkishen v Narain, 13 N L R 121, Ajudhia v Jagannath, 20 O C 18=38 Ind Cas 605 A purchaser cannot be prejudiced by admission subsequently made to the debtor whose property has been sold

does not bind the parties Beni v Dudha Nath 27 C 156 P C=26 I A ... 4 C W N 274, Dwar v Fati 26 C 250=3 C W N 222

Admissions are always evidence against the party who makes them but

marriage is a question merely of adjective ... Act Its probative value must depend on the ... Fatima v Mt Jiandi, A I R 1927 Sindh 20 ... account book is not sufficient to charge a person with liability still with regard to admissions i e entries, against the producer's own pecuniary interest the law dispenses with all proof save that the book has been kept by or under the authority of the producer Mathai ... v ... 96 Ind Cas 429=A I R 1926 Mad 955

sibility' *Best Ev* § 528. So it is, in general, immaterial to whom the admission was made. Thus, an admission made to a stranger is as receivable as one made to an opponent; though it is said that an admission, in order to support an account stated, must have been made to the creditor or his agent, and an acknowledgment of debt made to a third person, neither agent nor privy to the creditor, will not defeat the Statute of limitations, since it is not evidence of a promise of which he could not take advantage (P... v. C... [illegible]

[illegible]

v. *[illegible]*, 17 W R 990; *Whart* § 1128); as are admissions made to himself in mere soliloquy (*R v Simmons*, 6 C. & P 540)' *Phip Ev* ...nd *Ed* p. 191.

[illegible] general, im- [illegible] *Ev 7th Ed* [illegible] of evidence, between direct admissions and those which are incidental or made in some other connection or involved in the admission of some other fact. *Greenl Ev* § 144. Frequently letters of a party are competent purely as admissions, and because some inference may be drawn from them unfavourable to the claim or defence of the writer. *Burr Jones Ev* § 269, *Sital Prosad* v *Monohur*, 23 W. R 325. When letters of a party are in the nature of admissions, they are competent although written long before or after the commencement of the litigation, even though written to persons not parties to the litigation, on proof of their genuineness. *Burr Jones Ev* § 269. When letters are otherwise competent as admissions, they need not be signed or actually written by the party, provided they are sent by his direction. *Barlett* v *Mayo*, 33 Me 518. Except for the purpose of readier reference, there would be no need to deal with other written admissions. The law is practically the same with regard to them as to letters, and is, that [illegible] properly be used in [illegible] matter may relate [illegible] memoranda written or authorized by a party may be offered as admissions against him like his oral statements. If self disserving in their character, it is immaterial in what form the document may appear. *Burr Jones* § 270. This rule has been applied to receipts [*Harrison* v *Remington Paper Co*, 140 Fed 385, (*Am*), *Gahan* [illegible] 27], bills of lading [illegible] *Macomber* v *Paul* [illegible] Ill 585, (*Am*)], [illegible] person making the admission (*Edward* v *City of Watertown*, 59 Hun, 620), maps (*Bridgman* v *Jennings* 1 Ld Raym 734 *Haronath* v *Preonath* 7 W R 249, *Craven* [illegible] T R 48, *Doe* v [illegible] rsh (Ky) 238], cer[illegible] *Van Voy*, 31 N J [illegible] Ald 606, *Graves*, [illegible] s in the books o[illegible] an action against its president (*[illegible]ney* v *Chadsey* 7 R I 224). *Burr Jones Ev* § 270.

[illegible] admissions, evidence against [illegible] 41) and, of course, equally [illegible] make them, against the party [illegible] *eynolds* 121 Cal 74 (*Am*).

[illegible]

of the defendant that the particulars contained in the entry were true *Narain Coomar* v *Ramkrishna*, 5 C 864=6 C L R 286. Similarly partnership books

S. 17.

' of the several partners and to be
tri
al

troversies between the members of the firm
each member *Daji Ibaji* v *Govind* 10 Bom L R ...
be with knowledge and consent, although the presumption may be rebutted by
proof that the partner or ... or ... against whom the entries are offered, have not
had access to the boo
incorrect *Burn Jones*
the defendant under ss
Goundan 17 M 134
in affidavits or in answers to interrogatories in the same or former proce
are also competent *Phip Ev* 4th Ed p 21 , *Fleet* v *Perrins* L R 3 Q B
536, *Harish* v *Prosunno* 22 W R 303; *Legal Remembrancer* v *Motilal Ghose*
41 C 173, *Bhugwant* v *Lall Jha*, Marsh 48 Evidence given in Extradition
proceedings by an accused person on his own behalf is an admission and is
prima facie admissible No particular formality is required to let it in as an
, 11? Ind Cas 50=29 Cr L J 962=1929 Sind 15
judicial admissions those contained in pleadings
by reason not only of these presumedly solemn
contents, but with regard to the time at which they were made, their use in the
action of which they form the basis, their use *dehors* that action the change in
lment, in brief by the circumstances
... making them includ...

speak only from information and belie
in their pleadings, these pleadings may be offered in evid...
parties as admissions of the facts so alleged *Girish Chander* v *Shama Charn*
15 W R 437 *Austen* v *Feast* 2 Gr App 91 (*Am*) A statement in the plaint
unchallenged and made by the *putnidar* after his interest had been transferred
is in no way binding upon the transferee *Jalhnomull* v *Saroda Prosad* 7 C
L J 604 The plaintiff may also rely upon the defendant's admission in the
Pleadings or Affidavits or Answers to Interrogatories *Tarinee* v *Dwarka Nath* 15
W R 451, *Re Cohen* (1924) 2 Ch 515 But admissions contained in a statement
filed in plaintiff's name are not proof that they have been made by her
Asmutloo v *Alla Hafiz*, 25 W R 125
to as evidence in plaintiff's favour
Radha Churn v *Chunder Monee* 9 W R
W R 519 But it does not bind his co defendant *Lochman* v *Jansu*...
395=A W N 1884, 136, *Azizullah Khan* v *Ahmad*, 7 A 353=A W N 1885,
54 So also admissions may be made in verified petitions *Girish* v *Shama*
15 W R 437, *Mohun* v *Chutto*, 21 W R 24, *Gour* v *Mohesh* 14 W R 481
An admission in a *Akhoy*, 19 C L J
1 An admission in *Bibee* v *Achmat*
14 B L R App , J 186; *Re Hoyle*
(1893) 1 Ch 84

Conditions of Admissibility—Statement must be one of fact The extra
judicial statement of ... conditions of admissibility
as would apply to the ...
of all essential that
be one of fact *i e* affir
While inference is ...
admission may be a psychological one, *e g*, belief *Ibid*

Admission on Matter of Law Parties cannot, by their admissions of law
... the court to adopt their view
... adm...

from certain facts, his 'opinion' as it is frequently called are not ...
for an admission except in cases where the declarant might, if present as a
witness, have testified to the same inference or conclusion *Chamberlayne's Ev*

§ 1293 An admission on ... S.
v Sunker, A I R 192 ...
Nag 313; R v Furse, 8 ...
13 Cox 178; R v Lan ...
L R 1928 Lah 779 = 113 Ind Cas 93; A I R 1927 Lah 281; A I R 1926 Oudh 341, 92 Ind Cas 732 An erroneous admission by a counsel on a point of law is of no effect and does not preclude the party from claiming his legal rights in the App llat ... 27 C L J 147 = 15 Ind Cas 953; ... 309 = I A Sup 17; Beni Parshad ... Johnston, 12 Heisk (59 Ten) 155, ... h v Asraf ... 16, 7 C L J 152; Ramsaran v Khakhan, 11 C W N 310 So also an erroneous admission of the pleader of a party on a point of law cannot bind the party. Dear Bux v Fatik 3 C W N 222, see also Kishna v Rajmal, 24 B 360, Narayan v Venkata, 28 B 408

Statements made under constraint or duress In regard to admissions made under circumstances of constraint, a distinction is taken between civil and criminal cases, and it has been considered, that on the trial of civil actions, admissions are receivable in evidence, provided the compulsion under which they are given is legal and the party was not imposed upon or under duress Thus, in the trial of *Collector* v *Lord Keith*, 1 Esp 212, the testimony of the defendant, ... tes in which he admitted the

...

vindicate his conduct. In that case *Le Blanc J*, remarked that the manner in ... atter of observation to the jury, ... a issue, he was bound to receive ... *las* v *Ramlabanya*, 106 P R ... s extends also to answers volun... given to questions improperly asked, and to which the witness might successfully have objected So the voluntary answers of a bankrupt before the commissioners are evidence in a subsequent action against the party himself, ... he whole examination was ... obtained by imposition ... led by *Lord Ellenborough* ... When such admissions ... *Stockfield* v *De Castel*, 4 Camp 11, *Robson* v *Alexander*, 1 M & P 448

Erroneous admission An erroneous admission may be withdrawn *Sita Ram* v *Pir Baksh*, A I. R 1931 Lah 6, see also A I R 1923 All 575, A I R 1928 Lah 726; 77 Ind Cas 875, 65 Ind Cas 368

Statement must be certain An admission must be certain, and consistent, definite and clearly proved It must, in addition, be couched in language reasonably capable, without forced or strained construction, to bear the interpretation placed on it While conjectural and suppositious statements are excluded absolute precision is not demanded in case of a declaration offered as an admission A statement is not inadmissible because of a possibility of ambiguity *Chamberlayne's Ev* 1295 A vague admission is not enough 83 Ind. Cas 904 = 21 A L J 869

Statement must be voluntary It is further required not only that the statement should be one of fact but that it should have been voluntarily made by the declarant. A distinction should, upon principle, be drawn between the admission obtained by the use of *duress*, where the will is overpowered or controlled and ...

...

the bare custody of an officer is not sufficient to exclude a statement otherwise

S. 18 voluntary Nor is it ground for rejecting the statement as not voluntary that it was given by the declarant as a witness in response to compulsory process whether in Court, before arbitrators, commissioners in bankruptcy, or in other judicial proceeding As the only important matter is the fact that the declaration was made by a party, the circumstances under which he made it are apt to be regarded as unimportant provided he knew what he was doing and desired to do it *Chamberlayne's Ev* § 1294

Admission—by party to proceeding or his agent;

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case as expressly or impliedly authorized by him to make them, are admissions

by suitor in representative character;

Statements made by parties to suits suing or sued in a representative character, are not admissions unless they were made while the party making them held that character

Statements made by—

by party interested in subject matter;

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

by person from whom interest derived

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements

[illegible]

[illegible] ...sibility attaches primarily if not exclusive[illegible] ...logical reasoning as a condition of ad[illegible] stated, in case of a probative fact, to [illegible] *gestae* fact, to its constituent quality in rela[illegible] rather than to the relation existing bet[illegible] which it directly alleges A statement competent as an admission may in many cases, be one in an independently relevant rather than an assertive capacity Thus the offer of one accused of crime to plead guilty under certain conditions while receivable against the declarant, is plainly not within the operation of the Hearsay rule Admission of this type are perhaps more

pre-eminently those of co
however, being made by t
partly as belonging to
person making them and
they are offered in evi
persons not parties to the su
admissibility of statements
against the interest of the part

utterance, when made thus represents the party's own belief (Vide s 20). By adoption, the party may assent to a statement already uttered by another person, which thus becomes effectively the party's own admission By privity of interest and by agency the party's rights may in the substantive law be affected by the acts of another person and thus the other person's admissions may equally be available evidentially *Wigmore* § *1070* In order that an admission may be
who made it had one interest
of section 18 of the Evidence Act
711; see also *Ma Sheu e* v *Maun*
r, 5 W R 268

A general Procedural Requirement From the historical point of view, it seems clear that the practical development of the subject of admissions was materially affected by the existence of procedural rules now practically obsolete These forbade a party to call his antagonist as a witness and thus confined a proponent, as to facts within the latter's knowledge, to such statements as he may have made with regard to them But an earlier and more potent formative influence, whether the admissions were judicial or extra-judicial, has been that
emands good faith
the Courts should
It is prescribed for
if he does not like
his story. It punishes a party who attempts to deceive the Court by false
The same principle
en to talk about a
Darbey v *Ouseley*,
is held to explain
any statements he may have made in the matter *Chamberlayne's Ev* § 1234

Scope of the section This section deals with admissions in general The

R 434 "No
to a suit. The
th admissions
made by nominal parties, e g, consignees suing in the name of consignor. When the Court considers the admission of such a party fraudulent, it should be rejected at once See notes to *Bannerman* v *Radenius*, 2 Sm L C 363" *Nort Ev* 143 Admissions under this section are only evidence against the persons

S. 18. making them. Under section 32, *infra*, the admissions there enumerated are evidence against all the world

In order to render the admission of one person receivable in evidence against another, it must relate to some matter in which either both were *jointly* interested or one was *derivatively* interested through the other; and a mere community of interest will not be sufficient. Thus, where two persons were in partnership and an action

made by the

only of co part

Rawstorne v *Gandell*, 15 M & W 304 *Phillips* v *Elaget*, 11 M & W 84 So,

of the contractors, nothing

bind the personal represen

23; *Fordham* v *Wallis* 10

& R 75), nor can the admissions of the executor bind the survivor *Seater* v *Lawson*, 4 B & Ad 350, *Hathaway* v *Haskel*, 9 Pick 24 Neither will the admissions of one tenant in common is receivable against his co tenant, though both are parties on the same side of the suit *Dan* v *Brown*, 4 Cowen 483 (492), *Taylor* § 751

Where a party sues in a representative capacity—i e as trustee executor, administra

and only a

statements

admission

in his pers

sentative (

ad litem begins to end with the litigation, and consequently his extra judicial admissions are not receivable at all *Wigmore* § 107, citing *Pindell* v *Rubenstein*, 115 Atl 859; *Stevens* v *Continental*, 97 N W 862; *Chapman* v *R Co*, 12 Utah 8 (*Am*)

Where procedure still the real and beneficial

action

I am t

for the

enefit of the owner admissible evidence real party in legal interest, and his statements cannot be received as admissions of the corporation *Wigmore* § 107 But a contrary view was early taken in England for parish inhabitants *R* v *Hardwicke*, 11 East 578, 585

Sub clause (2) is the converse of sub-clause (1) There the statement was that of the representative; here it is of the party through whom he derives his right to sue Thus, if an executor were to sue for a debt, the declaration of his testator that the debt was paid would be evidence against him *Pocock* v *Billings*, 1 R & M 227; *Smith* v *Smith*, 3 Bing N. C 29 In the same way the declaration of the ancestor respecting his title to the land held by him is evidence against the heir (*Doe* v *Pettet*, 5 B & A 229), and the declarations of the former owner of goods that he had sold them have been admitted against the lord of the manor who claimed them as *heriot* *Ivat* v *Finch*, 1 Taunt, 141, *Nort Ev 148*

Statements made by a party to the proce ... been stated

affect by his admissions the substantial rights of one for whom he is acting

other words, in all these relations, substantive interest rather than form of record is regarded as the determining factor One who is to receive the fruits of successful litigation procedure holds responsible for his statements in connection with its subjects matter. *Chamberlayne's Ev* § 1311 In the Court of Chancery, in England, evidences are not received of admissions or declarations of the parties, which are

For example, the admis-
ule. In an action by A against X for prosecuting a suit contrary to an agreement, to prove the prosecution of the suit by X, A offered admissions by X of the obtaining of the judgment and issue of execution. They were objected to, on the ground that they were not the best evidence, and that a certified copy of the judgment should be produced

In *Smith* v
case of the admis
grounds. The a l
belongs to parol evidence from other sources A party's own statements and admissions are, in all cases, admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed or record Thus the statements of a party that certain land
y deed
as the
admits
against himself may reasonably be taken to be true" A statement made by defendant in another suit may be used as an admission within the meaning of this section *Hirish* v *Prosunno*, 22 W R 303; *Mohun* v *Chutloo*, 21 W R. 34; *Lala* v *Digambar*, 22 W R 304 N; *Forbes* v *Mahomed*, 11 W R. 28 P C,

its simplest form when the admissions are made by one who is a party to the record and who is also a real party

if he made the statement When the statement proven is between the parties to the transaction it has always been the rule that one party could prove the

of the action Such admissions, *prima facie*, conclusive against the party who

S. 18. making them Under section 32, *infra*, the admissions there enumerated are evidence against all the world

In order to render the admission of one person receivable in evidence against another, it must relate to some matter in
ed or one was *derivatively* interested throug
of interest will not be sufficient Thus,
and an action was brought against them as partners of a vessel, and admission made by the one, as to a matter which was not a subject of co-partnership but

admission as executor or the like would not be receivable against them as
in his personal capacity A guardian so far as his powers place him in a representative capacity is subject to the same rules, but the function of a guardian *ad litem* begins to end with the litigation, and consequently his extra judicial admissions are not receivable at all *Wigmore* § 107, citing *Pendell* v *Rubens tem*, 115 Atl 859; *Stevens* v *Continental*, 97 N W 862; *Chapman* v *R. Co*, 12 Utah 8 (*Am*)

Where procedure still permits a
the real and beneficial party in

not that the declarations of the real
Smith v *Lyon*, 3 Camp 455, which
of the owner on a charter contract *Ellenborough L C J* said "Although
action is in the name of the master it is brought for the benefit of the owner, I am therefore of opinion that anything said by the latter is admissible evidence for the defendant." A share holder of a company is not the real party in legal interest, and his statements cannot be received as admissions of the corpor
rly taken in England for
85
There the statement was
that of the representative, here it is of the party through whom he derives his right to sue Thus, if an executor were to sue for a debt, the declaration of
inst him *Pocock*
29 In the same
land held by him
the declarations
of the former owner of goods that he had sold them have been admitted against the lord of the manor who claimed them as *heriot* *Ivat* v *Finch*, 1 Taunt, 141, *Nort Ev* 148

has no beneficial interest in the issue of the litigation will not be p in
affect by his admissions the substantial rights of one for whom he is acting

the previous assignment. *Henderson* v. *Wild*, 2 Camp. 651". *Greenl Ev* § 172. S.
"In modern prac
has no interest in
prejudice of
Bumstead, 99
party is even l
L. C. & D Ry
Payne v. *Rogers*, Doug 107.

A nominal party may be affected by the admission of a real party, who though not named in the record, has a substantial interest in the result. *Falcon* v *Famous Players*, (1926) 2 K B 174; *Bell* v. *Ansly*, 16 East 113.

Tacit
Sepsi law
to do J in
8 Scott. N. R 830 "The agency may be constituted by an express limited authority to make such contract or a larger authority to make all falling within the class or description to which it belongs, or a general authority to make any;
a relation existed between the parties
r instance, that of partners, by which
y law the agent of the other for all
rticular partnership whether general
or special, or usually belonging to it, or the relation of husband and wife, in
considers the husband to make his

agency may be created

is *quoad hoc*, precisely the same as a real authority given by the defendant to the agent This representation may be made directly to the plaintiff, or made publicly, so that it may be inferred to have reached him and may be made by

of the case, as expressly or impliedly authorised by him to make them' leave it open to the Courts to deal with each case that arises upon its own merits *Field* p. 44

The principal constitutes the agent his representative, in the transaction of certain business, whatever therefore, the agent does, in the lawful prosecution of that business, is the act of the principal whom he represents *Greenl Ev* §

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S. 18.

as his mere intsrument. So whatever
contract for his principal or at the time,
any act, within the scope of his authority,
and in the course of a particular contract or transaction in which he is then engaged, is in legal effect, said by his principal, and admissible in evidence not
merely because it is a dec
that being made at the time
is treated as the declaratio
the *res gestae*, a part of the
if in fact made by himself
own authority, and not accompanying the making of a contract or the doing of
an act, in behalf of the
transaction to which they re
part of the *res gestae* and
general rule of law, exclud
statement by an agent of wh
not a part of the transaction,

The declarations by agents are original evidence and not hearsay, a being regarded as verbal acts, they are receivable in evidence without calling the agent himself to prove them *Doe v Hawkins,* 2 Q B 212; *Tay* § 602 They are the ultimate facts to be proved and not an admission of some other fact, and the only question is whether the declarations were made and relied upon It often happens, however, that the declarations of an agent are admissible as part of the *res gestae* and that they form no part of any contract and contain no element of estoppel in which cases they are of course, open to explanation or may be shown to be incorrect, like admissions in general. *Burr Jones* § Tne admission of an agent that he purchased as agent is evidence that the purchase was made by him in that capacity and not on his own account *Goreebollah* v *M R G D Boyd* 2 W R 10, see also *Mohesh Lal* v *Basunt,* 6 C 340 (352), *Govindji* v *Chhotu,* 2 Bom L R. 651; *Parameswara* v *Vijathen,* 20 Ind Cas 637

Admission by agent—When receivable. The admission of an agent cannot always be assimilated to the admission of the principal The party's own admission, whenever made, may be given in evidence against him, but the admission or declaration of his agent bind him only when it is made during the

§ 1078 The b
in *Fairlie* v
in 1788 had set
some time before the true principle was defined and accepted *Ibid,*
(1) As the case of *Fairlie* v *Hastings,* 10 Ves 123 (1804) is of some importance as well as of interest the judgment of *Sir William Grant, Master of the Rolls* is given *in extenso* "The subject of this cause is a loan of money by the late plaintiff, *Maharajah Nabokissen* to the defendant *Warren Hastings* As it is not by bill in equity that money lent is to be recovered, it is incumbent upon the Court for

sum by instalments; that a bond
remain with a *Cauntoo Baboo,* an agen
should be advanced, and then should

ever received the bond, *Cauntoo Baboo* in S.

read, and could not read any part
evidence of declaration by *Gobin*
is whether these declarations ...
the bill. Upon that question my opinion is, that these declarations do not come within the principle upon which they are supposed to be admissible. As a general proposition, what one man says, not upon oath, cannot be evidence against another man The exception must arise out of some peculiarity of
... agent may, un-
... his agreement,
... be what constitutes the agreement of the principal, or the representations or statements may be the foundation of or the inducement to, the agreement Therefore, if writing is not necessary by law, evidence must be admitted to prove that the agent did
... with regard to acts done, the words
... uently tend to determine their quality
... must be affected by the words But except in one or the other of those ways, I do not know how what is said by an agent can be evidence against his principal The mere assertion of a fact cannot amount to proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent For instance, if it was a material fact that there was the bond of the defendant in the hands of *Cauntoo Baboo*, that fact would not be proved by the assertion that *Gobindee Baboo* supposing him an agent, had said there was for that is no fact, that is, no part of any agreement which *Gobindee Baboo*, is making, or of any statement he is making, is inducement to an agreement It is mere narration, communication to the witness in the course of conversation, and therefore ... ice of the fact" The bill was dismissed ... put by *Mr Justice Gibbs* in *Loughborn* ... 'When it is proved that A is agent to B, whatever A does ...
agent of B, is admissible
which he makes for B, and
the agent's account of what

also *Kahl* v.
C 335
... a coal merchant for a penalty for selling short measures a witness was proceeding to state what was said to him by one *Peely* who managed the defendant's business, as to a sale about to take place *Lord Ellenborough* admitted the evidence saying '*Peely*
... iness, what he
... t, or on another
... said respecting
a sale of coals, then about to take place and respecting the deposition of the
... s in the *course of*
... affect his master"
... Railway Company
... master to a Police
... y s servants, were
received as admissions against the company, the station master being the proper agent to make such statements *Ibid* In that case *Cockburn C J* said "I

Archibold J said 'Being in charge of the station at the time a felony was committed, it was his duty to put the police in motion That being so, I think he was acting within the scope of his duty, that he had power to bind the

S. 18. company, and therefore that t
scarcely a case of "cause of em
master may be responsible in
him, if done in the course of employment But in contract, and as regard
admis . *Cockle Cas* 177 In
Peto expression "course of
emplo the scope of authority
of an in the course of employ
ment. But to be within the scope of authority, the statement must apparently
be made in the course of employment. *Cockle Cas* 178

Where an agent, acting within the scope of his authority, wrote to his
princip money on their account, and they
replied. was held that the agent's state
ment he money *Coates* v. *Bainbridge*,
5 Bing 58, *Powell*, 438 So the declarations of an agent bind the principal only
so far as the agent had authority to make them *Faussett* v *Faussett*, 7 Ecc &
Mar Cas 93 95, *Hogg* v *Garrett* 12 Ir Eq R 550 If goods were deposited with
a pawnbroker in the ordinary course of business, a declaration of the shop-man
that his master had received the goods would probably be admissible against his
master, because it might be assumed that the shopman was authorised to answer
in them, but it
immediate business
al hundred pounds
Garth v *Howard*
C R 127 In the
former case *Tindal J* said. "It is dangerous to open the door to declaration by
agents beyond what the cases have already done The declaration itself is
evidence not given upon oath; it is made in his absence, when he has no
or any

trains at a certain station in the course of which the night inspector

after the transaction *G O Ry Co* v *Wills*, 34 L J C P. 195=13 C
S 748 In rejecting the evidence *Earle C J* said · "I am of opinion that this
admissions

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business and in the ordinary
to past or present events (*Prof*
arse, if the transaction or business
subsequent admissions regarding
are not
it will be rejected as will 210 ' So
properly within the scope ased, the
when the agent's right to an by his
principal can no longer be
Fairlie v *Hastings*,
rn v *Allroll*, 4 Taunt
M & W 58, 569,
, *Stockton* v *Demuth*,
mesuar v *Vigatten*,
agent can be received,
hari Mohan, 3 B. L

...nd Cas 709. So S.
be an agent is
... Ali 633 (Am) and
not by the declarations themselves even when accompanied by acts purporting to be acts of agency *Montgomery* v. *Leith*, 162 Ala 246 (Am) Unless and until the agency is so proved and the declarations, acts or admissions of the agent come within the rule laid down, the evidence is not admissible Such proof need not be invariably introduced in the first instance, the order of proof being within the discretion of the Court *Burr Jones* § 255; see also *Chamberlayne's Ev.* §§ 1338, 1339, *Emperor* v. *Ritbaram*, 19 Cr. L J. 789. Declarations and acts are competent to prove agency if there is proof of former similar acts or declarations recognized or approved by the principal. *Burr Jones* § 255. Agency may also be proved by proving that the agent has acquired credit by acting in that capacity and that he has been recognized by the principal in other instances of a similar character to that in question In *Watkins* v *Venee*, 2 Stark, 368, a guarantee signed by a son for his father was admitted
upon three or four
...n v *Towse*, 1 Camp.
Whitefield v *Brand*,
...o the general agent,
special power to do a particular act need not be shown *Ram Buksh* v *Kishori Mohan*, 3 B L R A C J 273

Agency may be either general or special, and it may be express as when it

...

and be an equivalent to an original authority; *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (A subsequent ratification has a retrospective effect and is equivalent to prior command) So, where A and B were jointly interested in a quantity of oil, which A contracted to sell without B's authority, and B at first ... agreement on hearing of it, but afterwards assen... made the contract binding upon him *Shom*... The point to be regarded in this clause is no... n agency, as to which the Court must be satisfied, but that there was authority given sufficient to cover the particular statements relied on as admissions Though the maxim is *qui facit per alium facit per se*, the identity ceases where the agent exceeds the scope of his authority, and his admissions in such a case will not bind his principal *Nort Ev* 144

...nfant because an

...

ner agreement to make a new contract for the future occupation of it, will be
...wife should have this extensive power
...e of conducting the business of the
...2, Tay § 605
...mpliedly constitues a third person
his agent for the purpose of

...

impliedly authorised to make t...
Fateh v *Baldeo*, 5 O W N 155 = A I R 1928 Oudh 233

S. 18.

19 Pick (*Mass U S*) But the opinion or conclusion of an agent ... legal effect of acts and transactions is not binding on his principal unless the ... n his behalf and are not admis- admitted but is rized to make a principal *Burr* upon the personal ation, inferences ts of acknowledg- Limitation Act (IX of 1908)

Evidence is Primary Admissions by an agent have the same quality of primary proof which characterizes other admissions The declaration is equally competent though the declarant be in Court and available as a witness The evidence furnished by the fact of an admission is primary So also, the statement continues competent after the death of the principal, if made by the agent before that event It is entirely unaffected by the death of the agent *Chamberlayne's Ev* § 1343

Agents ... ass ... tions, which ... ns of the latter will on ... nt make them (a) in ... l tran- tion, or (b) in pursuance of an authority to make statements or reports as to matters affecting his principal s business or interests; or (c) in the due execution of a general authority to carry on the business of his principal or a particular department of it with full discretion and powers of management *Wills' Ev* 163 So a letter written by the secretary of a company by order of the acting directors, stating the number of shares held by M was admitted on behalf of his executors in proceedings against them *Meux s Executors Case* 2 D M & G 522, see also *Natural Exchange Com* ... 9 Moo 103 But a statement made by the chairm ... Act, 1862, at a general mee ... against the company In ... *Roscoe* N P 70 in rejecting the admission of the chairman *Fry J* said ... could possibly be admitted ... his agency If that were so the statement would be admissible ... He for it was made ...

So also the secretary of a projected company has not by ... any power to bind the members of the provisional committee by adm ... *Burnside* v *Dayrell*, 3 Exch 225 In *Bruff* v *Gt N Ray Co*, 1 F & F ... *Willes J* rejected an admission of the secretary of a company as to the receipt of a letter And an admission by the board meeting of a company regi ... consisting of a less number of directors than was required by the deed of settlement was rejected in *Ridley* v *Plymouth Banking Co* 2 Exch 711 Admissions by servants of a ... not allowed ... the company, in ...

dants in action ... to who was responsible ... ened, when made at the time of ... tent, is against the company,

S. 1

on the ground that his employment did not carry with it authority to make declarations or admissions at a sul[illegible]
performed his duty; and that [illegible]
which the injuries arose and was [illegible]
then engaged, but that it was a mere narration of past occurrence. But as has already been pointed out, that there is a class of cases in which [illegible]

[illegible] business, [illegible] are made [illegible] *Kirkstall* [illegible] *lis,* 18 C. [illegible] v. *London Tramway Co,* 27 L T 193; *Mayhew* v *Nelson* 6 C & P 58; *Loughboro* [illegible] 389. But in [illegible] the agent's [illegible] do. *Warden* [illegible] So in every case the question invariably [illegible] by the agent in the scope of his authority or, as it is sometimes put, in the time of his duty? If so, it is admissible against the corporation. The declarations [illegible] npo [illegible] on [illegible] by him. *Burr Jones Ev.* § 357.

[illegible]

[illegible] contracts, give receipts, compromise [illegible] business. *Kishan* v *Har,* 38 I. A. [illegible] V N 321 He can maintain suit on [illegible] es and can receive payments and [illegible]

Ramkrishna, 15 Bom L [illegible] v. *Ram,* 35 A 380; *Sarka* [illegible]

S. 18. the transaction was really for the benefit of the family, he can not rely upon an acknowledgment of the liability, made by one of them as an acknowledgment duly made on behalf of all co ot

, save under special circumstances, bind the other adult co-parceners
suami v *Krishmer*
is also not open
make an acknowle
those who claim through the person acknowledging *Ram Kishan* v *Hardi Lam* 71 Ind. Cas 737 = 1923 Lah 135

It field in the
ample, if A
may not his
be received
against the employer? Because
made in performance of any wo
been asked by a brakeman whet
point, and had then mentioned receiving certain instructions from the
despatcher, this statement might be regarded as made in the course of performing his appointed work. *Wigmore* § 1078.

Admission by agents in criminal cases. The rules of admissibility are in general the same for the trial of civil and of criminal causes. Not only in practice, but in principle and in spirit there is no occasion for a distinction
16 Cox 460,

upon the division of opinions whether under the circumstances of the the testimony of *captain Coit* to the facts stated in the record, was admissible. That testimony was to the following effect That he, *Captain Coit* was at *St. Thomas* while the *General Winder* was at that island, in September 1824 and was frequently on board the vessel at that time, that *Captain* to

of the authority of the master, the nature of the fitments, and the

S.

accomplishment of the voyage, being thus laid, the testimony of *Captain Coit* was offered as confirmatory of the proof, and properly admissible against the defendant. It was objected to, and now stands upon the objection before us. The argument is, that the testimony is not admissible, because, in criminal cases, the

force of the argument. In general, the rules of evidence in civil and criminal cases are the same. Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act. It must be shown that the agent has the authority, and that the act is within its scope; but these being conceded or

be con-

poison.

sitive or

circumstantial, but this is matter for the consideration of the jury and not of the legal competency. So, in the cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all. Each is deemed to consent to or command what is done by any other in furtherance of

master was just as

the purview of the

The evidence here offered was not the mere declarations of the master upon other occasions totally disconnected with the objects of the voyage. These declarations were connected with acts in furtherance of the objects of the voyage, and within the general scope of his authority as conductor of the enterprises. He

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Captain

ons were

all made with reference to that object, and as persuasive to the undertaking

he is; an

principal

they had

An ad

criminal, as

defendant him

sible for a lett

letter was wr

it was written

Where a pers

agent, then it

S. 18. as where the agent is dead, ... is the best evidence of the ... which can be produced ... decided that a receipt give ... Lord Mel ... 's attorney ...

proved in the other, each particular fact is to be proved ... evidence" Mr Plumer on the opposite side: "I desire it may be distinctly ... that the rules of evidence are the same in ... evidence ...

between the agent and ... or said by the other; ... *Chancellor Erskine* in adm... the proof must advance ... cases, for a fact must ... to be followed by a crimin...

... is admissible ...

the statement of his servant, the ... strictly proved It is not sufficient to say that because a man acco... another to the thanna the former is a servant of the latter *Rabaram* v *Emperor*, 46 Ind. Cas 709=4 P L W. 120=19 Cr L J 789

Admission by wife The admission of the wife will bind the husband, only where she has authority to make them *Emerson* v. *Blomden*, 1 Esp 142, *Anderson* v *Sanderson*, 2 Stark, 204 ... 4 Camp. 92 ... This authority does not result, by opera... wife; but is a question of fact, to be ...

inference of ... with great ... *Greenl. Ev* § 185, *Gregory* v *Parker*, 1 Campb 485, ... 2 Esp 511 ... M 422, *Riley* v. *Snydam*, 4 Barb 222, *Palethrop* v *Furnish*, 2 Esp 511 ... Where a wife is authorised to manage business of her husband, during his absence, her admission is evidence against her husband. *Clifford* v *Burton*, ... 109 The law on this subject is that laid down by *Alderson B* in ... a wife can not bind her husband by her ... may be

may be his agent to make admissions with respect to matters connected with the trade" A wife's admission has been rejected to prove a slander by her husband *Tait* v *Beggs*, (1905) 2 Ir R 525 An admission of a daughter is not binding on the father. *Buch* v *Lulee*, 2 Agra 20.

Admissions by Pleaders, Attorneys and Counsels A vakil in this country has not ordinarily any greater power to bind his client than that which is possessed by an attorney in England *Woodroffe Ev* 237, *Prem Sukh* v *Pirthee Pa*

. . has authority to act as agent in
as it is to be implied from the mere
been enlarged in the particular
case, extends only to the management of the cause. Yet, conversely, all his admissions during the management, including utterances in the pleadings do affect the client *Wigmore* § 1063 "The attorney is not the agent of the client for the purpose of making admissions, except in the cause and for the purpose of the cause All that appeared here was that one of the plaintiff's witnesses

by a ly because
they *Ev* Art 17
An a ng on the
ala, 10
W R.
as 18
is not
evidence in the cause *Young* v *Wright*, 1 Camp 139, *Petch* v *Lyon*, 9 Q B 147 (154) The reason for this distinction is found in the nature and extent of
d for the management of the
also *Parkins* v *Hawkshaw*
ilson v *Turner*, Taunt, 398
If the admission is made
appears that the attorney was
Cliff, 4 Camp 133, *Ellis* v
Bishesuar, 5 Pat 777 = 1927
Pat 61 But in *Wagstaff* v *Wilson*, 4 B & Ad 339 a letter threatening legal proceedings, but written before action begun, was excluded See also, *Doe* v *Richards*, 2 C & K 216 So in the absence of any retainer at that time in the
ke the admissions
ss 185; *Burghart*
34 *Greenl Ev* §
If an attorney
herein binds the
liams 2 B & Ad
845, 855; *Standage* v *Greighton*, 5 C & P 406, *Tailor* v *Foster*, 2 C & P 195, *Griffiths* v *Williams* 1 T R 710, *Trusolie* v *Burton*, 9 Moore 64, *Lord Owen & Co* v *Wood*, 120 Ia 303 (*Am*)

wards be withdrawn" *Taylor* § 783 citing *Harve* v *Croudon Union*, per Ct. of
here there was no
counsel is the
N 82, *Mr. Justice*
to conduct his

to make binding
ie ca e" See al o
Jata, 10 W R 3?2,
Venkata ... Chambara, 21 M 274,
v Minns ... 13 A 272; Mathews
Bhasya ... B 122; Venkata v
v E I Ry Co, 52 C 386, see also Sen v Chuni Lal, 51 C 385, Askaran
authority is less extensive than that of a solicitor ... Muthu v Muthu, 105 Ind Cas 5 A counsel's
896, R v Greenwich 15 Q ... Richardson v Peto, 1 M. & G
... Gaya, 1923 (Pat) 307
... l is not binding on the

... to bind his client by
486, but see Bansi Lal v. Emperor, 30 Bom L. R 646 = A I R 1928 Bom 241 the absence of express authority. R v Downer, 14 Cox

If a plaintiff relies upon any statement by the defendant or his plea ... made in a previous litigation between the parties, that statement mu t ... regularly proved On proof of such statement the question arises as to ... weight to be attached to it Mani Lal v Uma Charan, 19 C L J 541

A judgment deliberately recording the admission of a pleader must ... presumed to be correct, unless contradicted by an affidavit, or the Judge's ow ... admission that the record was wrong Hur Dyal v Hura Lall, 16 W R 107

Oral testimony on behalf of a litigant in a litigation with A cannot ... admitted as evidence against him in a litigation with B on the footing of a ... admiss on by counsel The case lodged by ... not strictly a ... Lords ... in it, although ... atement ... any subsequen... arded ... British Insulate... Co v ... Jo 252 = 156 L T Jo 440 ... 203 = (1923) W N 344 (Eng) = 68 Sol ... 160 = 93 L J Ch 467 = 131 L T 683 Per Russel J affirmed an appeal in (1924) 2 Ch

Partners and joint contractors ... virtue of ...

... ner concerning partnership affairs
... by this Act is evidence against the
Mo 131 = 220 ... See also Cal C C P 1872 § 1870 ...

... member ...
By the ...
... Er ...
... Taunt 101; Pethering v Turner, 1 Taunt 104, ... v Marsh, 2 B & Ald 673; Wood v Bradlik, Fox v Clipton, 6 Bing 792, R v Hardwick, 11 East 578, Cour, 1 M & S 249; Nicholls v Dowding, 1 Stark. R. 81; Lucas v De ... Kali v Gope, 2 C W N 166, ... Whitcomb v Whiting, 1 S L C 644 = 2 Doug 652,

Partners and joint contr... making admissions against ... or joint cont... 588 (591) ... to the admis... admissible o... 281 (Am); ... who are pr... one of them, ... within his ... within the su... partners ... have been ob... made during ...

action, are admissible against both; and entries in the partnership books made by a partner during the continuance of partnership are admissible against both Admissions of one partner are admissible against all to prove the execu-

e admissible Although one
admissions may be received,
uestion of credibility." *Burr*
received against another on
ord, but on the ground that they are

business and within the sco

Kowsulliah v. *Mukta*, 11 C. 588 (591), *Steph Dig Ev* art 17; *Re Whitely*, (1891) 1 Ch 598; *Calho* v. *Jhoro*, 39 C. 995 While the firm thus created exists, it speaks and acts only by the several members; and of course when the existence ceases by dissolution of the firm the act of an individual member ceases to have the effect
as by the
agreed. *Bel.*
v. *Braddick*,

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the statement made during the existence of the partnership, it is undoubtedly binding on and evidence against the other members of the firm *Burr Jones* § 248. In *Wood* v. *Braddick*, 1 Taunt, 104 (1808) which was an action brought to recover from the defendant the sale proceeds of certain linens, which the bankrupts, in the year 1796, had consigned for sale to America, as the plaintiffs alleged, to the defendant jointly with one *Cox*, who was then his *partner*, but, as the defendant contended, to *Cox* only, the plaintiff produced a letter from *Cox*, dated 24th June, 1804, stating a balance of £919 to be then due to the bankrupts upon this consignment It was in proof that on the 30th of July 1803, *Braddick* and *Cox* dissolved their partnership, as from the 17th of November, 1800 *Cockell* and *Lens Serjts*, objected that this letter, being written after the dissolution of the partnership, was not admissible evidence to charge *Braddick* In rejecting the contention *Mansfield C J* said "Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other in any transaction which has occurred
rights created
lear that one
t principle is it
joint contract
one person in
regard to past
s last exception
Myl 191, 199,

200, wher
payment,
against th
Whiting,
Deane V

S. 18. others, admissions made by the signatory at a time other than the execution of the contract were held inadmissible *Taft* v *Church*, 162 Mass 527 (*Am*) And where one partner after having given a note in his own name said it was for the partnership h
Smith, 21 Wind (
partnership, that
for the rest, in con .
that relationship
for himself in simi
goods, either of t
into the same business, at the same place, on his own account. The legal presumption is, when a person purchases a thing, he purchases it for himself In such case, the vendor, in order to charge another person as a partner, must show the purchase was made for the firm or that it went to their use. So where a member of a partnership bought a mule, *ostensibly for himself*, and when it was sent home he said it was for the firm, his declaration so made after the purchase was not of itself competent to bind them It is a general rule of the law of evidence that the
against all the rest,
evidence is admis

received when the rule of interest in the cause excluded the witness" But

all the partners, and kept more or less
lso generally be received as *prima facie* evidence *inter se* *Gething* v *Keighley*, 9 Ch D 547, 551; *Lindley on Partnership* p 566 *Daji*
De G M & G
the books of
against them a
tion If one
ground for an
to exclude an allegation of a mistake or erroneous omission or insertion The only question is whether the books are *prima facie* evidence between *partners and their estates In my opinion they are*" *But it is not conclusive* evidence agin
if he can by clear evidence show that there is an
I R. in *Gething* v *Keighley*
9 Ch D 549, *c*
App 587, *Hutchison* v
5 Ir
Daji .

with
So an
But representation or m
respect to some partnershi
2 B & A 795, *Thwaites*
R 81, *per Lord Ellenborou*
of several parties in fraud
s fact by the innocent parties,
cted by the Court *Rawstorne* v
One member of a firm can borrow
notes and such promissory notes
sa, 40 M 727, *Karmali* v *Karu*
39 B 261.

Limitation—Saving of, by acknowledgment of one partner An acknowledgment or a payment by a parter without special authority is binding upon another partner. Under section 21 of the Limitation Act a partner *ipso facto* has no authority to acknowledge or to make a part payment, but if he has general authority to contract debts or make payments he has implied authority to keep the debt alive and it is unnecessary to make out a special authority.

Chegamull v *Govinda Swami*, A I R 1923 Mad 972 So in the absence of S.

v. *Veera-*
18=(1918)
Ind Cas.
1 Ind. Cas.
552=35 M. 112; see also *K. R. Firm* v *Sathyavada*, 21 Ind. Cas 635=37 M. 146=25 M. L. J 501

In *Premji* v *Dossa*, 10 B 358, *Scott J* said at p 362. "It must be shown that the partne
plied to do so
to be presumed
bad High Court in *Gadu Bibi* v *Parsotam*, 10 A. 418 and *Candy J* of Bombay High Court in *Dalsukhram* v
W R 145; *Lalta* v *Babu*, 32 A

) and though the
nership (*Watson* v
circumstances be
treated as continuing where, for instance, the retirement of a partner is kept secret and payments of interests are made in the name of the firm *In re Tucker* (1894) 3 Ch 429=63 L J Ch 737), see also *Abdulali* v *Ranchodlal*, 38 Ind Cas 872=19 Bom L R 86 (95), *Karamali* v *Boralasingji*, 26 Ind Cas 915=39 B 261=19 C W N 837

of payments by
s of Limitation as to
of that particular
form of liability is of first importance, and the solution lies in stripping the proposition to the bare statement of the authority, express or implied, with which the declarant was invested at the time of the declaration The discussion is limited to admissions made after dissolution Prior to it, and whether the admission be regarded as a new contract or an extension of an old one, there need be no question of the partner's ability to charge his co partners with the act which bars the Statute But after dissolution the agency and its cessation, or rather the exact time of the determination of the agency regulates the period when such admissions or payments which operate as admissions become, as to the other partners, ineffectual *Burr Jones* § 249

partnership does not
Similarly a partner of
o authority to give an
36 Ind Cas 225=
8 L B R 363

Parties suing or
party is receivable as
interest, i e, a relation
to be affected by the ac
evidence as that other person may have furnished by way of admission This
privity may be
Where the p
administrator,
and only adn
statements ma

S. 18. admissions as executor or the like would be receivable against him as a party in his personal capacity *Wigmore* § 1076 The admissions which are thus receivable in evidence, are those of a person having at the time some interest in the matter afterwards in controversy in the suit to which he is a party The admissions, therefore, of a guardian, or of an executor or administrator, made before he was completely ...

... *prochein amy*, made before ... against the ward or infant ... of heirs, devisees and ... (*Webb* v *Smith*, R & M. 106; *Fraser* v *Marsh*, 2 Stark 41; *Cowling* v *Ely* 2 Stark 366), though it may bind the person himself when he is afterwards a party, *suo jure*, in another action A solemn admission, however, made in good faith, in a pending suit for the purpose of that trial only is governed by other considerations

Generally the competency o... which they are made But it is an ... that if the admission is made by ... tive capacity only, it must be made ... capacity *Freeman* v *Brewster*, 93 ... dispute in England In one case, *Chief Justice Tindal* is reported to have received an admission of a person, who was serving as an assignee now called the trustee of bankrupt, though it ... *Morgan*, 2 B & Rob 257 But *Lord* ... the same point *Fenwick* v *Thornto*... the admission by an Official Assignee made before his appointment See also *Metters* v *Brown*, 32 L J Ex 140, *Plant* v *M'Ewen*, 4 Cox 544; *Taylor* § 755 So statements of an executor or administrator ... his appointment, cannot be received ex... *Church* v *Howard*, 79 N Y 415, *Lamor*... *Butler*, 48 N H 161, *Hilton* v *Snyder* ... v *Edmonds*, 25 L J Ch 125, 140 141 ... startling proposition' says *Taylor* 'that the assets of a testator, and the consequent rights of legatees may be affected by some inconsiderate statement which the executor, before the death of the testator, may have been induced to make' *Taylor* § 755 But statement of such persons is competent, if made while representing the person beneficially interested, and in the transaction of business or in performance of the trust in such manner as to be part of *res gestae* *Church* v *Howard*, 79 N Y 415 (Am), *Fox* v. *Walters*, 12 A & E 43, *Concha* v *Concha*, 11 App Cas 541 543 So an affidavit of guardian of an infa... infant in anoth...

... 'If he was a ... while actually ...

... *Vaughan Williams* J in *New Trustee* v *Hunting*, (1897) 1 Q B 607, 611, affirmed (1897) 2 Q B 19 ... *Land etc Co*, 28 Colo 320, the Court ref... fraudulent admiss...

... 544, *Fox* v *Walters*, 12 A & E 43, ...

v. *Russell*, 53 Hun 17=4 N Y Supp 781 ...

operate as a waiver *Kailas* v *Sheikh Chheau*, 12 C 516, *Woodroffe*, 232.

§ 1076(2); (see al... guardian of the person of an infant as to the property right of the latter are not ... for other purposes ... as 825, see also ... *i*, 10 C L R 377, ... *ammal* 24 I A ... rt of Wards, made ... bind or prejudice ... Cas 825=29 C L J. 577; *Ram Autar* v *Rajah Mahammad*, 24 C 853=1 C W N 117, 21 W R 253 An acknowledgment of debt ... period of limitation *Ram Charan* v ... J. 375; *Sobhanadari* v *Sriramulu* ... 456, *Annahaganda* v *Sanjadiqyapa*, ... 292; *Chhata* v *Bilto*, 26 C 51, ... guardian of a Hindu minor has no power to keep debt alive against the minor *Ramaswamy* v *Kashinath*, 108 Ind Cas 529=A I R 1928 Mad 226

... t in receiving ... to the party is ... same person ... that view that ... llows that the ... become receiv- ... other words, the admissions of one co-plaintiff or co-defendant are not receivable against another merely by virtue of his position as a co-party in the litigation This is necessarily involved in the notion of an admission, for it is impossible to discredit A's claims as a party by contrasting them with what some other party B has elsewhere claimed, there is no discrediting in such a process of contrast, because it is not the same person's statements that are contrasted Moreover ordinary fairness would forbid such a license, for it would in practice permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party and then employing that person's statements as admissions It is plain, therefore, both on principle and in policy, that the statements of a ...

... who happen to be joined as parties to the ...t" See also *In re Whiteley* L R. (1891) 1 Ch 558, *Azizull*... *Lachman* v *Tansukh* 6 A 395; *Amrita*... W R 214=2 I A 113, *Chandeswar*... *lal* v *Himmut Ali*, 23 W R 519 ... by one defendant can not be read in evidence either for or against his co-defen-... ...dant be read in ... *hens* v. ... *Johns-* ... being, ...ve been

S. 18. afforded for cross examination (*Jones* v *Turbeville*, 2 Ves 11, *Morse* v *Royal*, 12 Ves 355, 361, 363), and moreover, if such a course were allowed, the plaintiff might make one of his friends a defendant, and thus gain a most unfair advantage *Wych* v *Meal*, 3 P Wms 311" *Taylor* § 754

But the situation has often been obscured by the circumstance that the co party's admissions are received against himself, and that they are sometimes received also against the other co party because of a privity of obligation or of title But it is not by virtue of the person's relation to the litigation that this can be done, it must be because of some privity of title or of obligation, which would indeed have admitted the statements even had the declarant not been made a co-party *Wigmore* § 1076 In *R* v *Hardwicke*, 11 East 578 *Ellenborough L C J* said "Evidence of on[illegible] defendants in trespass will no[illegible] But if they be established to[illegible] declaration of the one, [illegible] evidence against all [illegible] object" The payment [illegible] the principal debtor cannot create a new period of limitation for the surety's debt *Gopal Dass* v *Gopal Bin*, 28 B 248.

In *Ambar Ali* v *Lutfee Ali*, 45 C 159 = 25 C L J 619 = 21 C W N 500, at page 999 *Mr Justice Mookerjee* said "There can be no room for controversy that the admission is good evidence against the maker of conveyance, but the question arises whether it is admissible against the other defendants These defendants it will be observed, are jointly interested in the land now in dispute, along with fourth and fifth defendants, in fact, they claim under a common lease from the landlord, and have on the basis thereof, taken a common defence to defeat the suit of the plaintiffs But these defendants were not joint owners of the property covered by the conveyance of 1894, and were strangers to that transaction They consequently press the view that an admission made by the owners of that property cannot be received in evidence against them, merely because, since the date of the alleged admission, they have jointly acquired the property now in suit. In our opinion this contention is well founded and section 18 of the Evidence Act is of no assistance to the plaintiffs The principle which regulates the reception in evidence of an admissio[illegible] another defendant, was formulated in [illegible] *Sundari* 11 C 585, *Chatho Singh* v [illegible] *muddi*, 44 C 130 = 20 C W N 1217 [illegible] are jointly interested in the subject mat[illegible] these persons is receivable not only [illegible] defendants, whether they be all join[illegible] relates to the subject matter in d[illegible] character of a person jointly intereste[illegible] is tendered The requirement of the [illegible] in legal interest between the joint owners is of fundamental [illegible] *Blakeney* v *Bishop*, 11 Beav 134. [illegible] joint owner-ship [illegible] Blakeney [illegible] person cannot [illegible] interest in the [illegible]

[illegible] consequently it is not by virtue of the [illegible] to the litigation that [illegible] the oth[illegible]

[illegible] of the admission against the co-defendant

S.

the words of section 18 were perfectly clear and in as much as he made the statement when he had parted with his interest in favour of his co-defendant in the present suit, the admission made by him could not be treated as evidence of admission against the co defendant *Rambillan* v *Ubon Bagh* 30 C W N

that the brothers were not joint at the date of the sale and that the properties were exclusively owned by U put in a deposition given by another brother K in the suit in which the money decree against U was passed in the course of which K stated that the family was not joint and the properties belonged exclusively to U *Held*, that the deposition of K in the previous suit was not

including defendant No 6 constituted a joint family and that a certain property was joint family property The defendant No 6 in the course of his deposition as a witness on behalf of the representatives of Upendra Nath Ghose in suit No 127 of 1911 stated that on the death of the plaintiffs' father Upendra separated from his brother and that there was no joint family The defendant No 6 therefore was not claiming any interest in the property in question and in the 'admission' made by him in the previous suit he did not fulfil the character of a declarant jointly interested with the party, in respect of the property con-
urther more, it is
ay that at the time
No 6 there was
thers" *Nogendra*
v. *Laurence Jute Mills*, 25 C W N 89 (94)=61 Ind Cas 544 An admission of one defendant in a written statement in a suit will not be evidence against the
by examining that defendant who
Ind Cas 974, see also *Appavu*
4 M L T 117=25 M L J 729,
s 2, *Hiat Bakhsh* v *Lachmuna*,
a confession of judgment by one of
nce against the other defendant
129, *Amrito Lal* v *Rajanee Kant*,
2 I A. 113=23 W R 214=15 B L R 10, *Narindar Singh*, v *C M King*, A I R 1928 Lah 769, *Saidu* v *Meher*, 101 Ind Cas 589, *Jones* v *Turberville* 2 Ves Jur 11, *Hay* v *Gordon*, 10 B L R 301=18 W R 480 P C, *Gopal* v *Gopal*, 28 B 248, *Morse* v *Royall*, 12 Ves 362, *Daniel* v *Potter*, 1 M & M 503, *Chandraeshwar* v *Chuni Ahir*, 9 C L R 359 A co party cannot, indeed, as a rule use the statements of his associate on the record as against the opposing interest He may, however, employ them in his own favour as against the declarant *Chamberlayne's Ev* § 1316

interest, and may be easily applied Many other cases arise which cannot be brought under any certain rule but must depend largely upon the facts as to identity of interest, as they are brought out at the trial In either case the authority should clearly appear before the statement of one should be considered binding as against another Bare statements by an agent unaccompanied by
o doing of his principal's business,
ess it were shown that the principal
In most cases the statements of an
l with acts in such a way as to be
part of the *res gestae*. *McKelvey Ev*
§ 125; *Greenl. Ev* § 109

S. 18. Admissions of persons having joint interest

... persons seized jointly are seized of the whole, each being seized of the whole, the admission of either is the admission of the other and may ... *Nagendra* v *Lawrence Jute Co*, 25 C C 159 = 21 C W N 996 = 25 C L J ... An admission made by some of several defendants in their character of persons jointly interested with the other defendants in the matter in respect of which the admission is made is binding on the other defendants *Bhika Mal* v. *Ganga Ram*, 69 Ind Cas 35; *Meajan Matbar* v *Alimuddi Mea* 31 ...

... and his fellows, whether they be all jointly suing or sued provided the admissions relate to the subject matter in dispute and were made by the declarant in his character of a person jointly interested with the party against whom the evidence ...
Meajan v *Alimuddin*, 34 ...
v *Mukta*, 11 C 588 ...
in evidence against anoth...
were jointly interested, ...
mere community of interest will not be sufficient *Taylor Ev* § 750 An apparent joint interest is obviously insufficient to make the admission of one party receivable against his companions, where the reality of that interest is the point in controversy A foundation must be laid, by showing ... *facie* that a joint ...
not be est...
but this ...
against th...

... for a sum of money, the other brother is not bound by such admission *Mama* v *Madho*, 21 Ind Cas 165

In ad...
who ...
releva...
be made ...
tial interes...
one entitl...
D' Alton, ...
interest is ...

party in in...
example, ...

... the admissions of party in interest Thus the interest of *cestui qui trust* of a bond, in a suit by the trustee, is an original interest, and not a mere incidental interest in the result of the suit, so also, the interest of persons in a policy effected in another's name, for their benefit It is also a requisite that the statements should have been made during the continuance of the interest. Declarations, made after the declarant has ceased to have any interest in the matter are not admissions, but mere hearsay *Burr Jones* § 238 The admission of one executor does not conclude another. *Chunder Kant* v *Ramnarain*, 3 W.

R 63 The admissions of the executor of a donor may be treated as the admission of the donor. *Dwarkanath v Chundeechurn,* 1 W R 339. The admission of a *ryot* of the rate of rent at which he holds a tenure cannot be treated as evidence against another *ryot* to prove the rate at which he holds the tenure *Nuroohurry v. Naraince,* W R (F. B) 23=1 Ind Jur O S 9.

Privies in Obligation. So far as one person is privy in obligation with another, i e, is liable to be affected in his obligation under the ... by the acts of ... admissions of ... Not ... here ... who ... interests ... one or two other classes of liability Wigmore § 1077.

Joint Promisors Co promisors like principal and sureties are also privies in obligation, and on principle the admission of one should be admissible in evidence against the other provided the other conditions are satisfied The rule is that, in the absence of fraud, if the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one is, in general evidence against all Such was ... laid down ... opriety and ... questioned ... *al,* 2 Bing. ... *Brandram* ... and to each ... Thus also ... period of limitation by one of several ...

... the act of one member of a class is liable to be taken as the act of all So acknowledgment of a judgment ...

Ashanullah v Dakhini, 27 ...

... Cas ... nt by ... st be ... 21 of ... eived ... decisions

18. of English Courts are by no means uniform in this respect Thus in an action against joint makers of a note, if one suffers judgment by default, his signature must still be proved against the other. *Gray* v *Palmer*, 1 Esp 135, *Shirref* v *Wilks*, 1 East 48

Principal and surety. Principals and sureties are privies in obligation i e one is liable to be affected in his obligation under the substantive law by the acts of the other *Wigmore* § 1077 So where the effect of a contract is that a surety shall be responsible for the acts and admissions of the principal, such admissions are competent evidence against the surety *Burr Jones Ev* § 238 So the entries of the principal were evidence against the surety because they were made by the collector (principal) in pursuance of the stipulation contained in the conditions of the bond *Whitnash* v *George* 8 B & C 561; *Goss* v *Watlington* 4 B & B 132 (137); see also *Jordon School District* v *Gaets*, 23 D L R 739 (*Canada*), *Sanders* v *Keller*, 18 Ida 592 But ordinarily where a principal is not a party to the suit his declarations are not admissible, unless they are made while the employment in which the principal was engaged continued, and in such manner as to be part of the *res gestae* *Burr Jones* § 238 The principle is thus laid down by *Greenleaf* "The admissions which are thus receivable in evidence mu... as we have seen be those of a person having at the time some inte...
in the suit to which he is a party ...
looks chiefly to the real parties in in...
same weight, as though they were parties to the record ... of the *cestui que trust* of a bond; those of the persons interested in a policy effected in another's name, for their benefit; those of the shipowners, in an ... of the identifying creditor, in an action ... deputy sheriff in an action against the high ... ty, are all receivable against the party making them And in general, the admissions of any party represented by another, are receivable in evidence against his representatives" *Greenl Ev* ... incidental or contingent interest in ... for the introduction of hearsay ... n interest *Burr Jones* § 238 ...

so as to become part of the *res gesta*
otherwise not The surety is cons...
party, and not for whatever he might ...
to proof of his conduct by original evidence, where it can be had, exclu... all declarations of the principal, made subsequent to the act to which they relate, and out of course of his official ... *Greenl Ev* § 187 So in an action against a surety the I...
of any admissions ...
the surety *Rambhaj* ...
v *Sreedevi*, 25 M L ...
D 668, *Lush J* sa...

had rece...
receivab...
Chesney,
one bec...
a clerk, ...
confessions of embezzlement made by the principal after his dismissal, ... admissible in evidence (*Smith* v. *Whittingham*, 6 C & P. 78. *Goss* v *Watlington* ...

37), though, *Whitnash* : *McGahey* v. case of *Ex* it even a decree against the principal to the amount of debt, but see *Drummond* v. *Prestman*, 12 Wheat 515

the money that the wife's admissions of the receipt by her of the carriage and horses were admissible *Francis* v *Lewis*, 10 Johns 35, *Greenl Ev* § 187 So when A guaranteed the performance of any contract that B might make with C, the admissions and declarations of B were held admissible against A, to prove the contract *Meale* v *McDowell*, 5 Bing 195; *Greenl Ev* § 187.

But where the surety, being sued for the default of the principal, gives him notice of the pendency of the suit, and requests him to defend it, if judgment

they operate against the surety *Greenl Ev* § 188

Privies in Title The admissions of one who is privy in title stand upon the same footing as those of one who is privy in obligation (*Vide supra* p 343) Having precisely the same motive to make correct statement and being identical with the party (either contemporaneously or antecedently) in respect to his ownership of the right in issue, his admissions may, both in fairness and on principle, be 1080
The grounds u with
the party maki *Rowe*,
1 A & E 1 *J* in
Gibblehouse v and
admissible evidence of any fact admitted by them to be true, and may be given in evidence to prove it, notwithstanding the confessions might be such as to show
non ex
when
making
party extends not only to the admissions of them against himself, but against all who claim or derive their title from him, in other words, between whom and himself there is a privity There are four species of privity privity in blood, as between heir and ancestor privity in representation as between testator and executor,
common
privity of

confessions . . It is asked, why not swear him? The answer is, the other

S. 18. party likes his declarations better. He may, from the same motive, vary his statement, and the party offering this evidence is alone to judge '

Admission ... land is so identified in ... title, that his admissio ... vested with title, are rece ... t the self interest involved in the ownership of tit' truthfulness of statement against interest m 19 Ill 383, *Taylor*, § 787 It is imperative pri ... of ... sta ... aff ... *Kel* ... and ...

suc ... we think they are receivable on the ground of identity of interest The fact of his being alive at the time of the trial, when, perhaps, his memory of facts was impaired, and when his interest was not the same, does not in our opinion, affect the admissibility of those declarations which he formerly made on the subject of his own rights" *Woolway* v. *Roe*, 1 Ad & E 114 So the declarations of former owners or occupiers, made while in possession, have been admitted as evidence of the nature and extent of their title against those claiming in privity of estate *Taylor* § 758, *Doe* v *Austin*, 9 Bing 41; *Davies* v *Pierce*, 2 T ... 367, *Jackson* v *Bord*, 1 Johns 230, 234, W ...

... ect ... claran ... R 2(... scheme between the grantor and grantee, e g ... that the declarant, if at the time owner ... possession, and conversely, that his being in ... does not make his declaration competent as an admission ... v *Dalton*, 109 Cal 662 (*Am*) ... books of survey, ... on this ground, wh ... under whose direc ... they are offered ... So, as to receipts fo ...

... successor, in an ejectment for the same property, in right of his vicarage *Doe* v *Cole*, 6 C. & P 359 The receipts, also, of a vicar's lessee, it seems, are admissible against the vicar, in proof of modus, by reason of privity between them *Jones* v *Carrington*, 1 C & P 329, 330 *n*); *Maddison* v *Nuttal*, 5 Price 485 An answer in Chancery is also admissible in evidence against any person actually claiming under the party who put it in, and it has been held *prima facie* evidence against persons generally reputed to claim under him, at least so far as to call upon them to ... er *Earl of Sussex* v *Temple*, 1 Ld ... *Roberts*, 16 East 334, 339. The ac ... contain ed in a mortgage deed is ... sentatives in interest of the original ... A 191 = 11 A L J 221, *Brajesu* ... *Hid*. 5, 10 A L J 390 *Bakhshi* v *Lal Jhai*, 35 A 353, *Birbal* v. *Behari*, 20 Ind Cas. 815

The admission of a zamindar that the holding of certain tenants is *Mokurruree* at a given rent is binding on any zamindar who succeeds him without being an auction purchaser at a sale for arrears of revenue. *Watson* v *Nobin*, 10 W R. 72.

S.

Sales for arrears of Revenu

bind v. *Rakhal*, 12 C

Hossain v *Girdharee Lal*, Bom L R P C 78; *Poreshnath* v *Ananta Nath*, 9 I A 147, *Watson* v *Nobin*, 10 W. R 72 The auction purchaser at a revenue sale acquired all the rights, which the original seller at the date of perpetual settlement had *Forbes* v. *Meer Mahomed*, 20 W R. (P C) 44 He is not also bound by the admission of the previous owner *Rungo* v *Raj Coomaree*, 6 W R 197; *Radha* v *Rakhal*, 12 C 3?;

judgment debtor *Dinendro* v *Ram Kumar*, 7 C 107 P C = 8 I A 65 = 10 C. L R 281, In *Lala Prabhu Lal* v *Mylne*, 14 C 401 (413) it was held that an auction purchaser is not a representative of the judgmen... vidence Act See also *Gour S*... *aj Coomaree* 6 W. R 197, 1... purchaser is not barred... *Koodep* v *Govt of India*, 11 B L R 71 (P C) = 14 M I A 247 Where the property is sold in execution of a decree, it can not be correctly said that the owner gives any right to the purchaser, *Mulji* v *Kashi Bai*, 10 B... judgment debtor to the exte...

his wish, and he is not bound by some of the acts of the judgment debtor, such as alienations made by the latter to defeat the decree but that does not show ... is not the ... ny purpose ... *hari* v *Hem* ... not in any ... By this ... In a later ... representative ... o *Prosonno* ..., 26 C 250 ... purchaser held in execution of a simple money decree against a judgment debtor is a representative of th...

the representative ... the nature of the qu... is between the judgment-debtor and the auction purchaser and the interests of the two are conflicting, the auction purchaser can in no sense be considered to be a representative of the judgment debtor *Narotam* v *Sukhraj*, A. I. R 1928

S. 18.

ckson v *McCall*, 10 Johns (N Y) 73), to show that the ancestor had ence would have been admissible 69 N Y. 404 Stating the rule ver the admissions of an ancestor are admissible against an heir claiming under him by descent The principle upon which such evidence is

devisor are competent against the devisee, those of an intestate against his administrator, and those of a testator against his executor *Broaddus* v *Jan s*

80 Conn 446, see also *Meath* v *Winchester*, 3 Bing N. C 183, *Mad... v Nuttal* 13 M. & R 15, *Carr* v *Mostyn*, 5 Ex R 369; *Doe* v *C...*, 6 C & P 559 So also the admissions of a testator that his tenant was to pay no rent, are admissible against his executor *Cox.* v *Baird*, 11 N L J. 105-19 Am Dec 386 And the declarations of an intestate are admissible against his administrator, or any other claiming in his right *Smith* v *Smith*, 3 Bing N C 29; *Ivat* v *Finch*, 1 Taunt, 141 A statement by the testatrix suggesting any inference as to the execution of a will would be an admission relevant against her representatives and would therefore be admissible as evidence *Nana* v *Shanker*, 3 Bom L R 465

applying the rule that a man's d his privies, care must be taken r life and that of a tenant in ... by some statute, prejudice, by

in adm ... tail is ... does, wi ... So the ... in tail ... Giff 45 ... *Kanhai* ... Hindu ... and I ... 82 Ind. Cas 1052; 86 Ind Cas 853 But by Act I of 1927 ... as regards acknowledgment have been made absolute The declarations of the tenant for life, do not bound the remainder man, as there is no privity ... them, for a privy in estate is a successor to the same estate, not to a ... estate in the same property, and the statements of the tenant for years are not admissible against the owner in fee. *Hill* v *Roderick*, 4 Watts & S

Landlord and tenant Mortgagor and Mortgagee etc A similar relation ... s, parol declarations of a for fraud are admissible where such declarations ... *n* v, *Meyers*, 11 Wend ... ce established it tely, and the of his

... in possession of ... relation of ... Ind Cas 644 = 10 ... or in title of ...

S 18[illegible]

[illegible] same rights of property [illegible] that the rights of [illegible] of the latter. [illegible] property. In [illegible] owner [illegible] may [illegible] mentioned, [illegible] rights in respect of [illegible] same as that [illegible] for them [illegible] there is no [illegible] who [illegible] charged [illegible] against the [illegible] that has [illegible] Dec. [illegible] are [illegible] there[illegible] object[illegible] in these cases [illegible] and [illegible] evidence, [illegible] of [illegible] ma[illegible] com[illegible] the [illegible] is not [illegible] Court [illegible] is true [illegible] rule [illegible] against [illegible] only, [illegible] Cal. [illegible] W [illegible] as a [illegible] in [illegible] inter [illegible]

[illegible] relevant [illegible] Co. [illegible] admission [illegible] identi[illegible] Where [illegible] claims [illegible] as [illegible] recei[illegible] would [illegible] 517 [illegible] of a [illegible] bro[illegible] 2 [illegible] to pr[illegible] [illegible] has been admitted [illegible] 7 [illegible]

S. 18. Am . . dary [*Jackson* v *McCall*, 10 Johns (N Y) 377)]; . Wis 373), to show that the ancestor had made . ch evidence would have been admissible again . *Founer*, 69 N Y 404 Stating the rule more whenever the admissions of an ancestor would . ng they are admissible against an heir claiming under him b . received is that the decla . his interests were such . of his title or possession . would have to his own . *Chadwick* v *Founer*, 69 N. Y 404. In the same manner the admissions of a devisor are competent against the devisee, those of an intestate against his administrator, and those of a testator against his executor *Broaddus* v *James*, 13 Cal App 464 Thus in an action by an administrator against the widow of his intestate for the conversion of property, declarations of the intestate that his tenant was to pay no rent are admissible for the defendant *Mooney* v *Mooney*, 80 Conn 446, see . N C 183 *Madison* v *Nuttal*, 1 M. . 6 C & P . no rent, *Cox* v. *Baird*, 11 N. L . Am De. . intestate are admissible against his administrator, or any other claiming in his right *Smith* v *Smith*, 3 Bing N C 29; *Ivat* v *Finch*, 1 Taunt, 141 A statement by the testatrix suggesting any inference as to the execution of a will would be an admission relevant against her representatives and would therefore be admissible as evidence *Nina* v *Shanker*, 3 Bom L R 465

Life estate . admissions are . to distinguish be . tail A tenant for life cannot, unless empowered by some statute, prejudice an admission, the interest of a remainder man or reversioner, but *a tenant in tail* is regarded as representing the inheritance, and, therefore, what he says or does, will often be binding on the person entitled in remainder *Taylor* § 730 So the remainder man is bound by release of equity of redemption by a tenant in tail in possession *Reynoldson* v *Perkins*, Amb 563, *Pendleton* v *Rooth*, . Somdal . 4 71, that . were not . *Venka* . *Rao*, 82 *Ind Cas* 1052; 86 *Ind Cas* 853 But by Act I of 19.. the . decisions as regards acknowledgment have been made absolute The declarations of the tenant for life, do not bound the remainder man, as there is no privity between them, for a privy in estate is a successor to the same estate, not to a different estate in the same property, and the statements of the tenant for years are not admissible against the owner in fee *Hill* v *Roderick*, 4 Watts & S (Pa) 221

. . . such declara- . ere . *Meyers*, 11 Wend . v, . established it . once . . ly, and the . or remo . nts of . . owledgme . predecessor as though they were his own *Jackson* v *Davis*, 5 Cow. (N.Y.) . An admission made by landlord, after creation of tenancy is not binding on tenant An agreement between two proprietors to become joint proprietors not binding on tenants *Puran* v *Dhanpat*, 52 Ind Cas 739 But the declarations of the tenant are not admissible to affect the title of the landlord *Jones* § 243

The admissions of mortgagor as against mortgagee are on the same footing as those of grantor and grantee, and evidence only in so far as they affect

estate mortgaged, and are limited in point of time to those declarations made before the signing of the mortgage *Foote* v *Beecher* 78 N. Y 155 An admission by the surviving daughter of a member of a joint Hindu family, that the children of her deceased sister were entitled to her father's share was held to be evidence of the existence of the title before the suit *Gour Lal* v *Mohesh*, 14 W R. 181

S. 1

Vendor or Assignor of personalty The same principle holds in regard to admissions made by the assignor of a personal contract or chattel previous to the assignment, while he remained the sole proprietor, and where the assignee must recover through the title of the assignor, and succeeds only to that title as it stood at the time of its transfer, in such case, he is bound by the previous admissions of the assignor, in disparagement of his own apparent title But this is true only where there is an identity of interest between the assignor and

already stale, or otherwise infected with circumstances of suspicion *Harrison* v *Vallance* 1 Bing 15, *Greenl Ev* § 190, *Taylor* § 790 *citing from Greenl Ev* § 190 Thus, the declarations of a former holder of a promissory note negotiated

is not to be cut down by the acknowledgment of a former holder that he had no title *Barough* v *White*, 4 B & C 325 explained in *Woolway* v *Rowe* 1 Ad & El 114 116, *Shaw* v *Broom*, 4 D & R 730, *Beauchamp* v *Parry*, 1 B & Ad 89, *Hackett* v *Martin*, 8 *Greenl* 77 So, so far as choses in action are concerned, this is one exception to the general rule already stated Therefore declarations of a former owner of negotiable paper are not admissible against one

of the indorser made while the interest was in him are admissible in evidence for the defendant *Bayley on Bills*, 502, 503, *Pocock* v *Billings* Ry & M 127

Admissions of [illegible]
the act of insolvency,
evidence against ano
ram v *Radha* 34 C L J 107=49 C 93 66 Ind Cas 15, see also *Re* v *Tollemache*, 13 Q B D 720 *Re Bottomley*, 84 L J K B 1020 So also evidence taken in the public examination of an insolvent cannot be used as against a third party to prove or disprove a title *Jnanendra* v *The Official Assignee*, 30 C W N 346, *Re Brunner* 19 Q B D 572 *In re Cooper* 19 Ch D 580 *Madhoram* v *Official Assignee*, 27 C W N 611

Illustrative cases of Admissible evidence In order to be a relevant admission, it is necessary to show that the person who made the statement had an interest at the time when he made the statement *Jogeswar* v *Akhoy* 19 C L J 1=22

as admissions only when the admissions are of a date prior to the date of their deriving interest Statements made by persons in possession of property and qualifying or affecting their title thereto are receivable against the party *Galstaun* v *Mirza*
by
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rtue
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ame foot
they allo

S. 18. A I R ... by accused to a Police officer are ... under ss 17 and 18 of the Evidence ... his favour *Azimudin v. Emperor*, 44 C L J 253 = A I R 1927 Cal 17 A statement made on oath by the accused before the Coroner at the time of the inquest is admissible in evidence at the trial as a statement made by a party to a proceeding under ss 18 and 21 of the Evidence Act *Emperor* v *Ramnath*, 28 Bom L R 811 = 50 B 111 = 93 Ind Cas 690 A statement in a case drawn up by an attorney for the opinion of a pleader is admissible in evidence as it must be regarded as a statement of the persons on whose behalf he was acting and what is said or done by him in the course of his business and within the scope of his authority is said or done by the persons on whose behalf he was acting *Chandiesuar* v *Bisesuar* A I R 1927 Pat 61 = 5 Pat 777 A party is bound by ... questions of facts, whether

... A I R 1 ...
Ganesh, A I R 1929 All 146 The admission ... unsupported by other proof, should be rece... and caution *Mrs L* v *W L* A I R 1928 Sind 55 = 105 Ind Cas 410 A statement made by an agent to the effect that his principal was a bastard was admissible in evidence as an admission under section 18 of the Evidence Act *Raj Fateh Singh* v *Baldeo Singh*, 3 Luck 416 = 109 Ind Cas 310 = A I R 1928 Oudh 233 An admission if gratuitous, can be withdrawn at any time and therefore such a confession though against the interest of the party making it, is of little value *Badhu Ram* v *Uttam Chand*, A I R 1925 Lah 726 A Batwara paper signed by the Partition Deputy Collector and containing entries required by the provisions of Ch 7, is a record made in the course of official duty within the purview of s 35, Evidence Act It would also be evidence against the proprietors under ss 18 and 13, Evidence Act, because they ... A I R 1929 Pat 32 = ... tion ... such ... him *Jamuna* v *Ka las* A I R 1929 Pat 254 = 10 P. L T 183 A p... has authority to admit certain facts so as to dispense with the necessity of further proof in a criminal case at the appellate ... I R 1928 Bom 241 = 36 ... be proved by the plaint...

... accused under section 18 of the ... his favour *Azimuddy* v *Emperor*, 44 C L J 253 = A I R 1927 Cal 17

Illustratives cases—Inadmissible evidence An admission made by a creditor after transferring his debt to a third person to the effect that the debt had been paid to him in part or whole before he had sold the claim, is not binding upon the vendee under section 18 of the ... v *Wasawa Singh* 25 Ind Cas ...

... with the ... Ind Cas 566 ... made by his *Mukhtear* ... of the authority con... I R. 1923 P 37. An ... emptor by another p... suit between plaintiff ... vendees *Ahmad* v *Jawahar*, 84 Ind Cas

257=A. I R 1923 Lah. 16. A party cannot be bound by admission of his pleader as to law in as much as the parties must be presumed to know what is correct law. *Chanloo* v. *Murlidhar*, A. I. R 1926 Oudh 311=13 O L J. 138=92 Ind Cas 732; *Fateh Ali* v. *Ahmad Din*, A I R 1927 Lah 281=100 Ind Cas. 833; *Panjabai* v. *Bhaguan*, 31 Bom L R 88=A I R 1928 Bom 89, *Muthia Chetti* v *Muthu*, A. I R 1927 Mad. 852=26 M L W. 465=39 M. L. T. 240; *Ulchi* v. *Nallamali*, A I. R 1928 Mad. 90 Recitals, regarding the boundaries in a document not *inter partes* and statements made by third parties cannot be admitted. *Sarat Chandra* v. *Sarala*, A I. R 1928 Cal 63=105 Ind. Cas 6 [illegible] one of several defendants in [illegible] *Narindar* v *C M. King*, A. [illegible] I R 1929 Lah. 129 *Kishan* v. *Lachman*, A I. R 1930 Lah 138 Neither the declaration of a donor nor the declaration of [illegible] evidence as against the [illegible] R 1928 Oudh 111 [illegible] capable of being regarded as a stale or time barred claim, it is to his interest to make allegations which would save the claim from the bar of limitation Having [illegible] were actually made *Ammallu* [illegible]

Admission by one of the defendants that the land in a suit is ancestral is not binding on the others when they are not represented by him and have independent rights of their own *Kishore* v *Lachman*, 122 Ind Cas 109=A I. R. 1930 Lah. 230

The Mohants of *Deva Pritha Saheb* are managers A *Chela* must first be nominated [illegible] cannot be regarded as admissions [illegible] Worshippers are not bound by the admissions of previous *Mohants* *Ram Parshad* v *Shivomani*, A I R 1931 Lah. 161; but see *Vidya Purna Tritha* v *Vidyanidhi Tiratha*, 27 M 435; *Hargian* v. *Baldev*, 127 P R 1908=123 P W R 1908 (F B)

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Admissions by persons whose position must be proved as against party to suit

Illustrations

[illegible]

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B

Scope of the section Ordinarily statements by strangers to a proceeding are not relevant as against the parties *Coole* v *Braham*, 3 Ex 183 But in some cases, the admissions of third persons, strangers to the proceeding are receivable *Greenl Ev* § 181, *Taylor* § 759 The admission of a third person against his own interest, when it affects his position or liability and when that [illegible]

S. 19. to add to the category of persons by whom a statement may be made before it can be considered to be an admission within the terms of the Indian Evidence Act The statements referred to in section 19 become admissible only provided that the ... as regards their nature and section 21 or an ... heir liability. *Per Tyabji J* in *Appasu* ... person whose position in relation to prope... to prove against another, is in the nature ... has not been ... statements are admissible ... of such persons at a particular time; in which case the practice is ... evidence in general as would be legally admissible in an action between the parties themselves *Greenl Ev* § *181* Thus in actions against the sheriff for not executing process against the de... ... of the debtor admitting his debt to be due to the execution ... the sheriff *Kempland* v *Macaulay*, ... 42, *Re Brunner*, 14 Q B D 572 ... person has been held sufficient evidence, on the part of the defendant, to support a plea in abatement for the non joinder of such persons as defendants in that suit; it being admissible in an action for the same cause *Clay* v *Longslow*, ... of a bankrupt, made before the act of ... *Jarret* v ... bankruptcy, ... use of the ... *Ev* § 181 ... *Edwards* ... D 72 ... *Re Tollemache*, 14 Q B D 415, ... his being An admission made by a land... proprietors of certain land and others, ...

Mal, 11 Lah. 503 = A I. R 1930 Lah 579 = 128 Ind Cas ... title, proceedings in a previous title suit instituted by defendant against third persons are relevant under this section *Jairam* v. *Loke Nath*, 125 Ind Cas. 782 = A I R 1930 Pat 405

Illustrative Cases—Admissible Evidence Where in a case of a disputed deed of adoption the defendant alleged that the deceased executant had become shortly after the execution of the deed aware of its existence, purport and ...

taken regarding it, cannot be excluded as irrelevant, but is admissible ... Evidence ... sections 18, 19 or 21 or section 11 of the Evidence ... in a ...

... for a long time is an admission in the defendant tenant's favour and ... amount to setting up a custom *Janaki Kuar* v. *Usman*, 62 Ind Cas 417, see also *Rameshwar* ... An admission made by a person ... against ano... from the for... ... question at issue was ... whom her mother was ... it was alleged, ... she was described as ... which she stated that she

had been living with the alleged father for 10 or 12 years, even if admissible is of no weight for the reason that her statement does not amount to an admission that she was living in adultery *Maqbulan* v. *Ahmad Husain*, 26 A. 108 P. C = 8 C. W. N. 241 = 6 Bom L R. 233 = 31 I A. 38

Admissions by persons expressly referred to by party to suit

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration

The question is whether a horse sold by A to B is sound A says to B—"Go and ask C; C knows all about it" C's statement is an admission

Principle If a party, instead of expressing his belief in his own words, names another person as one whose expected utterances he approves beforehand,

ement; and it

" said *Ellen-*

another upon

s third person

by himself."

ontaining the

true account of a particular matter, thereby making it evidence in regard to the particulars for which he has so vouched its correctness *Bricknell* v *Hulse*, 7 A. & E. 468, *Richards* v. *Morgan*, 33 L J Q B 114, *Wills' Ev* p 162

Admission by persons expressly referred to by party to suit. It not

cases, the party is bound by the declarations of the persons referred to, in the same manner and to the same extent as if they were made by himself *Burr Jones*, § 263, *Soloman* v *Herne*, 2 Esp 695, *Williams* v *Bridges*, 2 Stark 42, *Kempland* v *Macaulay*, Peake's Cas 65 In such a case the admission of a third person are receivable in evidence, against the party who has expressly referred another to him for information, in regard to an uncertain or disputed matter This species of admissions is well rec

unfairness in

Esp 145, on a

to A, and he

ing "Where

, what he says

if it is connected with the business which is referred to him, is evidence" In *Daniel* v *Pitt*, 1 Camp 364 note, defendant said, "If C will say that he did deliver the goods, I will pay for them" In the circumstances C's admission was held admissible Similarly in *Brock* v *Kent*, 1 Camp (note) defendant desired the plaintiff to enquire of *Jones* about it, *Jones* being a person who had paid money *Jones'* statement was held admissible. In *Garrett* v *Ball*, 3 Stark 160, which was an action of trover for a horse the plaintiff had said "if the defendant would take his oath that the horse was his, he should keep him" The fact of the defendant's affi

1 C & P 532 the defendant

"him" he meant one H

was admissible In *Sybray* v

to a horse, the defendant sai

the horse was killed was

to charge the defendant, beca

agents" In *R* v *Mallory*,

receiving stolen goods by the accused, the accused referred the police to his wife for a list of the prices and dates of purchase of the goods, stating that he did

S. 20. not know them, and the next day the wife handed the police the list in his presence The list was received, as an admission of the prices and dates This

he principle of awards by

rests on a contractual basis

s pronouncement Wigmore

ct, infra. Such statements

which were in the nature of awards required no stamp even when in writing Tay § 701.

What questions may be referred In the application of this principle, it matters not whether the question referred be one of law or of fact; whether the persons to whom reference is made, have or have not any peculiar knowledge on the subject; or whether the statements of the reference be adduced in evidence

herefore where two parties had

on the construction of a Statute,

ated was held bound thereby

& Sel 105; Downs v Cooper, 2

can be referred to a third party

Sybray v *White*, 1 M & W 435; *Taylor* § 761

Reference must be express This rule must not be understood as giving the force of an admission to statements made by a witness as against the party who calls him *Gardner* v. *Moult*, 10 A & E 468, *R.* v *Latchford*, 6 Q B 567, 577, *Bricknell* v *Halse*, 7 A & E 456 There must be an express reference for information in order to make the statement an admission Thus if A says, "I will pay ... the matter will

Killinger, 8 Wall (U S) 480 (*Am*) Thus, where a defendant stated that a book keeper would furnish whatever information was contained in the books, the

party makes the referee his accredited agent for the purpose of giving such answer. *Evatt* v *Hudson*, 97 Ark. 265 If a party, on motion before a Judge, uses the affidavit of another person to prove a certain fact deposed to therein, such affidavit is on any subsequent trial evidence as against him of this fact, and that too, though the person who made the affidavit is present in Court *Brickell* v. *Aulse*, 7 A & E 454, *Boilen* v *Rutlin*, 2 Ex. R. 675 (679), *Pritchard* v *Bughshaw*, 11 Com B 459, *Johnson* v *Ward* Esp 47; *White* v. *Aowling*, 8 Ir L R 128, *Tay*, § 764

does not affect the

a neces ary witness

irrespective of the

referees *McElwee* v *Troubridge*, 68 Hun 28 = 22 N Y Supp, 674 (*Am*); *Burr Jones* § 263

s bound by

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Lord

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n to have caused

o that ordinarily mere admissions are not conclusive as is provided in section 31, but admissions

Gordhan v *Husain*, A I R 1927 All 659=103 Ind Cas 34, *Himanchal Singh* v *Jatwar Singh*, A I R 1924 All 570=46 A 710=10 Ind Cas 16, *Muhammad Imtiaz*, A. W. N (1898) 200; *Keshoram* v *Piari*, 71 Ind Cas 761, *China* v *Venkata*, 42 M 625

Admission by interpreters To render the declarations of a person referred to equivalent to a party's own admission, it is not necessary that the reference should have been made by express words but it will suffice if the party by his

interpreter should be considered a

nd are in no sense hearsay, nor is it neces- that his interpretation A wife's statement *Schutter* v *Williams* ed by two persons ication with each statements of what

circumstances is during a trial is *Schearer* v *Harber*, cannot be admitt *People* v. *Ah Yute*, 56 Cal 119 (1m)

Depositi of a party's w the House of

21 ings as admissions *British Thomson Houston* v *British Insulated etc Co* (19) 2 Ch 160, *Phip Ev* 214 Unle s an express reference has been made to a witness on a certain question his statement will not constitute an admiss on as regards that question L R 2 All 209

Criminal Cases This section is applicable to criminal cases as well Th s where the accused told a constable that his wife would make out a li t of certa n property, a list afterwards m de out by her was held evidence agam t h r st was handed to the *J* expres ly refrain d effect of the pr son r e evidence and where he had asked for certain inquiries to be made, facts elicited in direct an wer or mere hearsay, are evidence aga nst h m v *Cambell*, 8 Cr App R 75, *R.* v *Westcod*

Illustrative cases—Admissible Evidence The plaintiff and the defendant in a suit signed a wr the parties that G shall statement that he may against the plaintiff *Held* that the statement of G must be taken to be an admission made in the suit by a nominee of a party thereto which was effectual as an admission by the party himself *Himanchala* v *Jatuar* 80 Ind Cas. 16 A I R 1924 All 570, see also *Gordhan* v *Husain*, A I R 1927 All 609=103 Ind Cas 34, *Sitaram* v *Piari* 47 A 921, *Muhammad* v *Imtia* , A W N (1898) 200

Illustrative cases—Inadmissible Evidence A party to a l t gation is not bound by the statement of the mukteer of the opposite side who was cross-examined by the parties *Mt Srimati Ausanbati* v *Ram Jas*, 4 U P L R 9 (Rev)

21 Admissions are relevant and may be proved as agun t the person who makes them, or his repre en tative in interest, but they cannot be proved by or on beh lf of the person who makes them or by his representative in interest except in the following cases —

Proof of admissions against persons making them and by or on their behalf

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations

(a) or is not forged

A n

a statem

himself that the deed is genuine, nor can B prove a statement by him the deed is forged.

(*b*) A, the captain of a ship, is tried for casting her away

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business

day to day, and

A may prove

ird parties, if he

were dead, under section 32, clause (2)

(*c*) A is accused of a crime committed by him at Calcutta

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section 32, clause (2)

(*d*) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue

(*e*) A is accused of fraudulently having [illegible]

and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding *illustration*

heads are receivable is discussed under each topic (*vide infra*)

to

a ci

the general rule as an admission *Abdul Ghani* v *Emperor*, A. I R 1931 Lah. 763 The primary rule in section 21 is that an admission is relevant and may be proved as against the person

Gulab v. *Fadali*, 68 Ind Cas

evidence against him *Lachman*

Ma Tha, U B R. (1897-1901)

be proved in a criminal case just as much as an admission by the defendant in a civil suit under section 21 of the Evidence Act But an admission under that

S. 21

section is one made by the party against whom it is tendered before the proceedings in which it is sought to be given in evidence It does not refer to pleadings in the case or to an admission contained in such pleadings *Jeemma* v *Vas* 1? Ind Cas 961=10 M L T 506=(1911) 2 M W N 576 A statement whereby of money is in most cases an

to a police officer is not

if he is on his trial as an accused person yet it is acceptable in a civil suit as an admission under sections 17, 18 and 21 of the Evidence Act *Bishendas* v *Ram Labhaya*, 32 Ind Cas 18=106 P L

title which was non existent thoug

making it if the title admitted had

37 Ind Cas 983 A a member of a Hindu joint family, whose house was at Lucknow, practised as a pleader at *Hardoi*, and made considerable savings from his professional earnings He eventually became managing member, but was all along

District.

earnings i

so entered

he purchases in the name of B

B was a statement against his own

Suraj Narain v *Ratanlal* 40 Ind Cas 988=21 C W N 1065=20 O C 211=19 Bom L R 737=15 A. L J 684 A written agreement by a tenant to pay the *Swantantram* or *Thanduvaram* is admissible as an admission of the evidence of custom unless the tenant explains away the admission and its effect can not be discounted or neutralised on the ground that the admission is recent *Kumarappa* v *Manavala*, 44 Ind Cas 699=41 M 374=1918 M W N 350 (F B) An oral confession by an accused person not being open to exception under section 24, 25 or 26 of the Evidence Act is as an admission by an accused person a relevant fact, and may be proved at his trial under section 21, and therefore such a confession made to a Magistrate is relevant, and may be proved by the evidence of the Magistrate *Feroz* v *Emperor* 45 Ind Cas 843=11 P R 1918 Cr =19 Cr L J 651, see also *Per Heward J* in *Emperor* v *Maruti*, 51 Ind. Cas 465=21 Bom L R 1065=21 Cr L J 65, *contra Per Shah J* in *Ibid.* The statement of an accused person as a witness in a previous case is admissible against him under this section to prove admission of relevant facts made by him in that statement *Emperor* v *Banarsi*, 77 Ind Cas 829=22 A L J 144=46 A 254=25 Cr L J 477 An entry in the body of the bond that no further account is outstanding against the debtor does not bind the creditor in any way and is merely an admission by the debtor in his own interest. *Gurdilla* v *Nabi Bakhsh* A I R 1926 Lah 381=93 Ind Cas 996 The statement that a document is a copy of the original ... when made by a deceased person in a docume

admission under s 21 *Seethaya*

W N 578 (P C) Entries in

purchase for clie

Ram v *Madan*

581 (P C) An

weight, but it i

operates as an e

after him his hei — were untrue *Bai Dev*

v *Rabishankar* — L R 109, see also *Hiranand*

v *Ahmed*, 1923 — statements made by a soldier

before a military — evidence against him on a

criminal charge in a *Civil Court* *R* v *Colpus*, (1917) 1 K B 574=86 L J

K B 450

164 and 61 of the Code might be proved as admissions by the accused,

wholesome provisions elaborately laid down in these two sections practically reduced to a nullity. *Queen Empress* v *Bhairab*, 2 C W. N 702 An oral

r section 24, n, a relevant ession made Magistrate. J 651; see 2 P R 1837 Cr; *Rajkumar* v *Emperor*, 9 Pat. L T. 449=A I R 1928 Pat 473; *Madan Guru* v *Emperor* 4 Pat. L T 381=73 Ind Cas 963=24 Cr L J 723; *R* v. *Crowe*, 81 J. P 28 against his co accused D to a Police officer may *m*, 106 P R

sible as admission *Satish* v *Bresuar*, A I R 1930 Cal 559 But an admission of judgment by one of several defendants is no evidence against his co defendant *Rashiduddin* v *Naziruddin*, 11 Lah L J 401=A I R 1929 Lah 721

18 of not ct of ined If tive uty tion 32, of the Evidence Act, or it must be relevant otherwise than as an admission In either case its value would be slight *Tarak Chandra* v. *Prosanno*, 78 Ind Cas 719=28 C W. N 679=39 C L J 389

Representative in interest would be admissible against him claiming under him by descent, and the same manner as they would *Greenl Ev* § 189, *Davis* v *Melson* of one having or claiming title him, they are competent against persons subsequently deriving title through or from him *Burr Jones* § 242 An admission against her own interest by the predecessor in title of the defendant is relevant under ss 18 and 21 of the Evidence to shift the burden Ind Cas 700 The term "legal representati C. P. C. cannot be the estate of the deceas *Narain* v *Jai Kishen* are of three kinds, namely (1) privies in blood, such as ancestors and heirs (*Weeks* v. *Birch*, 69 L. T 759) (2) privies in law, such as executor of a testator or

. 21. administrator to an intestate, and (3) privies in estate or interest as vendor and purchaser, grantor and grantee, donor and donee, lessor and lessee etc (*Lilbourne* v *Brougham*, 9 App Cas 307) *Phip Ev 4th Ed* p 219 The term "representative in interest" is rather vague (*Ishan* v *Beni*, 24 C 62, 72) but it seems to include most of the privies in blood, law or estate *Vide notes under section 18*, *Woodroffe Evidence* p. 255 So a party is bound by the admissions of his father and 1 A & E 114, *Doe* v *Pettell*, 5 B & A 22 . *Meath* v *Winchester* 3 Bing N C 183; also a statement by a party s predecessors *Doe* v *Lalin*, 7 C & P 481 But such admission is not binding on the successor if the statement is made after he has parted with his interest. *Doe* v *Webber*, 1 A & E 74, *Pocock* v *Billing*, 2 Bing 269 An auction purchaser in a money decree is a representative of the judgment debtor. *Ram Coomar* v *McQueen*, 18 W R 166=I. A Sup Vol 40; *Unnopoorna Dassee* v *Muffer Poddar*, 21 W R 14, *Ishan* v *Beni*, 24 C 62, *Kishore Lal* v *Ganga Ram*, 13 A 28, *Harlhayal* v *Narayan*, 1924 Nag 208, *Mahomed* v. *Kishori*, 22 C 909, *Badri* v *Jadnath* 16 A 483, *Sundara* v *Venkatavarada*, 17 M 228, but see contra *Manohar* v *Sumitra* 17 A 428 A purchaser at an execution sale is in privity with and the representative in interest of the judgment debtor within the meaning of section 21 of the Evidence Act, so as to be bound by his admissions Where therefore in a mortgage suit the mortgagor ... to a prior mortgage, the purchaser of the

...

mortgagors and their representatives in interest under section 21 of the Ev... Act *Podam Kuwar* v *Nahu Singh*, 39 Ind Cas 635=1 P. L W 413, *Pa*... *Nath* v *Jadoonath*, 7 W R 441, *Gadian* v *Veerappa*, 26 Ind Cas 999=28 M L J 92, *Bulal* v *Bihari*, 76 Ind Cas 815; *Bakshi* v *Liladhar*, 35 A 303 ... admissible in recital as to the passing of cons ... evidence against the transferee ... Act *Narain Singh* v *Bhikha* ... *tawa* 17 Ind Cas 444=10 ... =11 A L J 221=35 A 194 ... admissible against another re... through the former *Golab* v *Tadali*, 68 Ind Cas. 568

Admission cannot be proved in favour of the party making it Admissions are not admitted as testimony of the declarant in respect of any facts in ... *State* v *Willis*, 71 Conn 293 P's carriage was driven against M s carriage, whereby M s thigh was broken On the trial of an action by M against P for ... for M

... to be ... *Sutherland* v ... rejected because ... itself favourable ... had a weak case ... suborning witnesses to speak to having heard him make such statements A vast mass of the most worthless evidence would thus be imported in the case *Can Et* P 136, see also *R* v *Hard* 21 How St Tr 1093 94 ... *Letcherine*, 7 Cox 82—8... 352 ... hearsa... by a person can... in favour of his ... certain exceptio... person is admiss... stances which g...

an admission made by the plaintiff's lessor in his own favour and was consequently not admissible under any of the provisions contained in section 11, 13, 21 or 32 of the Evidence Act *Radha v Sarbeswar*, 86 Ind Cas. 674 = 29 C W. N 469 = A I R 1925 Cal 689

Ev § 520, *Phip Ev* p 223 The framers of the Indian Evidence Act in this

and (3) of the section The reason for these exceptions are thus given by Mr *Cunningham* "This rule (i e admission cannot be proved in favour of the person making it) however, if enacted without any relaxation would work harshly as there are some statements which though they are in the interest of the person making them, are yet from some particular circumstaces deserving of special credit Such for instance, are the statements mentioned in section 32 of the Act, to which illustrations (b) and (c) refer Practically the effect of this and the following exception is to let in a very large number of admissions as evidence in a man's favour,
given to them" *Cun Ev.* 137.
tive force An admission again
evidence, not only against privies in title, but also against strangers *Rajcoomar v Bissessur Dyal*, 10 C 688.

Clause (1) The securities which have been devised by municipal law for insuring the veracity and completeness of the evidence given in Courts of Justice vary, as might be expected, in different countries, and with the systems of law to which they are attached Several of those are principally relied on by the English law, such as the publicity of judicial proceedings, the compulsory presence of witness in open Court and the right of cross examination, etc *Best Ev* § 51 Of these safeguards against false testimony confrontation and cross-

another, cannot be received in any criminal Court to affect anybody except, him Every individual who stands upon his trial in a British Court of Justice has a clear right to have the witness brought in front of the Court, to be submitted to his cross examination, that he may have an opportunity of interrogating him respecting all the particulars of the fact.' We have seen that this rule is not violated when an admission is received against a party making it But the same principle is not available when the admission made by a party is received in

as a relevant fact must have some probative force So in eight cases where such

statements are made admissible by section 32, the circumstantial guarantee of *trustworthiness has been shown* Clause (1) lays down that an admission by a person may be proved by or in behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as

such admission is always admissible Section 34 of the Indian Evidence Act enacts that entries in books of account regularly kept in the course of business shall be relevant evidence though not sufficient of themselves to charge any person with liability *Josuant* v *Sheo Naraın*, 16 A (157 (161)=21 I A 6 The admission of such entries on behalf of a person making them is an exception to the general rule laid down in section 21 of the Act But where the documents are not proved to be account books regularly kept in the course of business their admission is illegal because proof of the entries therein would be in violation of

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custom or matter of public int
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fall within the language . . tion of section 32 of the Indian Evidence Act
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section 21 of the Act
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the entry in the sale certificate might be used in evidence in favour of . landlord *Manik* v *Jagadındra*, 24 Ind Cas 283 see also *Faral* v. *Prosonna*, 73 Ind Cas 719=28 C W N 679–39 C L J 389 Statements as to the date of birth of a person contained in his depos . n and in . ff lavits *filed by him* are admissible in evi
Act, if made b
or hearsay *Ra*
M W N 208
inter alia that
by one of the pl
in suit arose w
266 A statemer
certificate, obtai
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sion by him or his predecessor in title, and it cannot be used as evidence, . does not come under any of the exceptions to section 71. *Ramani* v *Mahanath*, 31 C 380 So also a recital in a writ of attachment is not admissible in favour of maker of the statement and is against persons who claim under an independent title *Moheeruddin* v. *Sumera*, 15 Ind Cas 310 On the question whether the Courts below should or should not have rec . ved in evidence the testimony
of a
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perso
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Act,
Babu Madho Das, 19 A. 77 P. C.

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section 21 of the Evidence Act and exclude road cess returns which are sought to be admitted in favour of the person by or on behalf of whom they have been filed

against persons other than the one who has made the return. *Chalho* v. *Jhaio*, 39 C. 995. A cess-return file
by a stranger against anothe
Dina Nath, 43 C. L J 425.
of any person who claims t
tive in interest. *Lachmi* v. *Jag Mohan*, 18 C. L J 633 (636), but see *Ramprosad* v. *Lala Sham Narain*, 6 C. L. J 22, where it is ruled that section 95 of the Road Cess Act has no application to the case where the parties who tendered road cess returns in evidence were not the persons who filed them, in pursuance of the provisions of the Act Road cess returns are admissible in evidence against the person by or on behalf of whom they are filed. *Hem Chandra* v. *Kali Prosonno*, 30 C 1033 P C = 8 C W N 1, *Swarnamoyi* v. *Sourendra*, 89 Ind Cas 747 = 42 C. L J 14 The effect of section 95 of the Cess Act is to prohibit the admissibility of return when tendered in favour of person of filing it, and it has, and was intended to have no

immaterial whether it was put in evidence directly to prove an admission or indirectly for some other purpose *Ram Narain* v *Hara Narain*, A I R 1926 Cal 727 = 92 Ind. Cas. 104.

Clause (2) "Clause (2) has received no illustration in the Act, probably because it has already been

21. relevant admission when religion of deceased person is a fact in issue *Leong v Leon*, 7 R 720= A. I. R 1930 Rang. 42.

oncomitants of illness and of phy cal mplain of pain and distress I think ity of the case" *Denis J* in *Callwell* n *State v. Davidson*, 30 Vt. 383 (*Am*) party are received to show the extent general ground that such injuries are

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suffering In some cases it seems to be required that the person be otherwise in an apparent condition of bodily ailment, of which his statements are the natural product *Penn Mutual L J Co* v *Wiler*, 100 Ind. 103 (*Am*); *McMurray v. Rigby*, 80 Ia 325 (*Am*), *Wigmore* §§ 1718, 1719

Who may testify as to statements The extrajudicial statement of one suffering pain or conscious of other bodily sensation may, as well as his coherent or incoherent ejaculation on the same subject, be testified to by any one who heard it Accordingly, a wife, parent, daughter, nurse, other attendant, or even a mere by stander is permitted to detail the statements to the Court. Even the declarant himself may testify as to his own statements. *Chamberlayne's Ev* § 2625.

to be of any degree of coherence Whatever this may be, whether that of a single word, or series of words, a disjointed or completed sentence, the evidentiary purposes is the same. We are dealing with circumstantial evidence, logically tending to establish the existence of a relevant bodily condition On this ground exclamations indicative of present pain suffering or distress, are normally received without objection. *Chamberlayne's Ev* § 2626

Kinds of fact narrated—statements of past events and conditions ex- of

because they do not relate to an internal state and thus other evidence is

to narrative is admissible as to who caused *R. v Gloster*, 16 Cox Cr 471 (473) The rule *Cleveland C C & J R Co v Newell*, 104 Ind esent existing pain and of its locality are

admitted upon

whether pain

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ings, pains or symptoms

principle of guarantee of trustworthiness, for they are not naturally caused by the existing pain or other symptoms, but being deliberate accounts of past occurrences,

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toms, a

ed in the same way. *Wigmore* § 1722.

Clause (3) This clause is intended to apply to cases in which the statement is sought to be used in evidence otherwise than as an admission, for ins

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is relevant

11, clause (1), as inconsistent with a rele-

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So also "care must likewi

res gestae The language

N 91 = 25 C 210, where the defendants

1 which they obtained under a parti

he plaintiff and denied the said partition

sly made by them, which went to show that there had been a partition and they had changed their attitude could be proved as against them and the statements were admissible evidence under sections 21 (3) and 11 (2) of the Evidence Act An admission may be proved *on behalf of the person making it under section 21 clause (3) of the Evidence* Act if it is relevant otherwise than as an admission If self serving statements are made in the presence of the opponent, and not denied by him, they are evidence for this purpose, so in the case of taking accounts, or where the entries are of a public nature (ss 35—37) or

In the case of a house said to have

Raghunath v *Brendeshwari* L R 5 A 231 = 82 Ind Cas 582 = A I R 1924 All

21. which the defendant was *not* a party, might be admissible *in* evidence as against the latter either under section 21 clause (3) read with section 11 clause (2) of the Evidence Act, or under section 32 clause (5) or under section 157 of the Act. *Sayeruddin* v *Samiruddin*, 72 Ind Cas 985 = A I R 1923 Cal 378 Self serving statements are admissible where they make relevant facts highly probable or improbable or they are *res gestae* *Harihar Prosad* v *Kesho Prosad* A I R 1925 Pat 68

Party can show mistake or fraud "There is no doubt that the express admissions of a party to the suit or admission, implied from his conduct are evidence—and strong evidence—against him, but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and that he is not estopped or concluded by them, unless another person has been induced by them to alter this condition, in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction, but as to third persons he is not bound It is a well established rule of law that estoppels bind parties and privies, not strangers *Per Bailey J* in *Heans* v *Rogers*, 9 B & C 586 The person against whom an admission is proved is at liberty to show *that it was* mistaken or untrue When an admission is duly proved and the person against whom *it is* proved does not satisfy the Court that it was mistaken or untrue there is nothing in the Evidence Act and there is no *general* principle or rule of law to prevent the Court from deciding the case in accordance with *it*. *Maung Mya* v *Ma Tha* U B R (1897 1901) Vol II, 377 An erroneous admission does not bind the person *making* such admission *Mangni* v *Shamnand* A I R 1923 All 575 When in a petition *there* is an inadvertant admission as to the nature of certain property it is open to both sides to give evidence as to whether the person who made the admission was or was not acquainted with the incidents of the property *when* he made the statement *Dinabandhu* v *Manilal* 52 Ind Cas 113 Statements made by a party at a previous proceeding without any definite knowledge of his rights and liabilities do not *operate* as an estoppel. Where the previous proceedings were compromised at an early stage without any decision of Court the party can *show in* a subsequent suit that the statement previously made was untrue *Mahamed* v *Pir Mahomed* 65 Ind Cas 363 = A I R 1922 Nag 67

Statements Post Litem Motam If the analogies of other exceptions be followed [*vide* clause (5) section 32] all statements made *post litem motam* are to be rejected as untrustworthy But it is questionable whether an absolute exclusion based on *this* distinction is either just or necessary *Wigmore* 1721

Illustrative cases—Admissible evidence Where in a *suit for mortgage* the defendant admits the execution of the document he also admits the receipt of the consideration *Seth Majanmal* v *Dalbortal*, 21 N L R 40 = 47 C L J 222 = 107 Ind Cas 113 = A I R 1928 P C 39 The fact that a co defendant took part in certain *batwara* proceedings in which the land in dispute was measured and a map was prepared [illegible] plaintiff's title was a limited, is admissible *in* evidence though it is n[illegible] on the other defendants who claim *under* an in[illegible] 90 Ind Cas 643 = A I R (1926) Cal 286 [illegible] the accused under s 342, Cr Pro Code prematurely at a time [illegible] sufficient to co[illegible] them with the crime, with the commission of which [illegible] charged, had b[illegible] it was held that although the Magistrate was wrong in [illegible] Criminal Procedure Code when it was impossible [illegible] the purpose of enabling them to explain *any* circumstance [illegible] nce against them, still their statements actually made cannot, if apparen[illegible] e and voluntarily given, be rejected as inadmissible in evidence on account of *this irregularity* of procedure; and that *prima facie* as admissions, these statements were relevant under section 21 of the Evidence Act *Queen Empress* v *Narayan*, Rat Un Cr C 679 = Cr Rg 15 of 1893 The statements of an accused person, from which his guilt may be *inferred* are admissions and may be proved under section 21 *Raj Mal* v *Empress* 3 P R 1880 Cr *Mt Mehro* v *Crown*, 8 P R 1907 Cr = 5 Cr L J 182, *Haroans* v *King Emperor*, 8 O C 335 = 2 Cr L J 811, *Nga Po* v *King Emperor*, 5 Cr L J 300

Illustrative cases—Inadmissible evidence Under section 21, a Court is bound to receive in evidence admissions of a party but no such rule applies to denials *Janki* v. *Emperor* 49 A 482=25 A L J 327=A I R 1927 All. 383. A statement in an order for delivery of possession as to the rent payable in respect of the land is inadmissible in evidence in a suit between the landlord and the tenant in which the rent payable is in dispute *Chandra Mohan* v *Sheikh Elim* A I R 1926 Cal 415=87 Ind Cas 512 An admission by an agent in favour of his principal cannot be relied on by the latter to prove his title to property *Maula Baksh* v *Jafar Ali*, 4 Lah L J 437 A respondent's admission in a divorce suit is not evidence against a correspondent. *Gordon* v *Gordon*, 58 P R 1870. A party's income-tax paper may be used against him but not in his favour *Shah* v *Emamun*, 9 W R 275 A party cannot use in his own favour an admission by his predecessor in his own interest *Bijoy* v. *Kalipada*, 20 Ind Cas 78=17 C W N 1013=18 C L J 347

When oral admissions as to contents of documents are relevant

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question

Origin of the rule In evidencing the contents of a document, it has at least, his oral accounted for as advanced in early

English rulings, in a forceful op sion, *Parke B* declarations wer for w th that mentioned in the schedule, although such admissions involved the contents of a written instrument, not produced, and I believe my *Lord Abinger*, who was not present at the argument, entirely concurs. Indeed, if such evidence were inadmissible, the difficulties thrown in the way of almost every

party himself *admits to be true, may reasonably be presumed to be so'* The

an unprofessional or ignorant man may be led to believe it may be so and so, where is the real and true meaning may be the very reverse or something very

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again t 2) of the the Act 78 Self highly Pro al

A I R 1925 Pat. 68

Party can show mistake or fraud "There is no doubt that the express admissions of a party to the suit, or admission, implied from his conduct are evidence—and strong evidence—against him, but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and that he is not estopped or concluded by them, unless another person has been induced by them to alter this condition, in such a case the party with respect to that person (and their · but as to third persons he is not

privies, not strangers' *Per Bailey J* in person against whom an admission is mistaken or untrue When an admission is duly proved and the person against whom it is proved does not satisfy the Court that it was mistaken or untrue there is or rule of law, Maung *Mya* v Imi s n does not bind the person making such admission *Mangru* v *Shivanand*, A I R 1923 All 575 When in a petition there is an inadvertant admission as to the nature of certain property, it is open to both sides to give evidence as to t acquainted with the *bandhu* v *Mannal* proceeding without operate as an estoppel ly stage without any decision of Court, the party can show in a subsequent suit that the statement previously made was untrue *Mahamed* v *Pir Mahomed* 65 Ind Cas 563=A I R 1922 Nag 67

Statements Post Litem Motam If the analogies of other exceptions be followed [*vide* clause (5), section 32], all statements made *post litem motam* are to be rejected as untrustworthy But it is questionable whether an absolute exclusion based on this distinction is either just or necessary *Wigmore* 1721

Where in a suit for mortgage locument he also admits the rec it *Moorilal*, 21 N L R 40=47 C L J 222=107 Ind Cas 113=A I R 1928 P C 39 The fact that a co defendant took part in certain *batwara* proceedings in which the land in dispute was measured and a map was prepared in which the plaintiff's title was admitted is admissible in evidence tho on the other defendants who claim u 90 Ind Cas 613=A I R the accused under s 342, sufficient to connect them with the crime, with the commission of which ld that although the Magistrate 342 Criminal Procedure Code

under section 21 of the Evidence Act *Queen Empress* v. *Narayan*, 1893 Cr C. 679=Cr Rg 15 of 1893 The statements of an accused person, from which his guilt may be inferred are admissions and may be proved *R. Mehro* v *Crown*, section 2 R. 1907 *peror*, 8 O C L J 811

ie party tendering them is with-
) admission assumes a degree
to possess as of a construction
e Judge may direct the docu-
F & F 653, *Boulter* v *Peplow*,

J C B 133) ;—*Phip Ev* 226

Scope of the section This section departs from the English law as laid down in *Slatterie* v *Pooley* 6 M & W 664 Following Mr *Taylor*, the views expressed in *Lawless* v *Queale* 1 Ir L R 352 has been adopted in the present Act Oral admissions as to
provided in this section are excluded
sions as to such matters, are howe
Cun Ev 140 So when the existence conditions or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest, such written admission is admissible *Section 65 clause* (*b*) But written admission mentioned here must be distinguished from written admission made under section 58 This section does not exclude admissions which the parties or their agents agree to admit at the

8 B H C R A C J 163 (165) Oral admissions as to the contents of a document are admissible when the party is entitled to give secondary evidence of the contents of such document under sections 65 and 66 of the Act Such admissions are also admissible when the genuineness of the document produced is in question "Where the question is" says *Norton* "not what are the contents of a document, but whether the document itself is genuine—that is, in the handwriting of the party whose writing or signature it is alleged to be—evidence

ess of the document produced is in question The effect of the last clause of this section seems to be that if such a document is produced, the admission of the parties to it, that it is or is not genuine, may be received *Nort Ev 153* Even where the contents of a document may be established by admission they cannot
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Oral admissions of contents In
79=13 C L R 271 their Lordships

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23. final judgment a former action against the defendant. The Court used the following language The admissions of a party are not open to the same objection which belongs to parol evidence from other sources A party's own statements and admissions are in all cases, admissible in evidence against him though such statements and admissions may involve what must necessarily be contained in some writing deed or record Thus the statements of a party though the conveyance the production of written admissions of parties as what a party admits against himself may be reasonably taken as true The weight and value to the statements and admissions will vary according to the circumstances and must be determined by the jury *Smith* v *Palmer* 6 Cush (Mass) 513 So the admissions of a party have been received to prove the contents of letters and of a deed [*Loomis* v *Wadhams* 8 Gray (Mass) 557], the existence of a partnership 6? Pa 374) the terms of a and the contents of a telegra other hand there have been that there is no principle in t the declarations of a party ev They point out the danger of mistake or misconception as to the terms of written evidence and also the danger of falsehood or fabrication and the difficulty of detection and the danger of following record titles to be lost by testimony so uncertain in character They lay down the rule that admissions rank only with oral testimony and that unless made in open Court, they are competent only where parol evidence would be admissible to establish the same fact *Halliberton* v *Fletcher*, 22 Ark. 453, *Bivens* v *McElroy* 11 Ark 23, *Flournoy* v *Newton* 8 Ga 306, *Burr Jones* § 208

Admissions in civil cases when relevant

23 In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given

Explanation—Nothing in this section shall be taken to exempt any barrister pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126

Principle of excl on principles which examination it would factory It would b the principles laid dow

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character has always been excluded and the rule has been so broad as exclude all admissions thus made Another instance of exclusion of testimony is that of an offer of one party to another to pay a sum of money or other valuable consideration with a view to a compromise of the matter in controversy It must be permitted to men to endeavour to buy their peace without being

prejudiced by a rejection of their offers Hence, evidence of such offers or proposals is irrelevant, and they are not to be taken as admissions of the legal liability of the party making them But here a distinction exists between the cases of an offer to pay money to settle a controversy, and an admission of particular facts, connected with the case, made by a party pending a negotiation for a compromise The *more convenient rule might have been* that which is *applicable to communications between client and attorney, excluding as testimony, everything communicated in this relation,* which rule, if applied here, would exclude every admission made during the interview which was had for such compromise To some extent this rule was attempted to be introduced, excluding all admissions of the parties, even admissions of particular facts, where it appeared that they were expressly stated at the time 'to be made without prejudice' But the exception was soon introduced, that the evidence was competent where it was the admission of a collateral fact This theory is consistent enough with general theory of privileged communication, (vide ss 126 129) namely, that expeditious and extra judicial settlements are to be encouraged and that privacy of communication is necessary in order to encourage them, and there is indeed a privilege for a party's statements to an official conciliator In policy however it may be doubted whether the recognition of

that the supposed privilege does not fit the rule of law as it is everywhere accepted and applied *Wigmore* § 1061(*a*)

appar

entered into any contract by it if the offer contained in it is not accepted *Similarly Lindley L J* in *Walker* v *Wilsher*, L R 23 Q B D 335, said "What ... I think they mean, ... f the terms he ... e accepted, a ... hout prejudice, ... 'This theory ... contained in ... be used for its ... it contain the express words 'without prejudice', may still be inadmissible in evidence and conversely'. *Wigmore* § 1061 (b)

Taylor § 795 'The essence of an offer to compromise ... *Thomson* v *Austen*, 2 Drol & Ry 358, 361, 'is that the party making the offer ... on" 'Money paid upon

23. final judgment a former action against the defendant The Court used the following language 'The admissions of a party are not open to the same objection which belongs to parol evidence from other sources A party's own statements and admissions are in all cases, admissible in evidence against him though such statements and admissions may involve what must necessarily be contained in some writing deed or record [illegible]

[illegible] the best evidence does not apply to the admissions of parties as what a party admits against himself may be reasonably taken as true The weight and value to the statements and admissions will vary according to the circumstances and must be determined by the jury" *Smith* v *Palmer* 6 Cush (Mass) 513 So the admissions of a party have been received to prove the contents of letters and of a deed [*Loomis* v *Wadhams*, 8 Gray (Mass) 556], the existence of a partnership based on a written contract (*Edward* v *Tracy* 62 Pa 374) the terms of a lease in wr[illegible]

[illegible] point out the danger of mistake or misconception as to the terms of written evidence and also the danger of falsehood or fabrication and the difficulty of detection and the danger of following record titles to be lost by testimony so uncertain in character They lay down the rule that admissions rank only with oral testimony and that unless made in open Court, they are competent only where parol evidence would be admissible to establish the same fact *Halliberton* v *Fletcher*, 22 Ark 453 *Bucns* v *McElroy* 11 Ark 23, *Flournoy* v *Newton* 8 Ga 306, *Burr Jones* § 208

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covered by this section are excluded rently by different Courts But on xplanations are more or less unsats- the cases and to try to find out whether satisfactory

Principle anologous to that of privileged [illegible] When an

[illegible] nu the usual way by which [illegible] privilege is by stipulating that the *Ibid* In *Dickinson* v *Dickinson*, 'The rules of evidence, exclude to [illegible] the declarations and admissions of a party Thus, the more fully to protect the rights of parties litigating all their communications with counsel are held to be privileged Evidence of this character has always been excluded and the rule has been so broad as to exclude all admissions thus made Another instance of exclusion of testimony is that of an offer of one party to another to pay a sum of money or other valuable consideration with a view to a compromise of the matter in controversy It must be permitted to men to endeavour to buy their peace, without being

for granted, not because they are true, but because good policy constrains the temporary yielding of them to effectuate a greater good, is not admissible, truth being the object of evidence" 'The preliminary question always is,' says *Doe C J* in *Colburn v Groton*, 66 N H 151, 156, 'not merely whether an admission of a fact was made during a settlement or negotiation, but whether a statement or act was intended to be an admission It is a question, not of time or circumstances, but of intention ' So it is apparent that the occasion of the utterance is not decisive, that is, it may or may not have been accompanied by a reservation or an injunction of secrecy, and it may or may not have occurred during negotiations for a settlement or a compromise. What is important is the form of the statement whether it is hypothetical or absolute If, making all implications from

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occurrence in the course of compromise negotiations or in other words a conces-

Wallace v *Small*, 1 M & M 449 An offer of compromise, in the sense of a peace offer, may be made by an

where the authority of the alleged agent

for example, a wife acting for her husl

ment will be rejected *Chamberlayne's Ev.* § 1448 An offer to compromise might be very well made, without restriction as to confidence *Ibid* So also to pay money by way of compro ... with a view to buy peace is not evidence

Bretton, 4 C. P 462, *Gregory* v *Howard*,

143; *Turner* v *Railton*, 2 Esp 474,

on v *Benson*, 1 P Wms 495 In *In re*

was whether a written notice sent by a

had suspended or was about to suspend

... to be written "without prejudice" was admissible in evidence to prove an act of bankruptcy upon the hearing of a bankruptcy petition In admitting the written notice, *Vaughan Williams J* said 'Ir

prejudice'

with anot

23. See also *Grace* v *Baynton*, 21 Sol Jour 631. But now the question is whether the same rule applies in India also Such a question arose in a Bombay case but it is left undecided by the Appellate Court *Madhavrao* v *Gulabbhai*, 23 B 177 In that case the defendant pleaded limitation In reply the plaintiff relied on an acknowledgment of the debt by the defendant The alleged acknowledgment was written on a post card sent by the defendant by the plaintiff It was in *Gujrati* and was as follows —"I was bound to send Rs 30 according to my *vaida* (fixed time) but on account of the receipt of the intelligence of the death of my father I have not been able to fulfil my promise But now on his obsequies being over, I will positively pay Rs 30 at *Sneth Meruanji's* You, Sir should not entertain any anxiety whatever in respect thereof As to whatever debts may be due by my old man, I am bound to pay the same as long as there is life in me

Therefore I w

"without prej

inadmissible

and they dism

that even if

acknowledgm

by limitation

observations

evidence To exclude it from evidence it would be necessary to hold that the words 'without prejudice' amounted to an express condition that the card should

In England apparently the card

of *Vaughan J* in *In re Daintry*,

Judge in the Court of first instance

quoted, are not, as the Subordinate Judge supposes, mere *obiter dicta* They state

documents marked without prejudice' has

in dispute or negotiation with another, and

the dispute or negotiation This rule is

to be found in many cases

"Probably a person ma

his demand being proved at t

for until the claim is not

only to enable negotiations to be entered into to settle an existing dispute.

marked 'without prejudice' but which contains

the terms be not accepted, can be admitted

v *Spence*, 58 L T 438=57 L J Ch 2

an anecdote of a young attorney who has

d always

that he

brought

an action for breach of promise of marriage against him When his letters

he merits of the cause a

her means" For the purpose

the parties, a letter written

without prejudice prevents it being read at the trial (*Pollock* v *Forrester* 3

Bkey 33),

Forrester,

has even

ter clearly

the correspondence should be privileged

Peacock v *Harper*, 26 W. R 109, *Oliver* v *Nautilus Steamship Co* (1903) 2 K.

B 639, *Powell* 293 The same rule is applicable in the case of conversations Unless there be a clear break between the conversation which is clearly *without prejudice* and subsequent conversation no admission of a party in the latter part of the conversation can be given in evidence *Thompson* v *Austin* 2 Dowl. & Ry 361 Correspondence marked "without prejudice" can be seen s *Waller* v *Walsher*, 23 Q B awarding costs. *Ibid* They r these are marked "without prejudice" *In re Dimtrey* (1893) 2 Q B 116: *Peacock* v *Harper*, 26 W R 109. the statements made during It is ordinarily against public A conviction based on such *mperor*, 11 C W N 26 N, see a dispute between two parties,

S. 2

446), or where an agreement, though purporting to be a compromise, has been finally concluded (as, where it nd executed), *Frognell* v *Lewelyn*, 9 Pr 122, , 20 C. W N. 1217. Where certain letters we the plaintiffs it prejudice' and the defendant's

under s 23 of the Eviden regards the letters it must be intended to claim the sam 6 O W N 1088 = A I R 1930 Oudh 193 Section 23 is no bar to the use of admission in compromise which is not rejected *Sadhu* v *Botha*, 11 L L J. 446 = A I R 1930 Lah 293

In *Healey* v *Thatcher*, 8 C & P 388 *Gurney B* excluded a letter beginning *ddock* v *ully M.* empt to *Thomas*, *Jorden* adverse party with a view to a compromise, or to an action, you must look with very

intention to admit liability to the extent of the claim" *Meajan* v *Ammuram*, 41 C 130 = 20 C W N. 1217 = 25 C L J 12

24. Facts adn
can be proved
the witnes "he
question in di
the defendant,
of money on
compromise" and therefore to be admissible. *Thomson* v. *Austin*, 2 Dowl &

348=4 Pat L J. 676=(1920) Pat 52.

which the Court can infer, etc This section
d the words "infer that it was the *intention* of the
fer that the parties agreed together that." In
England there has been some difference of judicial opinion as to whether admis

be drawn almost as a matter of course from the nature and circumstances of the case" *Wills' Ev* 299 This difficulty is further more obviated by the words used in the section

Explanation The explanation refers to the obligation on the part of Barristers and others to answer questions as to professional communications made to them in furtherance of a criminal purpose or as to any fact observed showing the commission of a crime or fraud since the commencement of their employment *Cun Ev* 141

Illustrative cases Admissibl ... person to

it is for the Court dealing with the
proper to such an admission *Punjab Singh* v *Ramautar*, 52 Ind Cas
Admission made by the tenant defendant before the pleader of the plaintiff landlord, to whom one of the defendants went before the suit for compromise is admissible in evidence in the absence of any express or strongly implied condition that evidence of the same would not be given *Meajan* v. *Alimuddin Mean*, 20 C W N 1217=44 C 130=34 I A. 571.

A I. R 1926 Lah 509=92 Ind Cas 319

24 A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from

Confession caused by *inducement*, threat, or promise, when irrelevant in criminal proceeding

a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him

S. 2

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defined in the Indian Evidence Act" says *Mahmood J* in *Queen Empress* v *Babu Lal*, 6 A 509 (F B) at p 539, "it, however, occurs under the category of admissions, and to make my meaning clear, I adopt the definition given by *Mr Justice Stephen* in Art 21 of his *Digest of the Law of Evidence*, by saying that a 'confession is an admission made *at any time* by a person charged with a crime, stating or suggesting the inference that he committed that crime" In *Queen Empress* v *Jagrup*, 7
follow the definition given
"was written in view of a pr

i the
, and
kept
out the spot to the effect that he
whether those statements amounted
25 *Held* that the above statements
as they suggested the inference that
not intended by the accused, as a
confession of guilt they were an admission of a criminating circumstance and would form a very important part of the evidence against the accused as showing

B 635 where at page 636, *Chandavarkar J* said
Evidence Act makes a clear distinction between an admission and a confession. It is only under s 3
accused persons jointly
as against the rest
affect both the person confessing
Yesuada taken by themselves do not fall within that category As *held* by the Allahabad High Court in *Emperor* v *Jagrup*, 7 A 646, the word 'confession' must not be construed as including a mere inculpatory admission which falls short of being an admission of guilt Section 30 must be strictly construed. The learned Sessions Judge has construed the statement into a confession by a process of inferential reasoning which is not what the terms of section 30 countenance" See also *Emperor* v *Nani Gopal*, 15 C. W. N 593 (612) = 38 C 569

In *Queen* v. *Mac Donald*, 10 B L R App 2, *Phear J* observed that there is a distinction in the Evidence Act between admissions and confessions, but the judgment contains no definition of the term This case was followed by

24. *Prinsep J* p.
the subject
Tribhoran M
statements which it is proposed to prove against an accused person to establish an offence or in other words what admissions do amount to confession, remained unanswered
Mullick, 15 (
meaning of
between admission and confession In *Queen Empress* v. *Nilmadhub*, 15 C 595, *Petharam C J* also said at p 607 "If the contents of the document did not amount to a e relevant as an admission under s 21 of the learned *Chief Justice* admitted the ex and confession but did not give any definition of the word 'confession'. The High Court of Madras is silent on this p
reported Madras
sion" one shoul
Empress v *Jagru*
the Law of Ev
time by a person
committed the cr
26 Ind Cas. 161
ting the guilt o
committed the c
followed th
of the Law
it has been
admission made at any time by a person
ing the inference, that he committed that
which amount to a direct acknowledgme
inculpatory statements which although they fall short of being
of guilt, yet suggest an inference of guilt or from which an inference of guilt follows The factor determining whether a statement amounts to a confession
.. but the fact that it leads to an
. *Tha* v *Emperor*, 5 L B R 131=
16 P R 1886 Cr;

ing the inference that he committed the crime *Hakiman* v. *King Emperor*
P L R 1905=20 P R 1905 Cr; *Queen Emp*
(707), *Superintendent* v *Lalit Mohan Singa*,
In *Queen Empress* v. *Jave Charan*, 19 B 363

him; it was no admission whatever of criminating circumstances It was therefore, admissible. The statement held to be inadmissible in *Imperatrix* v. *Pandharinath*, 6 B 34 was of a different char
admitted possession of a cheque alleged
one of the criminating circumstances which
against the accused. In the present case the statement does not amount
or indirectly, to an admission of any criminating circumstance, and is, therefore, outside the principle of the ruling cited." "In the result," says *Carnduff J.* in

Barındra Kumar Ghose v *Emperor*, 14 C W N 1114 at p 1197=37 C 467 "it seems to me that each case must be decided as it arises with reference to the question whether the particular statement concerned, whether it be positive or negative, verbal or expressed by conduct, is or is not a confession See also *Muthu Kumar Swami* v *King Emperor*, 35 M 397; *Emperor* v *Cuna*, 22 Bom L R 1247, *Ganapati* v *Emperor*, 6 N L R 180=12 Cr L J 60=8 Ind Cas. 1181 "By confession I understood not necessarily a full confession of guilt, but any statement made which, being relevant to the issue, may be put in evidence against the person making it" *R* v *Wong Chin Kuai, Roscoe, Cr. Ev* 37 Confessions of other crimes not relating to the charge *e g* showing or admitting a general tendency even to the crime charged, are inadmissible *R.* v *Cole, 1810*, *Roscoe, Cr Ev 37*

In *Smith* v *Emperor*, 13 Ind Cas 605, at p 611, *Phillips J* said "There is no definition of confession in the Evidence Act but I take it that it must be something more that a mere admission In *Emperor* v *Kangal Mali*, 26 Ind Cas 161–15 Cr L J 713=41 C 601 when dealing with the admissibility of statements, it . . . they were put . . . of the accused as . . . be found to amount to confessions Accepting both these propositions I would add that in order to make . . .

. . . inating, I am doubtful whether the fact that it does become incriminating owing to subsequent events would make it a confession" See also *Pan Gong* v. *Emperor*, 19 Cr L J 42; *Jasoda* v *Emperor*, 53 Ind Cas 691.

An admission of all the ingredients required to constitute an offence is a confession A confession is an admission made at anytime by a person charged with . . .

. . . associates and the police recovered stolen articles from the house of the person making the confession and from the persons named by him, *held*, that the confession was not rendered untrue merely because the person making the statement minimised his share in the dacoity 126 Ind Cas 498=31 Cr L J 1017=A I R 1931 Oudh. 74 A statement of the following . . . sion of complicity in an offence "I told . . . kill my husband, they were at liberty . . . against them But when they arrived at . . . t, I endeavoured to restrain them and was . . . r threats to kill me and my son if I . . . part in the murder, nor did in any way assist the murderers after my husband was put to death" *Bhag Singh* v *Emperor*, 4 Ind Cas 429=21 P W. R 1909 Cr=153 P. L R 1909 A statement of an accused to the effect that under threats of death he was forced to sit outside the . . .

. . . *Gul Hossain* v *Crown* . . . A confession must . . . tute in law the offence . . .

. . . R. 133 Where the . . . complainant, it is unfair for the Magistrate to treat the circumstance as an indication of the accused's guilt. *In re Abdul Rahman*, 4 L W 556=17 Cr. L J 462=36 Ind Cas 142 To constitute a 'confession' under the Evidence Act, it is not necessary that the person confessing should make a full and explicit . . .

24. of his guilt so clean as to leave no other hypothesis tenable. *Smith* v *Emperor*, 43 Ind Cas 605=19 Cr L. J 189 The fact that the accused did not claim a piece of cloth as his own before the Police but admitted at that time that it belonged to the deceased might have been due to this that the defence is not

forgery case be regarded as confession ...

1920 Cal 539

Confession, meaning of—English Law Stephen defines that "a confession ... with a crime, stating or ..." If the words 'any time' ... ime they seem too wide

2 K B 108 *Phip Ev* 255

Confession, meaning of—American view The general rule that a confession, a statement by one accused of crime directly or by necessary inference admitting his guilt, is receivable in evidence, provided it complies with certain requirements of procedure, is not questioned in any quarter It necessarily follows from the very definition of a confession that it must, as a total, incriminate the declarant, as to the crime charged in the indictment. But while every confession must be an incriminating statement, it by no means necessarily ... The confession ... confession as to ... to the knowledge ... or not conceded, ...

... ession, but ... to be established"

"A confession in a legal sense is restricted to an acknowledgment of guilt made by a person after an offence has been committed and does not apply to a mere statement or declaration o... may be inferred" *State* v *Reinhar*... *Ev* § 1476; *Wigmore* § 821 ... that an acknowledgment ... an inference of guilt is properly desig...

... or subordinate fact, or ... of facts which could be true whether the main fact existed or not" *Riley* v *State*, 1 Ga ... marked difference ... the main f... admitting ... with innoce...

On the other hand, the term confession has been strictly confined, by ... *Ind* Court, to distinct concessions of liability, nothing being left to inference So "to constitute a declaration a confession within the legal meaning of the term it must amount to a confession of the crime charged, or participation in

such commission, as distinguished from admissions or other statements tending to prove guilt or innocence, or of facts from which, taken together, guilt is directly deducible" *Encyclopoedia of Evidence*, Vol III, p 298

Confession
of admissions,
a criminal charge
exists and a special rule based on the general testimonial principle of trustworthiness exists, and a special rule, based on the general testimonial principle of trustworthiness of narration, becomes applicable. That rule satisfied, the confession occupies the status of ordinary admission; its relation to other rules of Evidence is therefore determined by its quality as an admission For example, as an extra judicial statement, it would ordinarily be obnoxious to the Hearsay rule but admissions are either not within the prohibition of that rule, or are an

law that it will not force any man to accuse himself; pain and force may compel men to confess what is not truth of facts, and consequently such extorted *Gilbert Ev 6th Ed* (1801) p 123, *Wainwright*, 8 A & E 691 (700), *Wills' Ev 2nd Ed* 150, *Taylor* § ived on the same principle as that d, *viz*, the presumption that a against his own interest *Taylor* § K B 346 So it is clear that Hearsay exception for statements a qualified witness, and could to day be so regarded, where the accused, not being compellable, fails to take the stand *Vide section 32, clause 4 and notes thereunder*; *Wigmore* § 816 (*Foot note*) As in the case of admissions, certain vicarious admissions, *i e* those of agents and other persons are often receivable, so also in the case of confessions, the confessions of co accused, co conspirators, and others are also receivable. *Wigmore* § 816

matter begins to be considered, and it is recognised that some confessions should

an examina
Wigmore §
Leach Cr
by threats o

24.

suspicion of all confessions
to repudiate them upon the

of changing the law or the practice" *Wigmore* § 817.

The Evolution of Reason To a certain extent, the history of the evolution of the law of confessions is that of most rules in the law of evidence. As is said elsewhere the early history of t
be witnesses down to the close
decreasingly one of administrati
as part of the executive of the cro
jurors as to what they might
were practically no rules, certainly none having the force of law At mo
action of the judges in this respect was determined by the custom, or practice of the various circuits of the King's Courts The effort was to administer the customs of the realm or other provisions having the force of law with legal reasons, as that term was then understood, for the attainment of substantial though, of course, conventional

In respect to confessic
fessions by way of pleas of gu
make sure that the prisoner
was fully aware of the conse
the penal code then in force,
for comparatively unimporta
accused laboured, it seemed but just that before the judge should allow a pris
undefended by counsel without the aid of witnesses, and hurriedly tried, often plea of

not necessarily be taken at his word, he was to be warned and even, occasio the advised to retract his plea Of this judicial administration, as of any other, the characteristic guide and test was reason

The political events of the seventeenth century in England, to which brief reference is elsewhere made, were united with the assumed necessity for concealing valuable judicial legislation, the temper and philosophy of the times and much else, to evolve the use of reason into the direction of establishing rules of law in place of those of practice or administration During the eighteenth and most of the nineteenth centuries the rules of evidence were being formed To a very large extent, this development was marked by a change from administration, as represented by the practice on the several circuits, into rules of substantive law relating to procedure Positive regulation of admissibility establishing classes of facts to be received or rejected had taken the place of legal reasoning as freely applied in the administration to the facts of the individual case It might almost be said that practice had hardened into
to law It seemed to the mind of the
e protection of individual liberty as
of the reasoning faculty, that a species
character and the like, which

substantial justice

From this period or stage of legal evolution has come the multiplicity of the conflicting decisions, each having the force of precedent, concerning

S.

[illegible] of confessions, claimed to have been involuntary, naturally, it has resulted from the rule of substantive or procedural law that all confessions made after certain [illegible] have been [illegible] to the defendant by designated classes of persons shall be rejected because in many cases such statements would be calculated to mislead a jury, that miscarriages of justice have been many and conspicuous. To a certain extent this evil consequence has been found to attend the operation of any rule of law which excludes entire classes or species of facts regardless of their probative effect in any particular instance, even where any alternative proof cannot be secured in any other way. It has therefore come to be felt as one [illegible] should be applied to the individual case rather than employed in the creation of arbitrary classes to which the quality of admissibility is once for all assigned or denied by the substantive law relating to procedure. In other words, while the feeling of the last century in favour of having a rule of law with regard to the conduct of legal business and the rights and liabilities of [illegible] and [illegible] far-reaching judicial distinction of [illegible] regarding the work of the courts [illegible]. Where the matter is one relating to rights or liabilities where certainty is important, a fixed rule of law, having the force of precedent and capable of collection, results from [illegible] judicial action in any particular case. Should, on [illegible] civil law, the law of actions, the [illegible] to be attained, the enforcement [illegible], the expediting of trials and the [illegible] are to be reached. At this point sound legal reasoning, the flexibility of administrative action, properly takes the place of the rigid rule of law, the precedent enforceable on appeal. Into this stage of legal evolution, the increasing admixture of the element of reason, the modern law of confession is and for some time has been, gradually emerging. *Chamberlayne's Ev.* §§ 1017, 1018.

Narration as affected by Motives to Confess guilt. "The trustworthiness of confessions of guilt has been a constant theme of argument in the administration of justice. From the point of view of logic, the question is whether the confessional narrative is explainable by any motive other than that of a consciousness of guilt arising from actual guilt. Obviously a double inference is involved,—first from the utterance of the confession to a consciousness of guilt as its motive cause and secondly from that [illegible] cause than the actual doing of the deed. There have been false confessions [illegible] in each case whether at [illegible] the confession to the [illegible] words, of the confession being a voluntary one, the process was one of *choice of motives*. If the confession was a false one, [illegible] of utterance with [illegible] non-confession [illegible] who is [illegible] confessor chooses [illegible] though damag[illegible] of damaging [illegible]

gence, his physical condition (hunger, fatigue, fear), and his environment. E.g. in the old English case where (under the then trial rules of Evidence) a confession was excluded because some one had promised the accused a glass of beer if he would confess, we could hardly conceive of ourselves making such a choice of motives; but we might have to believe that this particular man did make it, after we learn all the data about him. So, too, the oft-repeated case

4 in China of a man falsely confessing and impersonating the guilty one out of ecution, rests on motives which would not be merican

between the observer's idea of the choice of motives that he would make and the choice of motives that the accused being what he is, is alleged to have made. And the observer finds it difficult to judge the choice from any but his own experience and standard. The alleged choice of false confession by the accused could have been due only to the dominance of a motive so unlikely and so queer (from the observer's experience) that the explanation seems far-fetched and improbable.

Hence the decision in such cases calls for wide acquaintance with the human nature of confessions and an estimation of the probabilities that one of the rare or unusual motives is indeed present and dominant in the case in hand.
—*Wigmore's Principles of Judicial Proof* § 222

Same—Motives for confession. 'The confession is a very extraordinary psychological problem. (1) In many cases the reasons for confession are very obvious, the criminal sees that the evidence is so complete that he is soon to be convicted and seeks a mitigation of the sentence by confession, or he hopes through a more honest narration of the crime to throw a great degree of the guilt on another. (2) In addition there is thread of vanity in confession—as among young peasants who confess to a greater share in a burglary than they actually had (easily discoverable by the magniloquent manner of describing the actual crime). (3) Then there are confessions made for the sake of care and *winter lodgings*. The confession arising political criminals and others). (4) There nobility, from the wish to save an intimate such as occur especially in conspiracy are m of the real criminal or for the destruction of in the latter case guilt is admitted only until the plan for which it was u has succeeded, then the judge is surprised with a well founded regular and successful establishment of an *alibi*. (6) Not infrequently confession of small crimes is made to establish an *alibi* for a greater one. (7) And finally there are the confessions catholics are required to make in confessional and (8) The death bed confessions. The first are distinguished by the fact that they are made freely and that the confessee does not try to ... his crime, but aiming to make amen nite penance. Death b the desire to prevent person. (9) A number of cases may perhaps be explained through ... of conscience persons who are would appear o ceases, etc. If the confessor only intends to free himself from the ... means of confession, we are not but more or less with disease ... it where such hallucinations are the confession is made freely in response to mere pressure, we have a cause of conscience. There is always considerable difficulty in explaining these causes. To deny that there are such is comfortable but wrong, because we each know collection of cases in which no effort can bring to light a motive for confession. The confession is ... because the confessor wanted to make it, and that is the whole story." *Wigmore's Principles of Judicial Proof* § 223 citing from *Hans Gross*, Criminal Psychology.'

confessions are either ... rough mistakes are the mistakes a corpse for ... inding the body ... nfe-

intent result a rob he imagine sion is ma confession facts corre confession

but [illegible] know that legally he is not guilty (*R* v *[illegible]*, 5 C [illegible], *[illegible] R*, [illegible] 401). In [illegible] false confessions are intentionally made to escape vexation [illegible] all those false confessions which are extorted from a prisoner [illegible] or mental torture. A second motive is a desire to [illegible] which may be illustrated by the [illegible] of a man falsely accused of a [illegible] confession to throw off [illegible] of greater magnitude which he has already committed. A third [illegible] of life. A fourth motive, originating in the relation of sexes is thus described by *[illegible]*, to whom we are originally indebted for the [illegible] question — "In the relation between the sexes," says *[illegible]* in treating of the subject of false confessions, "may be found the source of the most natural examples [illegible] of many other [illegible]. The female [illegible] punishment as for seduction [illegible] the [illegible] for the purpose of keeping off rivals [illegible] the alliance. The female married—the like [illegible] even though [illegible] with a view to marriage through [illegible]. A fifth motive is vanity. *Best* takes the following extract from *Bent* [illegible] — vanity without the aid of any other motive, has been known (the force of moral sanction being in this case [illegible] against itself), to afford an interest strong enough to engage a man to sink himself in the good opinion of one part of mankind under the notion of raising himself in that of another." A sixth motive is the desire to benefit others. A seventh motive is the desire to injure others, this [illegible] the crime [illegible] revenge [illegible] expense of their own [illegible] *[illegible]*; also [illegible] 1368 § 560—573, *Wigmore's Principles of Judicial Proof* § 223.

[illegible] psychology of the true confession has not [illegible] more than one kind of motive is found [illegible] that in the normal person (not an habitual criminal) the consciousness of guilt of a serious crime, plus the nervous strain of avoiding detection lead naturally to a confession upon being detected and arrested.

The process is one of a suddenly relaxed inhibition. Upon doing a heinous act the person is conscious of an emotional shock at violating common morality and at finding himself in danger of punishment and ruin upon discovery. He therefore now inhibits every form of conduct that could reveal his guilt. The nervous strain of these multiple inhibitions cumulates hourly [illegible] If, finally (and as [illegible] for the murder of X, he [illegible] if facts are stated [illegible] so all the inhibitions [illegible] released. A flood of normal nervous consciousness returns. A full nervous relief is felt—equal to the physical relief given by a purgative after long constipation. There is no longer any strain of inhibition. And the [illegible]

[illegible] condition, however, lasts only a short time. The normal coolness [illegible]

reasonable hope of escaping discovery; *Empress* v *Dade Ana*, [15 B 452 (479)].

and half savage nature of the accused (*Taylor's Trial of cases*, para 135 cited

24 in China of a man falsely confessing and impersonating the guilty one out of ... ecution, rests on motives which would not be ... merican ... between the observer's idea of the choice of motives that he would make and the choice of motives that the accused, being what he is, is alleged to have made And the observer finds it difficult to judge the choice from any but his own experience and standard The alleged choice of false confession by the accused could have been due only to the dominance of a motive so unlikely and so queer (from the observer's experience) that the explanation seems far-fetched and improbable

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of the real criminal or for the destruction ...
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ceases, etc If the confessor only intends to free himself from the ... means of confession, we are not ... but more or less with d... it where such hallucinations are ... the confession is made freely in response to mere pressure, we have a cause of conscience *There is always* considerable difficulty in explaining these causes To deny that there are such is comfortable but wrong, because we each know collection of cases in which no effort can bring to light a motive for confession The confession is made because the confessor wanted to make it, and that is the whole story" (Criminal Psychology' —*Wigmore's Principles of Judicial Proof* § 223 citing from *Hans Gross*

... are ... her ... akes are the ... corpse for ... body lif less ... nfe-

charge . . . . According to the rules of evidence, what a prisoner has said respecting a particular fact is admissible evidence, not in the nature of a confession, but as evidence of the particular fact.' "The distinction between a confession and an admission, as applied in criminal law, is not a technical refinement but based upon the substantive differences of the character of the evidence deduced from each. A confession is a direct acknowledgment of guilt on the part of the accused, and, by the very force of the definition 'excludes an admission which, of itself, as applied in criminal law, is a statement by the accused 'direct or implied' of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt but of itself is insufficient to authorize a conviction'." *Per Holloway J* in *State v. Guie* 56 Mont 485=186 Pac 329.

What are confessions and what are not confessions were very lucidly explained by *Hamilton J* in *State v. Porter* 32 Or 135=49 Pac 964 (966) where he said: "We take it that the admission of a fact or of a bundle of facts, from which guilt is directly deducible, or which within and of themselves import guilt, may be denominated a confession but not so with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established. It is not necessary that there be a declaration of an intent to admit guilt; it is sufficient that the facts admitted involve a crime, and these import guilt, or as put by *Mr Wharton*, I am guilty of this, and "this" imports the admission of all the acts constituting guilt. It is necessary however, that the accused should speak with an *animus confitendi* or an intention to speak the truth touching the specific charge of guilt and when he with such intention, narrates facts constituting a crime the guilt becomes a matter of inference, a resultant feature of the narration without an explicit declaration to that effect. So that we conclude that whenever the statements or declarations of the accused, voluntarily made, are of such facts as involve necessarily the commission of a crime, or in themselves constitute a crime then the facts admitted import guilt, and such admissions may properly be denominated confession." So it is admitted on all hands that there is a distinction between admission and confession. *R. v. Macdonald*, 10 B L R App 2, *Empress v. Debee Prosad*, 6 C 530=7 C L R 531, *R v Buddho* 3 N L R 51=5 Cr L J 131, *Emperor v. Mahomed*, 5 Bom L R 312, *R v. Gopal*, 7 C 96=8 C L R 171, *R v Chooramoni*, 11 W. R. Cr 25, 26, *R v. Jay Gomar*, 2 C L R 62, *R v Meher Ali*, 15 C 598, *Empress v. Nilmadhab* 15 C 595 (607), *Q v. Jaffir Ali*, 19 W R Cr 57(62); *Taju Pramanik v. Empress*, 25 C 711, *R v. Hurribole*, 1 C 207, *Hari v. Emperor*, A I R 1927 Lah 650.

Confessions—Division of Confessions may be divided into two classes — *Judicial* and *Extra judicial*. *Roscoe Er* 37. *Judicial* confessions are those which are made before the magistrates, or in Court, in the due course of legal proceedings, and it is essential that they be made out of the free will of

consequences of the

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Magistrate, or in Court, this term embracing not only explicit and express confessions of crime but all those admissions of

ions of this kind

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R v. Gopee Nath,

Oral confessions

may be in any form. A favo

. 24 confession may properly be in written form and the accused may either prepare it for himself or adopt it as his when prepared by another For example a prisoner s confession taken down by some one else and signed by the declarant is as much his written declaration as would be one prepared by his own hand As to the manner in which a written confession should be authenticated to the tribunal, no established rule exists That some authentication is necessary is obvious *Chamberlayne s Ev* § 1572 In case no written document exists covering the confession, its statement may be proved by the evidence of any person who heard them *Ibid* § 1571 It may be in the form of a letter *Booh v R* 15 Cr L J 55=18 C W N 386

Form of confession writing—Best Evidence Rule Where a confession has been reduced to writing by the witness and signed by him the document itself is preferred in proof of it being the best evidence' Parol evidence therefore will not be received until the absence of the document has been explained to the satisfaction of the presiding Judge *Chamberlayne's Ev* § 1573 But when some body else has it down the confession may be proved by oral evidence of some witness who heard it made *R* v *Layer* 19 Win Abr 96

To whom Extra judicial confession is Made An extra judicial confession can be made to any person or collection or body of persons (*Harbans* v *K E* 8 O C 395, *Chanon* v *Crown*, 21 Ind Cas 468=14 Cr L J 596, *Keshri Mal* v *Emperor*, 15 Cr L J 502=24 Ind Cas 590 It is not necessary that the statement should have been addressed to any definite individual It may have

85 Ga 69) The great majority by persons in authority, upon the Though it is in connection with

confessions so made that th carefully scrutinized, no reaso what has been said to him even the trial judge are equal voluntary confession by one statements made, or letters written prosecutor (*R* v *Heal* 69 J P 224), 2 K B 108 where the letter wa

Gardner, 85 L J K B against him, if independently proved And it is immaterial whether the per *Welsh* 3 F & F Ev 261 It is be received with lieved when it

clear, consistent and convincing The evidence of an admission of guilt to villagers may be as strong evidence against an accused person as a confession before a Magistrate It requires no corroboration The Court is to decide whether the persons before whom the admission is said to have been made are trustworthy witnesses *Mannu* v *Emperor*, 134 Ind Cas 1018=A I R 1931 Oudh 415

Extra judicial confession—Proof of corpus Delicti as corroboration Whether extra judicial confessions uncorroborated by any other proof of the *corpus delicti* are of themselves sufficient to found a conviction of the prisoner has been gravely doubted in England In the Roman Law such naked confessions amounted only to a *semi plena probatio*, upon which alone no judgment could be founded, and at most the party could only in proper cases be put to torture But if voluntarily made in the presence of the injured party, or if reiterated at different times in his absence and persisted in they were received as plenary proof *Greenl Ev* § 217 *Taylor* § 868 In each of the English cases usually cited in favour of the sufficiency of this evidence, some corroborative circumstance will be found *Ibid* In the United States the prison held

receiving and weighing the evidence of confessions in other cases, and it seems countenanced by approved writers on this branch of the law. *Greenl. Ev.* § 217; *Taylor Ev.* § 868; *Guild's Case*, 5 Halst. 163, 185; *Long's Case*, 1 Hayw. 524, 2 Russ. C. & M. 825 826.

Weight of confession. The evidence of verbal confessions of guilt is to be received with great caution. For, besides the danger of mistake, from the misapprehension of witnesses,
express his own meaning,
that the mind of the prisoner
and that he is often influenced by motives of hope or fear to make an untrue
offenders,
persons
which are
exaggerated into sufficient proof, together with the character of the persons necessarily called as witnesses, in cases of secret and atrocious crimes, all tend
to its rejection,
Ev. § 214
decided conflict of
of confessions. On
affirming the slender
a classical predeces-
sor's language. O
in equally positive
kind of evidence
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judicial confession has been made
testimony. Such testimony is often
associates, angry victims, and over ze
testimony of these persons the suspicio

S. 24 of all evid c III, section 8, see also *Greenl Ev* § 214, *Earl* v *Simmons*, 6 C & P 540 That remark is sions and for the following rea o 'Proof m y are often misreported—whether throu h ignorance inattention, or mal t, he is equally affected in either case, and they istruction, and without this, evidence is not in disproved by that sort of negative evidence by which the proof of plain facts may be and often is confronted In other words, the suspicion that he has found it neces sary to entertain is directed entirely to the work of proving an alleged confes ion "This is the rea on above sugge ted as the real cause of the distru t we are ready enough to trust the confession if there really was one, but we are going to doubt and suspect for a long time before we accept it as a fact ' *Per Bell r J* in *Damas* v *People*, (1917) 62 Colo 418 *Mr J Earle* touched the kernal of the subject when he it is the best e This seems to if we distinguish the confession as evidence, we find that few have ever really doubted value, while the second is always to be susp

So the remarks that "confession should be received especially oral confession' (*U S* v *Mc Ken ie*, 35 Feb Rep 826) and that the books are full of admonitions from the wisest and best Judges in this re pect" (*Per Grover J in Teachout* v *People*, 41 N Y 7, 19) are applicable to the evidence of confession and not to the confession as evidence *Emperor* v *Pramatha tal* 30 C L J 503, see also *Mellor* v *Muthia Chetty*, 48 Ind Cas 981=35 M L J 518, *R* v *Nazir*, 9 C W N 474 The reason for this caution is that under the charge of a highly criminal offence, the mind must always be agitated and may be influenced by hopes or apprehensions which it is difficult, if not impossible sometimes to comprehend *U S* v *Nott*, 1 Mc Lean (*U S*) 499 Besides being satisfied that the witness who testified to the confession speaks truly the jury must be satisfied that the witness could not be, or was not mistaken in the substance of the confession *U S* v *Hughes*, 34 Fed Rep 732 In the last named case *Mc Cormick J* in charging the jury at p 736 said 'For want of an ex and make who made the confession

But it is generally agreed that voluntary and deliberate confessions of guilt are among the most effectual proofs in law, on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless urged by the promptings of truth and conscience *Moore on Facts* § 1151, *Greenl Ev* § 215

Conclusions from witnesses are not to be accepted In *Queen* v *Soobjan*, 10 B L R 332, (335) *Phear J* said Now, it is to be observed that these statements are in general terms and so are merely statements of a conclusion at or o

for the opinion formed by the Court, because, it may turn out that the taken together with the questions and the circumstances under which the questions were put, do not in truth amount to a confession of guilt such as the witness chose to represent it ' See also *R* v *Ali Husain* 23 A 306 309, *Kha Hlaw* v *Emperor*, 4 L B R 116=7 Cr L J 82 *Nawab Bibi* v *R* 22 P R 1883, *Queen* v *Babu Lal*, 6 A 509 (519), *R* v *Mohan Lal*, 4 A 46, *Nur Ali* v *Emperor*, 81 Ind Cas 530=5 L 140 But where the actual words used in the confession are not given it does not affect the admissibility but the weight to be given to such evidence *Ibid*, see also *Desraj* v *Emperor*, 1923 Lah 38=29 P L R 486 There is no rule of law which requires an extra judicial confession to be recorded 11 P R (1918) Cr , 21 P R 1881 Cr, 21 Bom L R 1065, 111 P R 1887 Cr.

Confessions made by signs or gestures Under this head we may group direct ... made in ... the pers ... a case ... because ... ponse to ... the ... gestur ... canno ... often ... and vehement language "A direct confession ... whenever the spoken or written word would be excluded" *Underhill Cr Ev* § 141 But where an accused, not shown to have understood English, is asked ... responsible for the act and he nods his ... act does not amount to confession It is ... used understood to be the meaning of remarks addressed to him as to his complicity in the crime and without being satisfied that the accused exactly understood the meaning and the import of the ... standing by themselves ... erstood what was sought ... which were intended to be ... his questioners ... nproved and so ... Cas 539=31 Cr L J 111=A I R 1930 Lah 81

Confession—Test of Truth A true confession made by a person who takes part in a murder invariably adds something to the knowledge already possessed by the investigating officer and that is the greatest test of its truth. *Mata Din* v *Emperor*, 132 Ind Cas 228=32 Cr. L J 854=A. I R 1931 Oudh 166

Confession must be taken as a whole When a confession is used against an accused person, the whole confession must be introduced So where an accused person makes a confession, the confession is evidence in his favour as well as against him and must be taken as a whole *Queen-Empress* v *Dada Ana*, 15 B 452, *Kalu* ... 88 Ind Cas 455=26 Cr L J 1142 *Emperor* v ... 1 (F B), *Queen* v *Greedhory*, 7 ... *Po*, 1 Bur 324; *Wafadar*, ... v *Sahadu* Rat Un Cr C 771, ... 22 C W N 834; *Sinnas* v *E* ... justice to the accused person ... a confession to ... tion therewith, ... *Com* 10 Bush ... 2 Alt 154, 160

... part which is against him, and disbelieve that which is in his favour *R* v *Higgins*, (1829) 3 C & P 603, *R* v *Clewes*, (1830) 4 C & P 221; *R* v *Steptoe*, (1830) 4 C & P 397, *Halsbury* Vol IX p 398, *Taylor* § 870, *Kamoda* v *Emperor*, 46 Ind Cas 705 There were earlier rulings to the contrary *R* v *Jones*, 2 C & P 629, *Bosanquet Serjeant*; *R* v *Llyod*, 1 Phill Ev (3rd Ed) 399 In determining whether the statement is true or not, the jury should consider wh ... in ... Jo ... an ... it ... go

S. 24. only fair measure is to take confession as a whole *Maung Po Thin* v *Queen Empress*, L. B. R (1872-1892), 324; *Queen-Empress* v *Ehgit*, L B R (1872-1892), 327; *Crown* v *Summundur*, 4 P R 1872 Cr; *Queen* v *Bishoo*, 9 W R Cr. 16, *Queen* v *Sheikh Boodhoo*, 8 W. R Cr 38, *Queen* v *Chaka Khan*, 5 W R 70; *Queen* v *Sonaoolah*, 25 W. R Cr. 26; *Golole* v *Magistrate of Chittagong*, 25 W R. Cr 15; *R* v *Gour Chandra*, 1 W R. 16(17); *R* v *Beshor*, 18 W R Cr 29; *Pika Bewa* v *R*, 16 C W N 1055; *Pulin* v *Emperor*, 40 C 873, *Queen* v *Soobjan*, 10 B L R 332 So a prosecutor is not to be allowed to give in evidence part of a confession made by a prisoner, *but it must be put in proof as a whole*, so that the jury in one case, and the Judge and the assessors in the other may have the fullest means of testing its accuracy and forming their opinion as to whether the whole or part, and what portion of it, can be believed For example, if a passage in a statement made by a prisoner standing by itself amounts to an [illegible]

passages quali[illegible]
merely because [illegible]
point *Empre*[illegible]
1926 Lah 554, [illegible]
Ind Cas 178= [illegible]

[illegible] with the general tenor of the confession *Queen* v *Nityo Gopal*, 24 W R Cr 60 *The mere fact that the accused has been interrupted, and therefore has not stated all that he might* [illegible]

[illegible] consequences (1) The prosecution must put in the whole of the accused's statement, including the portions favourable to himself as well as those unfavourable But this does not prevent the use of statements which are separate in themselves though not forming all the accused's utterances nor of such fragments of a [illegible]

[illegible] ion of a crime, the [illegible] has a right to lay before the Court the whole of what was said in that conversation not being confi[illegible] against him, [illegible] occasion, relat[illegible] *Queen's Case*, [illegible] C 46 § 5, *R.* [illegible] *Case*, 9 Leigh [illegible] the whole is [illegible] which [illegible] whole [illegible] any p[illegible] the jury for their consideration, precisely as in all other cases where one part of evidence is contradictory to another, [illegible] of a confession are entitled to equal cr[illegible] charges the prisoner, and reject that w[illegible] grounds for so doing *Q E* v *Jhina Vali*, Rat. Un Cr C 436, *Reg* v [illegible] 10 B H C R 500; *Kamoda* v *Emperor*, 19 Cr L J 785 (Nag), *R.* v [illegible] Rat Un Cr. C 370 *Mata Din* v *Emperor*, 1930 Oudh 113, *Lakshmayya* v *Emperor*, 1930 M W. N 785 If what he said in his own favour is not

contradicted by evidence offered by the prosecutor, nor improbable in itself, it will generally be believed by the jury; but they are not bound to give weight to it on that account, but are at liberty to judge of it like other evidence, by all the circumstances of the case (1) And if the confession implicates other persons by name, yet it must be proved as it was made; not omitting the names, but the Judge will instruct the jury, that it is not evidence against any but the prisoner who made it " *Greenl Ev* § 218

A Judge ought to decide the question of the admissibility of a confession first an[illegible]
should [illegible]
in its en[illegible]
ordinar[illegible]
him an[illegible]
coming that this can be pressed to the extent of requiring that no part be accepted as true without accepting the whole *Hasun v Emperor*, 53 Ind Cas 145=20 Cr L J 737; see also *Kamoda v Emperor*, 16 Ind Cas 705=19 Cr L J 785, *K E. v Injleo*, 15 A L J 15, *Q E v Lma*, Rat. Un Cr. C 371

[illegible] of the guilt of [illegible] are false *Mata Din v Emperor*, A I R 1930 Oudh 113

Uncorroborated confession, evidentiary value of If there is no reasonable [illegible] oof [illegible], a [illegible] ted [illegible] nce [illegible] or

Shue Pat v Queen [illegible] accused's confession [illegible] sion of the crime w[illegible]

[illegible] v *Sangappa*, Rat Un [illegible] H C 137 But convic[illegible] [confe]ssion alone *Probhu v Crown*, 21 P W R 1907

[illegible] cannot appropriately be [illegible] [con]fession The statements

S. 24. of an accused person are not subject to an examination on oath compelling his

other than the deponent *Emperor v Yellamaddi*, 6 Bom L R 7 3 The
ble violence used to the accused for h
ised in the police custody for more than
. the marks on his person, were held to
have vitiated the voluntary character of his confession, which was, therefore

thus confirmed by the fact is proved to be true, and not to have been fabricated in consequence of any inducement It is competent, therefore, to inquire whether the prisoner stated that the thing would be found by searching a particular place and to prove that it was accordingly so found, but it would not be competent to inquire whether he confessed that he had concealed it there 1 *Phil Ev* 411 *Warickshall's Case* 1 Leach Cr Cas 293, *Mosey's Case* 1 Leach Cr Cas 301 N, *R v Gould*, 9 C & P 364; *R v Harris*, 1 Mood Cr Cas 338 This limitation of the rule was distinctly laid down by *Lord Eldon* who said that where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal, unless the fact itself proved would have been sufficient to warrant a
East P C 657; *Harvey's*
is 130, *Greenl Ev* 231
and delivered them up
to the prosecutor, notwithstanding it may appear that this was done upon inducements to confess, held out by the latter there seems no reason to reject the declarations of the prisoner, contemporaneous with the act of delivery, and

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prisoner, thus improperly induced, and of the information given, by and proof search for the property or person in question proves wholly ineffectual no proof of either will be received The confession is excluded, because, being made under the influence of a
and information of the pr
firmed by the finding of
The influence w
groundless condu
Confession
out the place of
dacoity and buri
with the aid of the jury *Naga Methu v Emperor*, (1911) 2 M W N 191 = Cr L J. 488 = 12 Ind Cas 96

Where the circumstances of the case compel a tribunal to reject all the other evidence and act only upon a confession the confession must be used *literatim et verbatim*, and due effect must be given to every statement contained therein whether in favour of the accused or against him *Jagdeo v Emperor*, 15 A L J 15

The law does not require that the confession of an accused person should be corroborated before it can be acted upon It is for the Court to decide whether it believes a confession or not *Emperor v Dhani*, 52 Ind Cas 881 = 20 Cr L J 721 The fact that the confession was retracted before the committing Magistrate would not deprive it of its voluntary character. *Sheo Prosad v Emperor*, 52 Ind Cas 50 = 20 Cr L J 562

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272 Apart from ... inadmissible in evidence, they are not of such a nature as entitles them to any weight, because it is impossible to ascertain the exact words used by the person To base a conviction on such a confession is not safe *Des Raj v Emperor*, A I. R 1928 Lah 858=29 P. L R 186 The evidence of an admission of guilt to villagers may be as strong evidence against ... Magistrate. It requires no corroboration ...

... 698 When ... which clearly ... r the convic-

prisor ... anoth ... them down, or by some one else who heard them In the case of *Munger Bhoo jan*, 10 W R Cr. 56

Confession how construed Where people are so ignorant as the Burmans are, of the ... an admission ... the acknowle ...

Circumstances strengthening Testimony to Admissions or Confessions Among these would be the fact that the confessi...

jury; that the witness and th... and both of them addicted to dri...

... oof of them lessens its probability but does not necessarily establish the untruth of the main feature *Moore on Facts* § 1182

... ions ... the ... ney ... l of ... 390 ... d in ... I of ... the ... the

Section 164 of the Cr Pro Code and Judicial Confessions Judicial confessions indicate confessions which are made on a magisterial investigation

S. 24.

sion, ...
other than the deponent *Emperor v. Yellaraddi*, 6 Bom L ... admitted ill usage, *viz.* the unjustifiable violence used to the accused for his arrest, illegal detention of the accused in the police custody for more than twenty four hours after his arrest, and the marks on his person were held to have vitiated the voluntary character of his confession, which was, therefore, not admitted ... 1 Bom L R 307 The object of a ...

R. v *Gould*, 9 C & P 364; *R* v *Harris*, 1 Mood Cr Cas 338 ... tion of the rule was distinctly laid down by *Lord Eldon* who said that where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal, unless the fact itself proved would have been sufficient to warrant a ... 2 East P C 657, *Harris* ... 430, *Greenl Ev* 23 ... and delivered them up ... but this was done upon ... seems no reason to reject the declarations of the prisoner, contemporaneous with the act of delivery and ... they may amount to a confession ... act of delivery, is to be rejected And if ... prisoner, thus improperly induced, and of the information given ... search for the property or person in question proves wholly ineffectual no proof of either will be received The confession is excluded, because, being made under the influence of a promise, it cannot be relied upon, and the acts and information of the prisoner under the same influence, not being confirmed by the finding of the property or person, are open to the same objection The influence which may produce a groundless confession may also produce groundless conduct *Greenl Ev* § 232

Confession four days after the offence and the fact of the accused pointing out the place of the burial of the body is admissible in evidence *In a case of* dacoity and burial of the corpse, the Sessions Judge need not have tried it partly with the aid of the jury *Naga Methu* v *Emperor*, (1911) 2 M W N 197=1 Cr L J 488=12 Ind Cas 96

Where ... of the case compel a tribunal to reject all the other evidence and ... *et verbatim*, ... tained ... whether in favour ... *peror*, 15 A L J 15 ... should ...

... trate would not ... 52 Ind Cas 50=20 Cr. L J 562

No doubt the extra-judicial confession is of great importance but it must be a true extra-judicial additional evidence to be a weak cau the question wheth evidence, they are not of such a nature as entitles them to any weight, because it is impossible to ascertain the exact words used by the person To base a conviction or ! . . ! " *Emperor*, A. I. R 1928 Lah 858=29 : . .. . of guilt to villagers may be as . . . . s a confession before a *Magistrate*. !. . . . *to decide whether the* persons before whom the admission is said to have been made are trustworthy witnesses *Emperor* v. *Ba lal*, A I R 1928 O 393=5 O W N 698 When the accused were unable to explain away their confessions which clearly indicated the guilt, *held* that the confessions alone were sufficient for the conviction *Sitai* v *Emperor*, 5 O W N 968

Confessions of prisoner in another case—how proved The confession of prisoner in one case in which he was convicted cannot be used against him in another case, unless they are deposed to on oath either by the person who took them down, or by some one else who heard them *In the case of Munger Bhooyan*, 10 W. R Cr 56

Confession how construed Where people are so ignorant as the Burmans are, of the most elementary legal principles, it is extremely dangerous to accept an admission as a plea of guilty without the closest scrutiny of the meaning of the acknowledgment *Mi Nyein* v *Q E*, U B R (1897-1901) Vol I, 72

but does not necessarily establish the untruth of the main feature *Moore on Facts* § 1182

ons *the ne* k of 390, d in l of the the , 65

Section 164 of the Cr Pro Code and Judicial Confessions *Judicial* confessions indicate confessions which are made on a magisterial *investigation.*

24 Section 164 of the Criminal Procedure contains the provisions for recording confessions by Magistrates The evidence of witnesses who are sent up by the police for the purpose of having their statements recorded under s. 164, Criminal Procedure Code, and who have been presumably in police custody until their production before the Magistrate, should not be recorded by such Magistrate, unless he has some assurance that their attendance and statements were voluntary. *King Emperor v. Bhutnath*, 7 C W N 315 The provision of this section is imperative *Indar Dath v. E . . r*, 32 Cr L J 818=A I R 1931 . . . e to presume when an accused p . . . Code before him is to ask him, . . . If he says he does not, the . . . If he does, the Magistrate shou . . . the statement . . . be) and ask the . . . ascertain clearly wh . . . be made with a view . . . as though h . . . *Gaya Singh v* . . . recording a . . . been in custo . . .

. . . ubt upon . . . *ror*, 133 I . . . should . . . it was made. *Emperor v Patey Singh*, 133 Ind Cas 593=A I R 1931 All 609 A Magistrate must not put any question to accused which tends to incriminate h . . .

. . . section 164 and prepare a record *Lalu v Empress*, 4 P R 1893 Cr Great care and circumspection are necessary in recording a confession under section 164 of th . . . is necessary to reco . . .

. . . and has not been procured by threats or inducements *Kandhai v Emperor*, 15 Cr L J 633=25 Ind Cas 833, see also *Kesho Sing v King Emperor*, 20 O . . . *Kura*, 1882 A. W N 166, *Imperator* . . . 1 Cr L J 385 *Balgirala v Cro n* . . . what . . .

. . . ad of ascertaining whether the accused . . . hat the Magistrate had not acted properly . . . *e Rayappan*, 2 Weir 136; *In re* . . . should ascertain whether a confessional . . . beginning of the statement, and not at the end *In re Rayappan*, 2 Weir 136 . . . O. C 191 *Pal . . .*

. . . There is no provision for the admission in

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evidence of a confession made to a Magistrate unless it is recorded in the manner prescribed by law, and even if such confession may, under special circumstances be proved otherwise, where the confession of the accused is shown to have been made under the inducement, such fact deprives the evidence of its value *Nga Myat Kyan v Queen Empress*, U B R (1897—(1903) Vol I, 41 Where a Magistrate inadvertently omits to certify the voluntariness of a confession recorded by him under section 164, Cr Pro Code, the defect may be cured by the evidence of the Magistrate *Ram Sanchi v Emperor*, 9 Ind Cas 118=12 Cr L J 15 *Queen Empress v* ... *alayan*, 22 M 15, *Empress v J*... 8 C P L R Cr ... *Lana Singh v Emperor*, 89 Ind Cas 1026

Section 164 of Cr Pro Code does not enable a Police officer, who has obtained a ... made by some person to send such ... under custody, to have him examined at ... enquiry or trial for fixing him down to that statement in the subsequent judicial proceeding *Q E v Jadub* 27 C 295=1 C W N 129

Section 164 of the Criminal Procedure Code, absolutely prohibits the employment of a Police officer to t... n accused person ... wn such a confes...

... on the Magistrate ... ed person but he ... e facts of the case ... C W N 864 But he may ask as regards any ambiguity in the statement *Ibid v Emperor* 128 Ind Cas 793 Under s 164 Cr Pro Code and s 24 Evidence Act, a confession made under an inducement to confess, is not a voluntary confession, and as such is inadmissible in evidence *Queen Empress v Nga Shwe*, L B R (1893—1900), 52 Where the accused pleads not guilty, a conviction cannot be based on a confession which is not recorded in the manner prescribed in ss 164 and 364 of the Cr Pro Code *Nga San Ya v Emperor*, 11 Cr L J ... 9=U B R 1909, Vol. I, ... form without showing ... re it appears that the ... strictly with the law ... *Queen-Empress* U B R (1897—1901) Vol I 47, *Queen Empress v Karim*, S C 102 Oudh

Where there is no positive ... at the precautions required by s 164 ... n and the certificate required by sub ... f the confession, the presumption is ... were duly taken *Majhi v Emperor* ... =104 Ind Cas 247=A I R 1927 Lah 682, *Aheman v Emperor* 6 Lah 58=88 Ind Cas 18, *Pratap Singh v Emperor*, A I R 1925 Lah 605 *The Code* contains no provision as to a confession being made in open Court, and where it is of ... th, a Magistrate may avoid its being ... ase the proper procedure is not to return ... until it is fully recorded *Nilmadhub* ... 09=27 Cr L J 957=A I R 1926 Pat ... 30 C L J 503=21 Cr L J 266,

... rding a statement ... question of the ... 29=23 A L

... L R 1 2=7 Lah L J 170

Cr. L J 1279=88 Ind Cas 1055 A

S. 24 a Magistrate under sectic ... in exculpatory nature, ... *Gulam* v *Emperor*, 4 Pat ... =86 Ind Cas 811 A statement recorded by a Magistrate is admissible in evidence under section 164 Cr Pro Code, whether taken on solemn affirmation or not *Bahadur* v *Emperor*, 26 Cr L J 1063=88 Ind Cas 7=A I R 1925 Sind 289

A confession recorded in answer to the only question viz (after due warning) "do you want to say anything?" cannot be accepted as being in accordance with law in the abse... any indication as to what due warning wa... 129=59 Ind Cas 551=22 Cr L J 119 A ... in accordance with the provisions of section 164 ...

... greatest value is a fact relevant to the probability or improbability of his guilt *Madan* v *Guru*, 4 Pat L T 381=73 Ind Cas 963= 24 Cr L J 723

perso... Magistrate on questioning the made ... to believe that it was voluntarily ... express form of question is prescribed and the extent to which a Magistrate should question the person making the confession must large... depend on the particular facts of each case *Thibu* v *Emperor*, 4 Pat L T 2... =73 Ind Cas 569=24 Cr L J 649=A I R 1923 Pat 356, see also *Pul... Tanti* v *Emperor*, 40 C 873=22 Ind Cas 169=15 Cr L J 25 It is highl... desirable that a Magistrate in recording the confession should put variou... questions to an accused to enable him to decide whether the confession is voluntary one or not *Emperor* v *Dewan Kahar*, 72 Ind Cas 961=24 Cr L J 497=4 Pat L T ... *mperor* 25 Cr L J 116=76 Ind Cas 180 ... Magistrate, showing that he observed all the ... Procedure Code, is sufficient and the con... *Emperor*, 3 Pat 872 Magistrates recording ... hand of the persons making them, should ... to ascertain how long such persons have ... police and, in recording their reasons for ... forth all the information they are able to obtain on the subject *Empress* v *Madar*, A W N 1885, 59 (F B) Section 164 of the Criminal Procedure Code does not apply to any statement of the accused taken by the Magistrate holding the enquiry *Empress* v *Chattar*, A W N 1884, 84.

trate ... t the Magis... questi... , and upon ... voluntarily; and that the ... order that the confession to be recorded is made ... and true account of the statement made by the Magistrate should contain a full ... *Emperor*, 2 L B R 317 When the Magistrate who recorded the confession took all possible precautions to satisfy himself ... n was made volunta... at the time ... e would get ... *Mohipal* v ... =26 Cr L J 752=1 Luck 223 Where the confession was recorded on a sunday and at the house of the Magistrate and the Magistrate while certifying and stating ... satisfied himself that the accused wa... ot record the questions put and a... that the evidence was recorded in ... that the irregularities in recording ... *Abdul* v *Emperor*, A I R 1931 Lah 163=133 Ind. Cas 55; see also *Khanum* v

Crown, A I R 1930 Lah 171=31 Cr L J. 759 Where the confession of a prisoner is made in a language foreign to the recording Magistrate, and is interpreted to him by some person who is not an official interpreter, such confession can not be regarded as properly proved by the testimony of the Magistrate which is only hearsay evidence The signature of the accused in the translated record of the confession is no evidence of its correctness, when there is no proof of the record having been accurately translated to the prisoner *Queen Empress v. Lakhsmya*, Rat. Un Cr C 835

Section 364 of the Criminal Procedure Code —The rules laid down in section 364 of the Criminal Procedure Code are applicable to the examination of the accused under section 342 *Emp v. Nagar*, 4 Bom. L R 161 All that a Court has a right to do under s 364 Criminal Procedure Code, is to ask the accused person to explain the circumstances wh
him *Tufani v King-Emperor* 15 C L J 32
283 In examining an accused person under
improper to ask him such a question as ' If yo
who did ? " *Chelan v King Emperor* 7 O C
person to a statement re
presence and under the con
Bhika, Rat Un Cr C C
statement by a prisoner in
Majji v Chenlramma, 2 Weir 437 Where the Magistrate instead of asking separate questions to the accused puts him a long composite question, the examination of the accused is irregular and not in accordance with law *Hasu v Emperor*, 103 Ind Cas 847=28 Cr L J 767=A I R 1927 Lah 650 If the prisoner is not prejudiced in
questions put to him does not make t

in any way in his defence
1=100 Ind Cas 821=A I R
should be strictly observed,
and they are applicable also to confes

presiding officer of the Court The whole of it need not be in the Court's handwriting *Empress v Riaz Ali*, A W N 1900, 203 The recording of confessions should be made by Magistrates with their own hands *Criminal Cir Memo No 7 of 1873* But a confession recorded by a clerk, under s 164 of the Code, in the presence of a Magistrate, in the form of a narrative and without the questions being recorded would not be illegal if the accused was not prejudiced
cused makes a statement in
be inferred that the statement
held that such a statement is
Procedure Code *Emperor v Taranath*, 37 C 735=8 Ind Cas 653.

error has not injured the accused as to his defence on the merits' Section 533, Cr Pro Code, is intended to apply to all cases in which the directions of the law have not been complied with, without any distinction between omissions to comply with the law and infractions of it Under that section, if the record of a confession is inadmissible owing to failure to comply with the law such as
omissior
documer
Act, ma
proved,

24 that it has not affected the merits of the defence *Queen Empress* v *Raja*, 23 B 221. Section 533 is to be interpreted liberally, and though a confession recorded by a Magistrate was in the first instance and by itself inadmissible as not being in the form of question and answer, not being recorded in the vernacular of the accused, and not bearing the signature or mark of the accused, it will become admissible by the taking of the evidence of the Magistrate that the accused duly made the statement recorded *Empress* v *Tularam*, 8 C P L R C 91

not to a Police officer and not improperly the Evidence Act is always admissible

nj-Emperor, 8 O C 395=2 Cr L J 811

ts to certify the voluntariness of a confession recorded by him under s 164, Cr Pro Code, the defect may be cured by the evidence of the Magistrate *Ram Sanchi* v. *Emperor*, 9 Ind Cas. 148=12 Cr L J 15; see also *Khudiram* v *Emperor*, 9 C L J 55 The Sessions Judge

as a witness nor was evidence taken that the accused duly made the statement so recorded *Held*, that as it could not be presumed without some evidence that the statements had to be recorded in English as they could not be recorded in the language in which they were made, there was no justification for their being record

could

taken

Judge was wrong in admitting such a record of the statements against the accused *Bawa* v *King Emperor*, 10 O C 112=6 Cr L J 94; but see *Ludai* v *Queen Empress*, S C 277 Oudh

A defe

person by

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person "dul

either the Magistrate himself or some other person who was present when the statement was recorded *Empress* v *Mussammat Ituari* 8 C P L R Cr 6,

J B R

r s 164

he was

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under

volun

tarily made *Ma On Nyun* v *King-Emperor*, 1 U B R (1902—1903) Cr Pro Code, 13

This section has no

made of a confession

211=19 Ind Cas 307=3

Magistrate shall record

making it, he has reasc

where laid down that the

he has put to the perso

made voluntarily But it is advisable that the Magistrate should always record a memorandum showing that he has, by questioning the person making it, satisfied himself that the confession is made voluntarily *Kheman* v *Emperor*, 6 Lab 58=8 P L R 316=A I R 1925 Lab

315; d Cas 1029=26 P L R 5 J

26 C Under section 533 Cr Pro Code

1882,

in accordance

provisions have

that the confession or other statement was duly made *Queen Empress* v *Bhairab*, 2 C W N 702

Section 80 of the Evidence Act and confession So far as section 80 of the Evidence Act is concerned, the Court is bound to make the presumptions specified

in that section in respect of the document purporting to be a confession of the accused *San Bau* v *Crown*, I L B R 310 F B Both the memorandum and the certificate required by s 164 should be attached to the confessions The effect of these is to afford proof of the accuracy of the record, of the presence of the Magistrate, and of the voluntary nature of the confession. *Reg* v *Shivya*, 1 B 219; *Pratap* v E [illegible]
R Cr 5, 18 [illegible]
"Magistrate" [illegible]
India *R* v [illegible]
R, 9 Cr L J [illegible]
169 = 16 Bom L R 261 = 15 Cr L J 433

[illegible]

...essions, so made by a prisoner, to any person at any moment of time, and at any place, subsequent to the perpetration of the crime, and previous to his [illegible] ...ived in evidence as [illegible] *Best Ev* § 524; *Will's* [illegible] promise of benefit, or a threat of harm, it is untrustworthy because it has been associated with an attraction too strong to reject [illegible] person which causes our dist[illegible] two alternatives, one of which [illegible] truth or falsity —*Wigmore* § 82[illegible] is a pseudo confession It is not a confession at all It is not made *animo confitendi* It is merely a self serving statement masquerading in the garb and under the name of a confession Accordingly, it has not the relevancy of a true confession, a self disserving statement, and is, in consequence, rationally to be regarded with suspicion As [illegible] ...ous impairment of probative value due to [illegible]

[illegible] The object of the rule relating to the exclusion of confessions is [illegible] ...y the prisoner being [illegible] ...self to be guilty of an [illegible] *J* in *R* v *Court*, 7 [illegible] every case it is for the [illegible] ...ner and under such [illegible] ...is to induce the prisoner to make a confession of guilt whether such confessions were true or no"

Declaration must be voluntary Confessions it is said, must be voluntary The reserve statements that a confession will be received in evidence, are equally familiar The difficulty experienced in understanding precisely what, in [illegible] ...ese expressions given out of the fact [illegible] other words several distinct ideas [illegible] by it Perhaps at the present day the most commonly and widely accepted meaning of the term "voluntary is that which is employed when a confession is rejected as involuntary because the speaker has been over persuaded, coaxed by hope or driven by fear into making it [illegible]
statement [illegible]
it was true [illegible]
matter covered by his declaration and honestly endeavoured to state it An incriminating st[illegible]

[illegible]

S. 24. under a misleading inducement is therefore, said to be involuntary *Chamberlaynes Ev* § 1479

Meaning of the term voluntary' The terms voluntary and involuntary are apparently used in respect of confessions indiscriminately in three but not entirely separable situations —(1) Where the will of the declarant has been left entirely unconstrained
to his judgment in such a
incriminating statement for s
the declar
statement
subject, (3
cular statement To put the
incriminatory declaration b

misleading inducement, by a judicial compulsion to break silence or a the

states of fact is found to exist, and what are the real considerations attending question of admissibility in any particular case in which they are present *Chamberlaynes Ev* § 1480 A confession may reasonably be deemed to be voluntary' when it is made with the concurrence of the will,—where the volition is not for
a voluntary one,
the exact truth r
however a confess
mental influence
rejected by a rule of procedure,—even though as a matter of experience of this incriminating statement, though subject to criticism or the argument of counsel would still warrant the jury as reasonable men in acting in accordance with it *Chamberlaynes Ev* § 1483

Scope of section 24 In this section the framers of the Act perhaps properly avoided the use of the word voluntarily or involuntarily which is of doubtful import but stated the circumstances under which a confession if made
by saying that a confession is
o of receiving some benefit
on with pending proceedings
in authority over the course
Section 24 of the Evidence
Act provides that a confession of an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement having reference to the charge against the accused

of voluntariness' 2 Bom L R J 228 The reason for rejection of confessions thus stated by *Eyre C B* A confession forced from the mind by the

S. 2

, when given to But a counsel —of the a conse- mes the You are overestimating it The law does not presume it is untrue, but rather that it is uncertain whether a statement so made is true" *Lord Campbell, C J* added "I doubt whether the rule excluding confessions made in consequence of an nfession is , and that lrawn from same case *Pollock C B* said "There is no presumption of law one way or other . There is no presumption that it is false, or that the law considers that such a , but such confessions are rejected because it erous to leave such evidence to the jury" *nsfield* 11 Cox Cr 639 *Williams J* said. "It aving the truth elicited that these confessions are excluded, but the law is jealous of not having the truth" Similarly in *Scott's Case*, 1 D & B 58, *Campbell L C J* reiterated ' It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary, but this only means that it shall not be induced by improper threats or promises, because under such circumstances the party may have been influenced to say that which is not true, and the supposed confession can not be safely acted upon" ' The principle upon which all this class of cases is founded is that by inducement being held out to the prisoner, he may be led to suppose that he will be more mercifully dealt with if he confesses and that

temperament, may falsely acknowledge guilt This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledg-

preferable' The law cannot attempt to weigh testimony before even listening to high tion of a it Thus conceivably than silence unless a con of a confes *gmore* § 822 ection 24 of the Indian Evidence Act Section 24 contains an absolute rule which is not affected by the proviso made for a different purpose in section 27 When the Legislature wished to make an exception to the absolute rule, it did so by a separate section, namely confession rendered irrelev that are irrelevant under other section of the Act promise can be relevant, e *King Emperor* v *Nga Po Min*, 2 L B R 168, *Nga Sanya* v *King Emperor*, U B R 1909 1st Qr Evidence 3 = 11 Cr L J 41 4 Ind Cas 759, but see *Amiruddin*, v *Emperor*, 45 C 557 = 22 C W N 213 A confession to be

S 24. But, in coming to a decision
law and principles which
Justice and should not be in
recording what should be
evidence adduced *Nga Shwe* v *Queen Empress*, L B R (1893—1900) 145

A confession by an accused person is not made irrelevant if otherwise relevant merely because the accused person has been sworn or affirmed *Raj* v *Empress*, 3 P R 1880 Cr An oral confession by an accused person no ... s 24, 25 or 26 of the Evidence Act is, as an

Emperor 45 C 557=22 C W N 213=27 C L J 148=44 Ind Cas ... Cr L J 305, but see *Emperor* v *Nga Aung*, 35 Ind Cas 962=17 Cr L J 402=U B R (1916) Vol II 114 *Tara Singh* v *Emperor*, 29 Ind Cas 817 11 P R 1915 Cr =16 Cr L J 545

If the case against the accused entirely rests on the confession made by the accused and there is a conflict as to the manner in which the confession was obtained, the accused is justified in asking the Court to give him the benefit of doubt *Rahman* v *Emperor* A I R 1930 Lah 88 Where a person of sound mind and of full age makes a confessional statement in ordinary simple language after he has been warned he must be bound by the language of the statement and by its ordinary plain meaning and a subsequent retraction of the same is of no effect *Hazari* v *Emperor*, 124 Ind Cas 247=A I R 1930 Oudh 353=31 Cr L J 1210 Where the confession made before the police was found by the Court not to have been voluntary it cannot be corroborated by the confession of the accused as an approver, subsequently retracted *Safi* v *E* ... A I R 1930 Nag 259=124 Ind Cas 459=31 Cr L J 661 A confession made by an accused person is not invalid merely because it was made under the ... benefit by making it *Public Prosecutor* ... I R 1929 Mad 92 A confession is ... a criminal case The making of a counterfeit coin is not a statement and hence the evidence of persons who say that the accused made counterfeit coins in their presence is not barred by s 24, 25 or 26 *Braj Nandan* v *Emperor* 133 Ind Cas 154=A I R 1931 All ... A confession alleged to have been made by the accused person in the jail to the warder in the absence of any evidence on the part of the prosecution to prove ...

... 45 A 900=21 A L J 143=73 Ind Cas 62=24 Cr L J 526 ...

v *Emperor*, 26 Cr L J 937=86 Ind Cas 1001=A I R 192...

Where the Magistrate who recorded the confession took all possible precautions to satisfy himself that the confession was made voluntarily and that the accused ... confession ... and he ... Held that the con... Ind Cas
... 30 Cr L J 702=8 A I C R 116

The mere fact of a person being in custody cannot be a good basis for a inducement, ... ceding from ... fited ... J.

... used ... ng it ... con- ... 24, Evidence Act *Dip Singh* v. *Emperor*, 27 Cr L J 158=101 Ind. Cas 891=A. I R. 1926 All 216.

... that a certain set of words used in a particular case has been held to be in the nature of an inducement *Kunja Subuddhi* v *Emperor*, A I R 1929 Pat 275 Where there is veiled threat as well as inducement, a confession so obtained is invalid *Kunja* v *Emperor*, A I R 1929 Pat 275

Made A confession made to one person by the accused is irrelevant, even where the inducement, threat or promise is held out by a different person if the ... C R 416 But un- ... ession by the use of a ... to carry either into ... e time of making the confession, would ... upon his mind, and the confession ... *ommonwealth* v *Tuckerman*, 10 Gray ... s seems to be that a confession is not ... exhortation, or admonition, or other ... r time from some one who has nothing ... prisoner, for a promise made by a perso... of this kind is not to be presumed to have ... prisoner as to induce him to confess tha... innocent' 3 *Russ Cr* p 393

Accused person The expression "made by an accused person" in this section, means that person must be an accused person at the time of the confession *Per Sundara Ayyar J* in *Kumara Swami* v *K E* 35 M 397 (535) see also *Empress* v *Jadab* 4 C W N 129 ... ised, ... e in ... n 24 ... the ... sion it is sufficient if the person ultimately comes to be an accused person with reference to the charge in respect of which he is said to have made the confession *Per Shah J* in *Emperor* v *Chima* ... Bom L R 1247= ... Ind Cas 324, ... R 1931 ... *matter of* ... be applied ... the time ... e when he

24. was present when the deceased was killed, then stated that he and not the accused had shot the deceased, is properly excluded unless the person whose statement is offered shall be produced as a witness *Selby v Commonwealth* (Ky) 80 S W 221 The prisoner may of course, disprove his guilt by proving the guilt of some other person But he cannot do that by introducing the extra judicial confession or declar
commit, or that he had committed th
never conclusive upon the declar
because of this so called confession,
To receive such statements as exculpatory proof would be to open wide the door for the practice of fraud whereby the acquittal of the real criminal would be assured *Underhill Cr Ev* § 145

If it appears "The words lend some colour to the argument that the confession ought to be made to appear to the Judge to have been improperly induced—in other words that the *onus probandi* is in the first instance on the prisoner I do not accede to that argument A confession may appear to the Judge to have been the result of inducement on the face of it, and apart from any proof at all In every case, I contend, where a prisoner says he has been forced to confess the Judge is put upon judicial enquiry, and as I ended before, I end now, that enquiry should *precede* the admission of the confession and any examination into its truth" *Lex*, 2 Bom L R (Journal) 163 "A confession ... been made voluntarily ... med in section 24 of the ... same Act When ad ... , and acted on only if it
is believed t ... admitted
in 2 Bom ... *Basuanta*
25 B 168= ... The use
of the word ... probability
than would ... perhaps in
a particular case fairly hesitate to say that it was proved that the confession had been unlawfully obtained and yet might be in a position to say that such appeared ...

case, it appears to the Court that there is reason to suspect that a confession was ...

take into consi ... ached on surmise
conjecture *Em* ... Ind Cas 961=
Cr L J 497= ... bility of a confession
depends upon a ... evidence antecedent
to ... hat it is liable to rejection
und ... nd upon this issue and
deci ... upon the contents of the
con ... =26 Cr L J 937=
Ind Cas 1001=A I R 1925 All 606

In *Emperor v Panchkari Dutt*, 29 C W N 300=52 C 67=86 Ind Cas 111=26 Cr L J 782=A I R. 1925 Cal 587, *Mr Justice Mookerjee* ...

S.

"There are words and expressions in this section to which one must pointedly direct his attention in order to construe the section There occurs the word 'appears', the 'inducemen
against the accused person'
is said is to the person
inducement, threat or promise would in the opinion of the Court be sufficient to give the accused person grounds which would appear to the accused person (and not the Court) reasonable for supposing that by making the confessions he would gain an advantage or avoid an evil of the nature contemplated in the section It will be seen therefore that the mentality of the accused has to be judged rather than that of the person in authority That being so, not merely actual words, but words accompanied by acts or conduct as well on the part of the person in authority, which may be construed by the accused person situated as he then is, as amounting to an inducement, threat or promise, will have to be taken into account A perfectly innocent expression, coupled with acts and conduct on the part of the person in authority together with the surrounding circumstances may amount to inducement, threat or promise In scrutinising a

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t, to determine
ertain grounds,
d to see whether
pposition that is
the confession

appears to have been caused in consequence of the inducement, threat or promise The use of these vague expressions has been deliberately made with the object

this direction A study of the cases, bearing upon the question, which are too numerous to mention, would show that anything ranging between the barest suspicion on the one hand and absolute certainty on the other has been held to be sufficient to satisfy the requirements of the section In this connection reference may be made to *Reg* v *Balavant* 11 B H C R 137, *Shafi* v *Emperor* A I R 1930 Nag

ina 15 B
Empress v
u Pramanik
tion is not
h is not as strong an expression as proved
N 1112=A I R 1929 Cal 226 The true view seems to have been taken in the case of ...

Thompson, (1893) 2 Q B p 12
matter, with regard to which there
opinion in this country as well
of the Indian Evidence Act and also to the presumption attaching to certain recorded confessions and arising under section 80 of the Act the true and

been obtained by use of threat, persuation etc Anything from the barest

24 suspicion to positive evidence would be sufficient for a confession being discarded *Raghav v Emperor*, 23 A L J 821 = 89 Ind Cas 903 = L R 6 All Cr 161 = 6 Cr L J 1431 = A I R 1925 All 627 P C

Burden of proof—English law The question of voluntariness is for the

2 Q B 12, *R* v *Rose*, 18 Cox 717, *Ibrahim* v *R* (1914) A C 599 (610, 611) = 18 C W N 705 (P C) where all the English cases have been reviewed, *Ph* ... 18) 1 K B 351 But *Prof Wigmore* interpreted *Thompson* in a different way He ... middle path, and seems to receive the confession ... improper inducement, and then in case of doubt leaves upon the prosecution the burden of convincing the Court of the admissibility *R* v *Thompson* (1893) 2 Q B 12, 18, *Cave J* (in case of doubt) See also *Chamberlayne's Ev* § 1579

Burden of Proof American view 'Under the early English procedure which has been followed and still prevails in a majority of American Courts (*R* v *Thompson*, [1893] 2 Q B 12, *R* v *Warringham*, 2 Den Cr 447, *Thompson's Case*, 1 Leach Cr L 3rd Ed 328 *Emperor* v *Bhagi*, 8 Bom L R 697) the burden of evidence is upon the prosecution to satisfy the Court upon the tender of the confession in evidence that it was voluntarily given, to the extent at least, of showing that no threats promises or other misleading inducements were held out to the declarant by the person to whom the confession was made Where objection is taken to a confession as 'involuntary' its voluntary nature must be affirmatively established in the first instance by the prosecution to the reasonable satisfaction of the presiding Judge This may be done either by direct or circumstantial evidence Such a requirement will, however, receive a fair construction The state need not show beyond a reasonable doubt that there was not the slightest fear or the least possible hope of benefit in the mind of the declarant ' *Chamberlayne's Ev* § 1579 The view has also found representatives that the prosecution must not merely in the above circumstances, but in all cases show the absence of an inducement from any one else and not merely from the person receiving the confession (*State* v *Garvey* 28 La An 929) This is an absurd extreme A few jurists regard the confession as *prima facie* admissible and require the defendant to show that the alleged improper inducement existed ... for there ... reason to object to the ... to Of course he should ... the Court's ruling, ... *layne's Ev* §§ 1577 1578

Introduction of confession into Evidence It is a natural, if not inevitable' says *Mr Chamberlayne* 'result of the rules of procedure rejecting confessions deemed, for some reason 'involuntary' that a prisoner's counsel is tolerably certain to contend that his client's statement of guilt was not a 'voluntary' one Usually the chance for success on the main issue of the trial is entirely dependant upon his ability to keep that confession from the jury Much ... ve, as a rule, been expended upon the subject ... therefore, constantly present themselves ... manner the question of the voluntary nature ... preliminary to its admission into evidence In the absence of statutory regulation, or binding precedent, the presiding Judge will be called upon to consider (1) Shall he decide the question of admissibility upon ... the prosecution or shall ... examine the governm ... (2) Is it better that ... jury or after their retirement from the counter room? (3) Would it be, ... of whole, sounder admini ... the prisoner's statemen- alternative instruction they find that it was not 'voluntary' as that term is defined by the ... procedure?—*Chamberlayne's Ev* § 1577

1112; *Emperor* v *Panch Kori*, 29 C. W. N 300=52 C 67, *Wigmore* § 861, *Bolton* v *State*, 107 Ala 108; *Emperor* v *Keshav*, 11 Bom L R 332 The right

both parties, at the stage of *voir dire*, to enter upon an extended range of enquiry into all facts bearing upon the voluntary nature of the confession, tracing any attendant circumstances under which it was made and also the physical, mental and moral characteristics of the declarant The Judge, on the other hand, as is elsewhere said, may receive the confession in evidence upon a *prima facie* showing by the prosecution that it is relevant;—leaving to the defendant at an appropriate later stage, an opportunity of showing that the confession was in fact involuntary ' Among considerations tending to exclude the evidence of the accused at that stage is the very important one that it is not customary to consume time by hearing affirmative defences resting upon controverted fact on *voir dire* It is not, moreover likely that a Judge will overlook the further consideration that evidence, as a rule, is admitted whenever the jury might reasonably act upon it, and that, unless the facts are such that

probable that it would be within
short, conclusive point dispos
expediting the trial of receiving the evidence at once is obvious It has been said that where, the burden of evidence is upon the defendant to show the

heterodox rules prevalent in
in admitting evidence 'In

"(1) The Judge must hear the defendant's evidence (including evidence

may be introduced

R 338=A I R 1930
voluntarily made and was
it in evidence once it
not *Emperor* v *Kesav*, 11 Bom L R 332=2 Ind Cas 917

The maxim of the English Courts is
the influence used, or decide upon its
... 36 But the Indian Act places

In *Reg* v *Navroji Dadabhai* 9
leaves it entirely to the Court to fo

evidence which would be rejected in

S. 24. suspicion to positive evidence would be sufficient for a confession being di car d *Ragjha* v *Emperor*, 23 A L J 821=89 Ind Cis 903=L R 6 All Cr 161=b Cr L J 1431=A I R 1925 All 627 P C

Burden of proof—English law The question of voluntariness is for the Judge; and it is now settled that it lies upon the prosecution to establish, and not upon the accused to negative the element, it being the duty of the prosecution to satisfy itself therefore before putting the statement. *R* v *Thompson*, (1893) 2 Q B 12; *R* v *Rose*
18 C W N 705 (P C)
Ev 7th Ed 256; *R* v
the ruling laid down in
modern English rulin
unless attacked by evidence of an improper inducement, and then in case of doubt leaves upon the prosecution the burden of convincing the Court of the admissibility *R* v *Thompson*, (1893) 2 Q B 12, 18, *Cave J* (in case of doubt)" See also *Chamberlayne's Ev* § 1579

view 'Under the early English procedure prevails in a majority of American Courts (*R* v *Warringham*, 2 Den Cr 447; *Thompson's Case*, 1 Leach Cr L 3rd Ed 328, *Emperor* v *Bhagi* 8 Bom L R 697), the burden of evidence is upon the pr
of the confession in evidence
least, of showing that no threats,
held out to the declarant by the person to whom the confession was m
Where objection is taken to a confession as 'involuntary' its voluntary nature

declarant' *Chamberlayne's Ev* § 1579 "The view has also found representatives that the prosecution must not merely in the above circumstance, but in all cases, show the absence of an inducement from any one else and not merely from the person receiving the confession (*State* v *Garvey*, 28 La An 925) This is an absurd extreme A few jurists regard the confession as prima facie admissible, and require the defendant to show that the alleged improper inducement existed This is the
reason
Of cour
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layne's Ev § § 1577, 1578

Introduction of confession into Evidence "It is a natural, if not inevitable' says *Mr Chamberlayne*, 'result of the rules of procedure rejecting confessions deemed, for some reason, 'involuntary', that a prisoner's counsel is tolerably certain to contend that his client's statement of guilt was not a 'voluntary' one Usually the chance for success on the main issue of the trial is entirely depend
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selves to a trial
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evidence In the absence of statutory regulation, or binding precedents presiding Judge will be called upon to consider (1) Shall he decide the question

jury or after their retirement from the counter room? (3) Would it be

confession, it is obvious that the various situations can be best grouped according to the nature of the inducement But as the strength of the inducement depends more or less upon the power of the person offering it, the rule of law must first specify the kinds of persons from whose mouths the inducements may be [illegible] Though a too restricted [illegible] "person in authority" in this [illegible] had authority to interfere in [illegible] be sufficient to give him that authority *Emperor* v *Kutul* 57 C 188=A I R 1930 Cal 633 Unless the person attempting to obtain a confession has the power (apparently to the confessor) to carry out the threat or promise, there is no reason for treating the [illegible]

facts which may amount to a confession, and such statement, if not privileged by reason of the relation between the accused and the party to whom it is made may be used For example, X, who is charged with the murder of A, is induced by the chaplain of the jail to confess his sins He accordingly confesses the crime with which he is char[illegible] voluntary *Reg* v *Gilham*, 1 [illegible] tried at Exeter Summer Assize [illegible] prisoner to confess a murder [illegible] the denunciations of scriptur[illegible] it could be used against him, and *Best C J* refused to allow the clergyman to [illegible] that it was improper in the clergyman to [illegible] by the prisoner, and expressed a strong [illegible] *les* cited Peake, 78, *Williams*, v *Williams*,

On principle, such a promise should be of no consequence unless the promisor was one having (apparently) the power to arrest or prosecute *Wigmore* § 829 In England the older and more usual view was that inducement to exclude must come from a person who has legal interest or authority in the arrest and prosecution *R.* v *Row* R & R 153, *R* v *Gibbons*, 1 C & P 97, *R* v *Warringham*, 2 Den C C 447, *R* v *Taylor*, 8 C & P 734 In 1839 *Lewin* in his note to his 2 Lew Cr C 125 said "The cases seem to establish the principle that where a confession is obtained through the medium of a [illegible] the prisoner can have nothing to hope [illegible] *R* v *Dunn*, *R* v *Slaughter*, 4 C & P [illegible] telling a prisoner that it will be better [illegible] confession made to him See also *R* v *Spencer*, 7 C & P 776 Finally in 1852, the earlier view was confirmed, and the existence of a legal interest in the prosecution was taken as the test—not the mere existence of actual control or influence growing out of social or commercial relations of the persons. *Wigmore* § 829 In connection with an inducement held [illegible] *Moore*, 2 Den Cr C 522 said [illegible] (when it was

S. 24. England without a moment's hesitation" 2 Bom L R J 227 But it must be remembered in this connection that the English practice which is based on drastic procedural rule has provoked much unfavourable comment from Judges seeking to operate a rational system of judicial administration Vide *Per Baron Parke* in *R.* v *Moore*, 2 Den Cr C 522 (527), *Chamberlayne's Ev* §§ 1507, 1508

Was the inducement sufficient by possibility to elicit an untrue confession of guilt While no one seems to have questioned the fundamental principle of exclusion of confessions, there has been a decided difference of practice in the kind of test used in applying the principle It has been seen that the reason for distrusting a confession arises when the person is placed in such a situation that an untrue confession of guilt (more correctly, a confession of guilt irre
alternatives h
features of th
present silen
and associate
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over silence,
perhaps apt
benefit or a t
is that this duplicate form of statement is not essential, it indicates
educible to the single form
, of pardon) is the inducement
edom which will accompany
false confession more attractive at the moment than the mere possibility of freedom, coupled with temporary restraint, which attends silence Again, where a mob's threat of hanging has induced a confession, the alternative of present certain and future possible safety proves naturally more attractive than present certain death Thus in both cases—a promise and a threat—the confession is untrustworthy because it has been associated with an attraction too strong to resist In general, then, the position of the confessing person which causes distrust is that of being compelled to choose between two alternatives, one of which involves a confession of guilt irrespective of its truth or falsity Each instance pre
confession (
of non-confe
what it is,
averagi
the thr
evidenc
(involvi
degree,
and roughly, was the inducement such that there was any fair risk of a confession? *Wigmore* § 824

of the

Person in authority
procedural rule' says *M*

or, in other respects, to direct the co
y, 14 Q B 789. Authority in this connection may be delegated expressly or by implication (*R* v. *Garner*, 2 C & M
The term 'person in authority' may therefore extend so far as to designate any one who acts in the presence
colour of his power in the matter

on questions of this nature and
in authority, and must have some relation to the crime charged
inadmissibility of a confession depends on the relative strength of the inducement to confess falsely, as measured against the prospects attached to

S.

. 358 (368) W a travelling auditor
ilcations
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id added
after which the prisoner was
brought before the Traffic Manager, in whose presence

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C J
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ould
seem to be 'had the person authority to interfere with the matter?' and any concern or interest in it would appear to be held sufficient to give him that authority as in *Queen* v *Warringham*, 2 Den C C 447 N, where *Parke Baron* held that the wife of one of the prosecutors, who was concerned in the management of their business, was a person in a
down in *Archbold's Criminal Practice*'
the prosecutor *Ashutosh Dutt* v *The*

induce-
ing to do
ound that the confession
, 53 Ind Cas 605=19 Cr
to the words "persons
A village Magistrate is a
=2 Weir 733, but the son of a village Magistrate is not a person in authority *In re Kuppa Thachan*, 2 Weir 733 So also is a police patel (*R* v *Rama Birappa*, 3 B 12), a police constable (*R.* v *Luchoo*, 5 N W P 86), a Police Inspector (*R* v *Ramdayal*), 15 P R 1885 A travelling auditor of a Railway is a person in authority so far as a Railway clerk is concerned
9 B H C R 358
or not the accused had
intercourse with the r
admitting that they were guilty of murder, *held* that the provisions of section 24 of the Evidence Act, could not be
members of the *Punchayat* were not in a
of that section,
reference to any A 46=A W N 1881 84 B is was leading the accused to believe that he had that authority, *held* that a Court would be justified in holding that he was 'a person in authority' within the meaning of section 24 *Nazir* v *Emperor*, 9 C W N 474=2 Cr L J 256; *Emperor* v *Josha*, 11 C W N 904 But a member of the Punch is not a person in authority *Emperor* v *Philip*, 4 Bom L R 785 A jaildar is a person in authority *Mutsaddi* v *Crown*, 221 P L R 1911=12 Ind Cas 642=12 Cr L J 554, *Karam* v *Emperor* 34 Ind Cas 642, so also is the *thugyi* or headman of a village *Nga Kya Nan* v *Emperor*, 15 Cr L J 681=26 Ind Cas 129, see also 10 Bur L T. 270 A zamindar is a person in authority *Imperator* v *Dabud*, 4 S L R 209=9 Ind Cas 718=12 Cr L J 119, *Debendra* v *Emperor*, 101 Ind Cas 881 A president of a *panchayat* is a person in authority *King Emperor* v *Aushi Bibi*, 20 C W N 512=23 C L J 477=17 Cr L J 183=33 Ind Cas. 828 Zamindars *qua* Zamindars are not persons in authority under section 24 of the Evidence Act. *Crown* v. *Long*, 10 S L R. 140, see also 49 A. 57.

S. 24. But wherever Zamindars are directly concerned in the investigation by the direction of the Police, then they clearly are persons in authority within the meaning of s 24 of the Indian Evidence Act *Crown* v *Long*, 10 S L R 140 A headman is a person in authority *Zeta* v *Emperor*, 18 Cr L J 106=37 Ind Cas 314=10 Bur L T 270 A confession made to a police patel is invalid *Emperor* v *Ramadhan*, 31 Ind Cas 340=17 Bom L R 898=16 Cr. L J 740 A Lambardar is [illegible] *un*, 4 Lah L J 235=A I R 1922 [illegible] *ayatdars* are not persons in authority [illegible]

The expression [illegible] than the actual prosecutor and the test is, 'has the person authority to interfere in the matter and any concern or interest in it is sufficient to give him authority *Smith* v *Emperor*, 43 Ind Cas 605=19 Cr. L J 189 The mere fact that the accused [illegible]

185=A I R 1931 Lah 408

An Artificial Rule, repudiated [illegible] person extending a misleading indu[illegible] and necessarily, to be a person in au[illegible]

[illegible] ere yet the confession is voluntary [illegible] admissible So intangible a distinction between actual and ostensible authority has, very reasonably failed to commend itself to certain distinguished courts who extend the function of "persons [illegible] the language of the Supreme Court of [illegible]

[illegible] be fairly supposed by him to [illegible] mised, or to influence the threatened [illegible]

Confession made before coroner In England, it is now the practice to admit statements or depositions of the prisoner before the coroner if properly proved Formerly there was some doubt as to their admissibility and the cases on the subject were conflicting Vide 2 Russ Cr (8th ed) [illegible] *R* v *Wheeley*, 8 C & P 250, *R* v *Owen*, 9 C & P 83, 238, *R* v *Haworth*, Greenw Coll Stat 137, *R* v *Sandys* C & Mar 345 In [illegible] [illegible]

S.

A statement made on oath by the accused before the coroner at the time of the inquest is admissible in evidence at the time as a confession made by him where the accused was told he need not make any statement but he insisted upon doing so. Such a statement is a pure voluntary statement. Section 20 of the Coroner's Act provides that a coroner shall be deemed to be a Magistrate for the purposes of section 26 of the Evidence Act. *Emperor v. Ram Nath*, 28 Bom. L. R. 111=50 B. 111=93 Ind. Cas. 690=A. I. R. 1926 Bom. 151; *Emperor v. Mahomed*, 30 Bom. L. R. 86. But it would be wrong of a coroner to examine an accused person on oath on the ground that he did not know that the person was an accused person and thereafter use that evidence in a trial for a charge based on that evidence. *Emperor v. Kazis*, 28 Bom. L. R. 79=50 B. 56=A. I. R. 1926 Bom. 141.

Confession when caused by inducement, threat or promise. The terms of the ... promise, a threat of pro ecut... veness if it is (*Wills' Ev. 2nd* ... and fast rule as to what constitutes inducement. The question is one for the discretion of the Judge, and its decision will vary in each particular case. *Nort. Ev.* 161. The inducement need not be expres... Cox 69) it need not be made to the ... and does come to his knowledge. *R. v.* ... *Il Ev.* 106. "Before a confession, either judicial or extra-judicial, can be received as such it must first be shown that it was in every respect freely and voluntarily made ... y any sort of threat or ... ever slight the hope ... And while circumstances are usually invoked to determine whether the confession is voluntary yet as a safe general rule, it may be said that the statement will be presumed to be volunt... procured... *Underhill* ... 'voluntar... obscure th... choice be... subject to a choice. As between the rack and a false confession the latter would usually be considered the less disagreeable, but it is none the less voluntarily chosen. The term 'voluntary' then, as describing the absence of the vicious element which excludes a confession is, in ultimate exactness unsound. All concious verbal utterances are and must be voluntary, and that which may impel us to distrust one is not the circumstance that it is involuntary, but the circumstance that the choice of false confession is a natural one under the conditions. The choice of false confession is associated with a prospect (namely ... oting that it is not human nature to resist ...

... whether the confession has been obtained ... by a third person to the prisoner's mind. But this after all is merely one of several tests or rules which have been employed as representing a general principle underlying these differently phrased tests. 'The foundation of all rules upon this subject rests upon an anxiety to ...

... petent is not because any wrong is done to the accused in using them, but because he may be induced, by pressure of hope or fear, to admit facts unfavourable to ...

S. 24. found only in frequent ment held out to the one" *R.* v *Thomas*, 7 1 Den Cr C 331; *R* whether there had been a ... of such a nature that from fear of it the prisoner was likely to have told an untruth If so, the confessions should not be admitted Its exclusion rests on the connection with the inducement, they stand to each other in the relation of cause and effect If it is apparent that no such connection exists, there is no reason for the exclusion of the evidence" *Williams* v *State*, 63 Ark 527, *Greenl. Ev* § *219* (*a*) "The well recognized misleading motives under the influence of which procedure anticipates danger to judicial administration under certain circumstances, are hope and fear The risk run by a tribunal in relying upon incriminating statements so induced has found judicial expression of great frequency ... as distinguished ... infirmative consi... influenced ...

... hope or fear are such as to make them unsafe as evidence

It is much more common to ... probability ... state that ... or a threat is made thre... and this has or promise 155, *Bonne*... early, histor... confession w... so indefinite... tion with the ... in as a subordinate test *Thomson's Case* 1 *Leach* Cr C 293, *R* v *Fennel* 7 Q B D 150, *R.* v. *Thompson*, (1893) 2 Q B 17, *State* v *Jones*, 54 Mo 479, *Greenl Ev* § *219* (*a*).

A confession induced by a false allegation is irrelevant even if it is true. *Queen Empress* v *Chintaman*, Rat Un Cr C 153 When the statements made by the accused amount to saying that the other accused were really guilty, and any share they had in the offence was owing to compulsion, they are not confession which can be used against the other accused *Queen* v *Kuso*, 7 W R. 8

Confession was made by the ... Judge did not disbelieve it ... by the accused under the belief ... this was not a confession in ... is not invalid. *Public Prosecut*...

The question whether or ... as being a confession or not usually arises in the ... a Police officer or ..." the police *Ambar* ...

For a threat ... as to give the accuse... would gain an adv... In this case, before the accused confessed the Magistrate said to him "It is no use your trying to get out of it You were seen with the pair of shoes" *Held* that though the language used might be considered to overcome the mind of an uneducated and inexperienced boy, yet, it was not sufficient to overcome the mind of a man of the age, experience, education, and position of the accused, so as to induce him to make a confession, and, that it therefore, did not invalidate the confession *Mukherji* v. *Queen Empress*, L B R (1897–1901) Vol. I, 147

A *punchayat* is not a Police officer, but only a person in authority within the meaning of section 24 of the Evidence Act. Therefore a confession made by an accused before a *Panchayat* is admissible in evidence, if the *Panchayat*

does not make use of any inducement to admit his guilt *Emperor* v *Jasha Bewa*, 11 C W. N 901=6 Cr L J 151 But where an inducement to confess a crime proceeds from a member of the *Panch*, the confession made in virtue of such inducement is not bad under s 24 of the Evidence Act, the member of the *Panch* not being a person in authority *Emperor* v *Philip Ju e Fernand*, 4 Bom L R 785

Even in cases where certain words used by the Police officer to the accused amounted to a threat, that fact would not render inadmissible in evidence the information given by the accused which led to the recovery of articles which are the subject matter of the offence *Emperor* v *Pilak*, 17 Cr L J 33=32 Ind C[illegible]

[illegible] es the admission of a confession [illegible] the latter telling him to speak [illegible] ss the case against him would not come out *Zeta* v *Emperor*, 18 Cr L J 106=37 Ind Cas 311=10 Bur L T 270

[illegible] to the [illegible] Act in [illegible] W N 451=45 Ind Cas 284=19 Cr L J 524 When a confession was made after Police custody for several days and [illegible] and the investigating Police officers [illegible] the confession was made under ci[illegible] *Mobarak Ali* v *Emperor*, 23 C W N 886=53 Ind Cas 929, *Emperor* v *Pramatha*, 30 C L J 503; *Rasna Teli* v *Emperor*, 54 Ind Cas 881=21 Cr L J 177

[illegible] sion was made was called [illegible] him were made freely, [illegible] hen drawn up that at the [illegible] nt, that the hand cuffs [illegible] told the accused that he was a [illegible] ated, *held* that the confession [illegible] voluntary and truthful *Daulat* [illegible] sion made by an accused person [illegible] ce officer in a subtle way in the [illegible] Magistrate is inadmissible in

[illegible] mprisonment made a statement [illegible] the offence for which he had [illegible] a witness he denied implication [illegible] t made to the Magistrate was [illegible] was convicted *Held*, that the [illegible] *Khan* v *Emperor*, 18 A L J 18=54 Ind Cas 893, see also *Emperor* v *Canna*, 59 Ind Cas 324=22 Bom L R 1247=22 Cr L J 68

[illegible] el informs [illegible] it becomes [illegible] is inadmis-

[illegible]

24

Misleading Inducements—Hope The real question is whether there has been any threat or promise of
to tell an untruth from fear of thre
v *Reason*, 12 Cox Cr 229 "
be seen that his mind is entirely free from every false hope or fear that would be likely to operate upon his mind and induce him to say that which is not true That is the principle upon which all these cases are decided *R. Hornbrook* 1 1 Cox Cr 54

Misleadi
nection with
fear which lea
certain circu
the truth for f
to the resulting statement a high degree of probative force In like manner a fear lest an innocent person should suffer for the crime and a feeling that therefore an obligation exists to tell the truth at all hazards naturally calls

to the emotion instilled by duress It is the fear of the coward of the man
colloquially speaking, is
but for the reason tha
worse off, in connection
statement apparently desired Such an emotion, united to a lively imagination may possess many of the elements of terror and render a declaration affected by it entirely worthless for evidentiary purposes Under its influence backed at times by the counsel of injudicious friends perfectly innocent persons have not only confused
but of wrongs which
of crimes which in
degree of fear, assumi
ment is not material so far as the exclusion of the statement is concerned if the fear has been applied in connection with the proceedings by some person
in aut
in que
effect

general principles to withdraw the confession from the jury In like manner the operation of fear in a given case may have been such that the will of the declarant has been actually forced and controlled, the act is not his

centuries It is the subordination of reason exercised on the facts of particular cases to reliance upon a general rule for which certain instances furnish a reason A hearsay statement may mislead a jury, therefore all hearsay statements whether actually prot
confessions induced
declarations so influe

of a confession, can be regulated or measured In *Hope* v *People*, 110
the Court observed, "The admissibility of such evidence so largely d

S. 2

t it is difficult, cases, as the , and since his Courts have wisely forbor n the limits of admission and exclusion ' anguage used to the prisoner would, under case, constitutes such a threat or promise The sex, age, disposition, education, experience, character, intelligence and previous training of the prisoner are elements to be considered in *Williams* geous and nity, as a *State*, 97 Ma l 6, 7, *Underhill Cr Ev* § 1?8

Inducement at an end ' If the impression produced by the promise or threat is clearly shown to have been removed *e g*, by lapse of time or by intervening caution given by some person of superior (but not of equal or inferior) authority to the person holding out the inducement, a confession subsequently made will be strictly received *Phip Ev* 255 *R* v *Clewes*, 4 C & P 224, *R* v *Howes*, 6 C & P 404 *R* v *Richards*, 5 C & P 318, *section* 28, *infra*

Having reference to the charge against the accused The charge here means a criminal charge or a charge of an offence in a criminal proceeding The words "having reference to the charge against the accused read with the words "in a criminal proceeding antecedent and the words 'in reference to the proceedings against him' following imply that the inducement, threat or promise must be with reference to the charge of an offence in the Criminal Courts of the country, and the language is wide enough to admit of the construction that the charge need not have been framed nor any criminal proceedings begun at the time of the confession In other words, the object of the person ain a confession of having comm which will be, the subject of a with the intent that the confession may be used in the subsequent criminal proceedings In this view it is difficult to understand *Queen* v *Hicks* 10 B L R. App 1, 5 M L J Art p 26 The inducement must have reference to any charge against the accused person *R* v *Mohan Lal*, 4 A 46, *R* v *Garner*, 2 C & K 920 A promise or threat to render a confession irrelevant, sonably imply that the prisoner s r worse according as he confesses Ed 210 302 An inducement to confession as to another and different one *R* v *Warner* 3 Russ Cr 6th Ed 459 *(n)* But this rule is not applicable where the two offences are so blended together as to form in fact but one transaction *R* v *Hearn*, 1 C & M 109 *Tay Ev* § 891 Where a confession has been obtained by an inducement having no connection with the charge

without the charge being stated upon a confession was made, it was 1 D & P 245=6 Cox C C 213 been obtained from the accused by an inducement relating to some collateral matter unconnected with the charge *Roscoe Cr Ev* 43

out the inducement or threat But a rule has been laid down in different

24. precedents by which we are bound, and that is, that if the threat or inducement is held out actually or constructively by a person in authority, it cannot be received, however slight the threat or inducement, and the prosecutor, Magistrate, or constable, is such a person and so the master or mistress may be If not held out by one in authority they are clearly admissible" So also section 24, whilst

offered by a person in authority, leaves it entirely
n opinion as to whether the inducement, threat or
the prisoner to suppose he would derive some
temporal nature by confessing. *Per Sarjent C J* in *Reg* v *Navroji*, 9 B H C R 358 (367); see also *Per Farle J* in *R* v *Garner* 2 C & K 920.

Sufficient to give accused grounds . . avoid any evil The Courts have construed these words liberally in favour of prisoners Considering the ignorance of the people of this country and their dread of persons in authority, the

holding out a hope of forgiveness from God would therefore be admissible evidence In *Empress* v *Mohan Lal*, 4 A 46, the threat employed was ex communication from caste for life. This was an evil probably temporal L J J 29

Misleading inducements—Hope and Fear—Necessity for determining Actual mental State For several reasons, it may be essential to determine in any particular case, the actual effect produced upon the mind of the declarant by the

offered that the falsifying motive actually operated on the mind of the accused Logically considered however, it is frequently essential to determine the actual influen
him
in ord
involu
on the
who h
was the actual result produced, under the circumstances disclosed, influence exerted A secondary consideration, also requiring the determination of this question of actual mental state, is that it may become the province of the jury, to find the probative weight to be accorded the confession, the infirmative consideration arising out of the inducements Should the q be submitted to the
psychological effect
to his will in view of
layne's Ev § 1488

or wa
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with
calculated to create such an impression may be considered by the Cou
confession made und
to appear that the
each other in the r

of cause and effect.

Such an enquiry will divide itself roughly, into three main lines (a) A consideration of the resisting power of the declarant's mind (b) Examination of the kind and strength of pressure brought to bear upon it (c) What administrative or procedural assumptions may properly be made as to the continuance of any mental state once shown to exist In other words, the effect of a misleading inducement upon the mind in any given case is a resultant of two factors —

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in

its objective aspect It will then remain to examine the extent, if any, to

iding inducement may be taken to have

declarant at the time of making his

(A) Subjective considerations In deciding in any given case, what was the actual effect of a misleading inducement it is necessary to consider not only the quantity and quality of the pressure but the resisting power of the person whose confession is offered in evidence The logical test of admissibility is the question Have the emotions of fear or hope, either as aroused by himself or

orthiness

itution

hibition

is tending to

direct or coerce it into a particular channel While a statement if made on account of its truth, is not rendered incompetent because it is the utterance of a person labouring under some mental disability, natural or superinduced by his voluntary act, in judging whether a given statement is true the mental capacity of the declarant to resist

capacity may be natural, as

feeble minded persons, idiot

case of insanity, or intoxication —*Chamberlayne's Ev* § 1490

Children, Feeble minded etc Whether a confession of guilt made by a child shall be deemed relevant because truthful, is a question for the decision of the Court in view of the special facts of each particular case under proper circumstances, the incriminating statement of a child legally

special

readily

sons in

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may well entirely control the volition of a

will he fail to notic

confession by one of

it is probably less

Feeble minded persons

tion very similar to that occup

is such that the presence of

Subjective considerations—Intoxication A confession is not rendered

was furnished him by one in authority for the express purpose of inducing him to talk, and by leading the conversation in certain directions, to persuade him to confess, do not suffice to exclude a declaration so secured Such a course of conduct ranks as a mere deception like any other, and, unless more appears than the mere fact of unguarded loquacity brought about by intoxication, no ground for rejecting the confession is furnished In other words,

24 loosening the ... the brai is n t sufficient to ... and incompe nt. So long as the ... knows what he is talking abou, ... *nlsbu* 7 (C & P 187) When the later stages c... longer knows the effect of ... because entirely untrustworthy

(B) Objective considerations—Hope The objective strength of the inducement which operates by way of hope or fear to bring about a confession may be as varied as is the subjective strength of individual accused to resist them Things promised may range, in intrinsic value from those deemed highly desirable by persons of well balanced judgment down to considerations so slight as to render the conduct in question practically unmotivated If hope should in any case be regarded as having induced a confession it is essential that the latter should have been made at such a time that the inducement may fairly be regarded as still operative It is further necessary if hope is to be regarded as in action, that some benefit, not necessarily specified should have been distinctly presented to the mind of the declarant and his ability to obtain it conditioned upon his confessing Any mere suggestion as to the general desirability of confession or of confessing of guilt is not sufficient to show the influence of hope Should the declarant before ... a promise of benefit had been ... confessing his guilt and the ... d to have acted in accordance ... As intimated it is not essential ... confession ... would be

... worse off ... way of hope ... something ... in connection with the ... if he speaks ... need not be specified it may be left in *dubi* ... tween a mere exhortation to confession because it is right and the vague promise of material benefit in the same event is not in all cases one easy to draw *Chamberlayne's Ev* § 1495

Inducement must be material The thing hoped for must be of a material nature Admonition to speak out based on moral grounds, *e g*, that confession is a better thing than guilty silence is not, legally speaking, an inducement, *R* v *Akhilesuar* 4 P 646=89 Ind Cas 961 The words used in the section are of a temporal nature The word "temporal" is opposed to spiritual or religious A confession induced by holding out a hope of forgiveness from God would therefore be admissible In *Empress* v *Mohan Lal* 4 A 46, the threat employed was excommunication from caste for life This was an evil probably temporal 5 M L J 29 But confession induced by moral or religious exhortation will not be excluded *R* v *Gilham* 1 Moo C C 186 *R* v *Ja...* C L R 1 C C R 96 *R* v *Reeve* L R 1 C C R 362, *R* v *Hall* 1 Moo C C 459, *R* v *Sleeman* 6 Cox C C 245 A simple request for a clean breast ... a given matter, though made to the accused by the person aggrieved fails to affect adversely a subsequent confession made in accordance with it *Chamberlayne's Ev* § 1496

Influence of a religious or of a moral nature In *R* v *Radford* 1 Mood Cr C 102 a clergyman ... dwelt on the heinousness of the crime charged and ... the denunciations o... thereby But *Best* ... be dangerous after ... to receive the ...

crime of which he was not guilty, or that a man under ... falsehood, ... spiritual relation with God could hope to please God by a falsehood, ... if his confidence created' between him and his pastor, or the being thrown off his guard by his confidence should induce him, not to confess (that it ... naturally do if he were guilty), but induce him to confess falsely Such spiritual

convictions, or spiritual exhortations, seem from the nature of religion, the most likely of all motives to produce truth. They are therefore of a class entirely different from those that exclude confessions. A confession is excluded because the motive which induces it is calculated to produce untruth because it is likely to lead to falsehood. If temporal hope exists they may lead to falsehood. Spiritual hope can lead to nothing but truth" *Joy Confessions*, 51, *R* v *Gilham*, 1 Mood. Cr C 186, *R* v. *Gilney* Jebb Cr C 15, *R* v *Wild*, 1 Mood Cr C 452; *R* v *Sleeman*, 6 Cox Cr 245. Proof that an incriminating statement was made by one accused of crime under the influence of a moral or religious inducement to make a statement, is in reality a ... rment of its probative force. ... exhortation to tell the truth by ... *Emperor* v *Wilesuar*, 89 ... I R 1925 Pat 772. The fear ... trustworthiness of a confes-

Threats made but not influencing the accused. Where threats are made to the accused but the accused made the statement deliberately, *i e* uninfluenced by the threats this section does not apply. *Emperor* v *Inandarao*, 19 B 612=27 *Bom L. R* 1034=89 *Ind Cas* 1016=26 *Cr L J* 1478.

Advice that it would be better to tell the truth. 'On principle, says *Prof Wigmore* the advice by any person whatever that it would be better to tell the truth cannot possibly vitiate the confession, since by hypothesis the worst that it can evoke is the truth, and there is thus no risk of accepting a false confession. The confessor is not obliged to choose between silence and false *confession* ha ... utterance of ... is nothing in t ... for if it has ... But that theory does not obtain in England. A confession obtained after the advice that it would be better to tell the truth is excluded in England. *R* v *Enoch*, 5 C & P 539; *R* v *Hearn*, C & M 109, *R* v *Laugher*, 2 C & K 225; *R* v *Garner*, 1 Den Dr C 329, *R* v *Baldry* 2 Den Cr, C 42, *R* v *Waringham*, 15 Jur 318, *R* v *Gellis* 11 Cox Cr C 69, *R* v *Bate*, 11 Cox Cr 686, *R* v *Dogharty*, 13 Cox Cr 23, *R* v *Fennell* 7 Q B D 147, *R* v *Enoch*, 5 Car 539, *Queen* v *Uzier* 8 W R Cr 13, *R* v *Thompson* (1893) 2 Q B 16, 18 ... 'It can hardly be said ... to confess what he ... 96 *Kelly C B* said ... meaning that they ... confessions. Some cases have gone the length of saying that a statement is inadmissible if it is ... er tell the truth. For my part, I ... that he had better tell the truth ... had better confess, when you do not know whether he is guilty or innocent.' *Per Peacock J* in *In Nobodey Chandra*, 1 B L R Cr 15. 'Much conflict, says *Mr Chamberlayne* exists among the ... as to whether ... ere exhortation, advice or suggestion that

received in evidence a statement *prima facie* so induced. The ruling seems justified as, upon the surface the inducement if any, held out to the declarant is a moral one. It is required that no threat or promise or favour by one in authority should have accompanied the suggestion. On the contrary the use of but slightly varying expression such as 'it will be better for you to tell all you know' or 'you had better tell the truth', has been held to exclude a confession so induced.' *Chamberlayne's Ev* § 1517. A mere exhortation to

S. 24. the accused to speak the truth could not be construed into an inducement, threat or promise, and, least of all, into an inducement to make a false confession and is not enough to exclude evidence of a confession ... ess, 9 P R. 1894 Cr ... s made by a superior ... 24 of the Act *Nga Pye* ... *U le car* 5 Cr R 3?

the moral or religio... an officer or other p... the latter s presence ... goes so far as to pro... will do what he can ... The subsequent co... statement of the person in authority frequently both in tone ... language ... ake The ... better for ... covert thre... case if he ... *frequently* ... tion with the proceedings, will accrue in the manner requested There is plainly danger in such a situation ... volition of the accused be over-powered, that he will state the truth not as it is but as he thinks will be pleasing to the officer, or other person in authority to have him say that it is Adopting this distinction the Courts of several jurisdictions have regarded the statement of an accused person thus influenced as inadmissible under the rule, because involuntary' *Chamberlayne's Ev* § 1516 1518

or perhaps under the violent pain of the rack, he thinks of nought ... present relief from agony which his confession will gain him *Wigmore* § 833. A confession is not admissible, which has been made immediately after the prisoner with others had been threatened with a loaded rifle It was immaterial that the threat was not made to extort a confession, but to suppress an attempt at mutiny *Queen* v *Hicks,* 10 B L R. Ap 1 It is a mistake to suppose that a confession cannot be irrelevant under section 24 unless it can be alleged that there was torture leaving marks of personal violence Under the section the confession becomes irrelevant if the making of it appears to have been caused by any inducement, threat or promise *Queen Empress* v *Narayan,* 25 B 543= 3 Bom L R 122

Promise of pardon A confession by promising immunity from prosecution of another case is not admissible against the confessor *Kaloo* v *R.* 12 P W R 1907 Cr =5 Cr L J 437, see also *Abdul Karim* v *K E*, 1 A L J 110=1 Cr L J 211 *Mahommad Shafi* v *Empress* 1 P R 1899 Cr *Crown* v *Radha Kissen* 9 P R 1869 Cr *R* v *Ashjar* 2 A 260, *Nga Io* v *Queen Empress* L B R (1872 189?) 396 *Ina* v *Emperor,* 45 A 633, *Emperor* v ... *Inant* 32 C L J 201=60 Ind Ca 417=22 Cr L J 225, *Queen* v ... W R Cr 53, C 50 (73), *In re Kora Govindan* ... *Gilhs* ... *Baidulla* v *R.* 10 P R 1895, ... *Was* ... 11 Cox Cr 69, *O Hojan J* ... and ... against the prisoner induced by a person in authority to make the information ... I think ing himself by the hope of obtaining the immunity of an approver that he was He became a Crown witness in a reasonable expectation that he would escape punishment as a return for his accepted services in bringing offenders to justice ' Where a promise of safety was made by a Police officer to whom the accused confessed, which confession was repeated before the committing Magistrate and the accused also made a confession, although differ... in

...it the confession before the S.

...l is an inducement or threat ...ithhold my matter within ...voluntary statement given ...in evidence as against him *Reg* v *Alibhai*, 8 B H C. Cr 103

Inducements involving a higher punishment, mild treatment in prison or a reward of money "It is scarcely conceivable" says *Prof Wigmore* "(except ...

...persons for the ends of justice, be encouraged ...ey do so they will receive lenient punish-... *entirely wrong impression and to be* ... *King Emperor*, U B R (1916) 2nd Qr. p 113=17 Cr L J 102=35 Ind Cas 962, 820, *People* v *Johnson*, 41 Cal 153, *Smith* v ... in treatment while in confinement cannot ... a false confession *R* v *Green*, 6 C & P 655, *Com* v *Dillon*, 4 Dall 116 Although ...ld be voluntarily bartered ...s result has some-times bee... *...lackburn*, 6 Cox. Cr. 337 ...esser offences are often con... ...be housed and ...

...and to reject absolutely a confession so induced Where the circumstances of a ...obably thus induced, let it be excluded ...the basis of so unusual a contingency ... Evidence" *Wigmore* § 835

Promise of cessation of prosecution release from arrest etc A promise ...has ...ich ..."If you will tell me where my goods are I will be favourable to ... *Could J* ...cy are ...secutor ...if he ...o *R* v *Simpson*, 1 Moody Cr C 410 In ... was disallowed as it was obtain... do all he could Similarly in *R* ... because there the prosecutor said if you will not tell we of course can do ... ...ent was ...ch But ...promise ...v *Mans*... ...*ase* 6 Cr ...exclude ... 3rd ed

Assurance that "what you say will be used for you" or "used against you" The advice of one in authority promising that "what you say will be used for you" was regarded in many cases as excluding a confession As regards confessions thus obtained *Coleridge J* said "I cannot conceive a more

24. direct inducement to a man to make a confession than telling him that what he says may . *R* v *Dieu*, 8 C & P 140 The learned . *v Hornbrook*, 1 Cox Cr 55, where he

430 by *Lord Campbell C J*, Pc
But in *R* v *Moore* 2 Den Cr C 5
that "however slight the threat
Wigmore § 837

Assurance that "you had better confess" The phrases "it would be worse for him if he did not confess or better for him if he did" (East Pl Cr ; 654, *R* v *Kingston*, 4
better for you to tell
Cr C 410), "you had
6 C & P 353), "you h
7 C & P 579), "if any other person had to do in the case, it is better you ... tell,' (*R* v *Moody*, 2 Cr & D 347), "you may as well tell me" (*R* v *Croydon*, 2 Cox Cr 67), 'because it would save him the shame of a search warrant" (*R* v *Collier*, 3 Cox Cr 57), "it would be best for him if he would tell how it was transacted" (*R* v *Warringham*, 2 Den Cr C 447, "if you do not tell, it would be worse for you" (*R* v *Cheverton*, 2 F & F 833, *R* v *Coley* 10 Cox Cr 536) and "it will be right thing for M to make a clean breast of it" [*R* v *Thompson* (1893) 2 Q B 12, 18] were held to be vitiating inducement "In a given case" says *Prof Wigmore* "the exclusion may occasionally not be improper under all the circumstances, but that such a phrase, or its equivalent, should in itself and as a rule operate to vitiate the confession is wholly bad on principle and in common sense' *Wigmore* § 838 "The mental effect of a suggestion that the accused had better confess is much the same as that of a declaration that he had better tell the truth; although, in form at least the injunction to tell the truth presents an alternative of self exculpation which the ... on the surface does not As however, the advice to tell the ...

confession
tendered
when offered ...
be deemed to hide a threat, equally intangible, in case the admonition had disregarded Viewed in this light an intimation to the declarant that he had better confes ... if he does not, has been treated as an ... may reasonably be assumed to ... the wish that the accused should make ... authority or made to him by the injured person does not impair a confession given in compliance with the suggestion" *Chamberlayne's Ev* § 1520

proceedings 5 M L J ...
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d (*Empress* v ...
entence, that he will ...
he like—5 M L J

Art p 29

Retracted confession—Corroboration of To use a confession as evidence against the accused, the Court must be satisfied (1) that it is voluntary, and (2) that it is substantially true Moreover, it is a general rule of practice not to act upon retracted confessions, unless they are corroborated on material points by credible independent evidence. *Crown* v *Motan*, 2 S L R Cr 31=10 Cr L J 20), *Muhammad* v *Crown*, 5 P L R 1915=3 P W. R 1915 Cr =16 Cr L J. 157=17 Ind Cas 221 *Harprosad* v *Emperor*, 36 Ind Cas 133=17 Cr L J. 453; *Sher Khan* v. *Crown*, 2 P W. R. 1917 Cr =75 P L R 1917 Cr , *Queen Empress* v *Gunu*, Rat Un Cr C 817 It is a recognised rule of the Law of evidence, that a retracted confession may be used against the person making it, but not against other accused jointly with him *Chet Singh* v. *Crown* 28 P W R 1907=7 Cr L J 227, *Yasin* v *Emperor*, 28 C. 683 A Judge should in the first instance, see whether a retracted confession is voluntary or has been improperly induced The mere fact that prisoner puts in a plea of guilty
made it by allegation

nduced That is a
If, upon weighing
it appears to the
Judge that the confession has been improperly induced, no matter how true it may be, he is bound to exclude it, it then becomes evidence and liable to be appreciated and weighed with the rest of the evidence in the usual way *Emperor* v. *Bhagi Vedu* 8 Bom L R 697=4 Cr L J 332, *King Emperor*, v *Durga* 3 Bom L R 441, *Majhi* v *Emperor* A I R 1927 Lah 682=104 Ind Cas 247,

certified by a Magistrate, is not enough
unduly induced *Queen Empress* v

by credible and independent evidence, it is unsafe in the majority of cases to found a conviction on a retracted confession A retracted deposition does not of itself afford a sufficient corroboration of a retracted confession *Empress* v *Chutia* 13 C P L R 107 *Queen Empress* v *Bharmappa*, 12 M 123=2 Weir 376, *Empress* v *Tila Ram*, A W N 1886, 52; *Queen Empress* v *Rangi* 10 M 295=2 Weir 361, *Queen Empress* v *Ranu* 19 M 482=2 Weir 745, *Empress* v *Balai Ghosh* 124 Ind Cas 486= A I R 1930 Cal 141, *Safi* v *Emperor*, 124 Ind Cas 409=31 Cr L J 661= A I R 1930 Nag 259, *Miran* v *Crown*, 30 Cr L J 340=A I R 1929 Lah 597, *Sheonarain* v *Emperor*, 8 Pat 262=A I R 1929 Pat 212; *Kunja* v *Emperor*, 8 Pat 289=A I R 1922 Pat 275; *Bijan Singh* v *Emperor*, 30 Cr L J 1046

an approver had been
made
should be examined at the
trial,
is a witness preferring
to deal with him as a co accused, his retracted confession would be irrelevant under *s* 34, *notwithstanding the special provisions of cl* 2 *of s* 339 *of the* Criminal Procedure Code *Mohammad* v *Empress*, 1 P R 1899 Cr, *Crown* v *Radha Kishen*, 9 P R 1869 Cr, *Yasin* v *King Emperor*, 28 C 689=5 C W N 670

Where a confession was made before a Magistrate under circumstances not liable to suspicion, and, to all appearances, fulfils the requirements of the law, the fact that it is retracted in the Sessions Court does not negative the presumption of the genuineness of the confession *Queen Empress* v *Bindu*, A W N. 1890, 173

A confession before the Magistrate, though afterwards retracted in the Sessions Court, is evidence against the party making it *Queen* v *Jema*, 8 W.

S 24. R. Cr 40; *Chit Sun* v. ... 17 W R Cr 4,
R v *Gharya*, 19 B ... *Jaikulal*, 20 A 153,
R v. *Kelvie* 29 A 434; ... be laid down a
an absolute rule of law that a confession made and subsequently retracted by
a prisoner cannot be accepted as evidence of his guilt, without independent
corrobor ...
depend ... d confession must
and the ... as originally given,
... the reason given
by the prisoner for his retraction *Sajjad Hussain* v. *Emperor*, 16 P. R. 1903
Cr = 153 P L R 1903; *Emperor* v *Bueswar Dey*, 26 C W N 1010 *Pada*
Prya v *Queen Empress* L B R (1872-1892) 423, *Nanhey* v *Emperor*, 134 Ind
Cas 876 = A I R 1931 Oudh 412

A confession though made voluntarily by an accused person before a Magistrate, if subsequently retracted, is not sufficient by itself to justify a Sessions Court in acting upon it *Queen Empress* v *Balya*, Rat. Un Cr C 90, ... 842, *Nga Pha* v *Queen Empress*, L B R. ... n, 38 P W R Cr 1910 = 24 P R 1910 = ... h is explained away is like a retracted ... A I R 1927 Lah 519 A retracted ... sufficient to warrant conviction *Rahaman* v *Emperor*, A I R 1930 Lah 88 = 30 Cr L. J 1080; *Nawab* v *Emperor*, 6 O W N. 545 = 118 Ind Cas 757 = A I R 1929 Oudh 381; *Sanual Das* v ... v *Emperor*, 1929 M W N 791, ... 29 M W N 901 = A. I R 1929 Mad. ... r, 31 Cr L J. 26 = 120 Ind Cas ... 35, *Durga* v. *Emperor*, 132 Ind Cas

... value of confession seems to be this

of an acc ...
voluntary ...
and simpl ...
the use to ...
matter rat ...
up its min ...
to believe ...
that, in the ...
convict or ...

... the retraction, notwithstanding its having

kind that not only confirms the general story of the crime but also, unmistakably, connects the ...
P. L R 1914 = 15 C ...
R 1914 Cr; see a ...
Chitsun v *Crown*, 1 ...
Cal. 633 It can ...
made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence The weight to be ...

retracting them were true. An omission on the part of the Judge to ... circumstance ... to the Jury amounts to a misdirection ... Weir 533; *Queen Empress* v *Bhagi*, Rat. ... ya, 19 B. 728. If a Judge

believes that a confession made by a prisoner although subsequently withdrawn, contains a true account of that prisoner's connection with a crime, the Judge is

indicate that it is a natural narrative of what took place in the presence of the man making it, and is not at variance with any evidence in the case which is believed
mouth
224; Qu
Empres
W
fession
was not liable to be convicted on the confession alone *Queen* v *Hardeua*, 5 N W P. 217 But confession of a co accused, though subsequently retracted is admissible in evidence against his co accused *Sardara* v *Emperor*, 125 Ind Cas 639=31 Cr L J 877=A I R 1930 Lah 667 Where the confession made before the police was found by the Court not to have been voluntary, it cannot be corroborated by the confession of the accused as an approver, subsequently retracted *Safi* v *Emperor* 121 Ind Cas 459=31 Cr L J 661=A I R 1930 Nag 259

In capital cases, the jury should often refrain from convicting on retracted confessions *Queen Empress* v *Ruppya*, Rat Un Cr C 245=Cr Reg 12 of
in a criminal case was the confession of the
but subsequently retracted, and where it

the prisoners who confesse

ly retracted, such a
very good corrobora-

ground that it was
ter admission, is to be
Evidence Act, and
the proper course for
the Judge to take evidence about the circumstances before admitting the

given in the
W N 380
understood
in another
what statement was made by the accused It is not the practice to base a conviction upon a retracted confession, unless it is corroborated That a person,

and while not ignoring the difficulties that surround retracted confessions, it

evidence by reason of the person making it having retracted it before the committing Magistrate *Sahib* v *Empress*, P L R 1900, 19 Cr There is nothing in section 30 of the Evidence Act which would exclude, as against

S. 24. persons being jointly tried for the same offence, a confession made by one of the accused duly proved, simply because at the trial the confession is withdrawn or denied *Aung Thein* v *Crown*, 1 L B R 133 Certain accused persons made confessions which led to the arrest of certain other persons The confessions were subsequently retracted, but were corroborated by the evidence of the approver *Held* that the retracted confessions taken behind the back of the
made them,
conviction
J 73=13
of J by
fracturing her skull C made a confession before a Magistrate, which she retracted in the Court of the trying Magistrate Except the evidence of one witness, who said he saw the two wom
whatever to show that C committed the cr
convict the accused person on his retracted
borated *Held* also, that production by
with
n *Mt Chandan* v *Crown*, 3 P W R 1901
-38 cannot be accepted as proper corroboration of a confession made to a Magistrate and retracted at the sessions trial, especially when that confession was not fair
Empress v *Jadub*, 27 C 295=4 C
where a confession was recorded und
when it was corroborated in material
King-Emperor v *Mohiuddin*, 25 M 1
made under the
164 of the Crimina if retracted afterwards
Nga Thin v *Queen*

A confessing prisoner should not be condemned upon a retracted confession unless it is corroborated in material particulars *Emperor* v *Mussamat Jawat* 70 P L R 1918=19 P W R Cr 1918=44 Ind Cas 179=19 Cr L J 213; *Har Prosad* v *Emperor*, 36 Ind Cas 133=17 Cr L J 453; *Behari* v *Emperor* 60 Ind Cas 789=22 Cr L J 293

An accused's confession subsequently retracted and not tallying with the other evidence in the case, cannot be pressed as strong evidence against him. *Emperor* v *Tilak*, 32 Ind Cas 321=2 O L J 468=17 Cr L J 33 In the absence of corroboration in material particulars, it is not safe to convict on a retracted confession, unless from the peculiar circumstances in which it was made and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been retracted from is genuine *Khushi* v *Emperor*, 31 Ind Cas 821=16 Cr L J 815 But it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of the plaintiff without independent corroborative evidence The weight to be given to such a confession must depend on the circumstances under which
n and the circumstances under which it was

N 1010=24 Cr L J 145=A I R 1923 Cal 217; *Bassireddi* v *Emperor*, 9 L J 613=18 L W 607=33 M L I H C 37, *Manna Lal* v *Emperor* O & A I R 947, *Moti Ram* v *Emperor*, 75 Ind Cas 153=24 Cr L J 201

The duty of a Judge presiding over the trial by Jury is to prevent the production of inadmissible evidence, whether it is or is not objected to by the

They will be admitted only if they are voluntary If the Judge is satisfied as to the truth of a confession but doubts voluntary character he is bound to exclude it under the law, though such rejection amounts to excluding truth from the Court *Emperor* v *Panchkari Dutta* 29 C W N 300–52 C 67=86 Ind Cas 414–26 Cr L J

It cannot b
and subsequently
guilt without and
of a confession is a matter to be decided by the Court in the circumstances of each particular case *Manna Lal* v *Emperor,* A I R 1925 Oudh 1 In deciding whether a retracted confession is to be admitted in evidence it is necessary to examine not only the statement of the prisoner as to how he came to make it, but all the circumstances of the case There is no rule of law which compels a Court to raise an inference of improper inducement from the mere fact that a confession is retracted *Partab Singh* v *Emperor,* 6 Lah 415=7 Lah L J 482= A I R 1925 Lah 605, *Mohor Sing* v *Emperor,* 96 Ind Cas 747=27 Cr L J 982 Confession
though retracted,
although certain
detailed confession
explained the con
381 Conviction based on retracted confession which was voluntary and was sufficiently corroborated is legal *Iqbal* v *Emperor* 103 Ind Cas 112–28 Cr L J 656

Procedure to be followed—Where admissibility of confession is objected to—English Practice Now the

uch alleged admission A
voluntarily It must have
...ed to make it by any promise
or favour, or by any threat held out by a person in authority *R* v *Thompson,* (1893) 2 Q B at p 15 So the only question in these cases really are—was any promise or favour or any menace or undue terror made use of, to induce the prisoner to confess? And if so was the prisoner induced by

the evidence *R* v *Thomp* 15

It is also important to note that the question as to the admissibility or otherwise of the alleged confession is a question for the Judge and not for the Jury

" No
until objec
prosecutio
gist of it,
has been determined by the Judge

Very often, however especially in cases at quarter sessions it is not unusual to
ment was
into the pro
of the evidence is to be taken by the defence And then when the evidence in chief is be
statement,
of the det
the Judge in the absence of the Jury

"It must be obvious to any person that such a procedure must be very damaging to the accused because even if the objection is sustained the Jury must naturally conclude that something not in the prisoner's favour is being withheld from them

S. 25. "What then is the correct procedure to be adopted in such case It is

be followed in such cases And that procedure appears to be as follows The prosecution, in opening, should make no reference whatever to the accused's statement, and should not even mention the fact that the accused made a statement.

"In examining his witness or witnesses, the prosecution must in the same way refrain from asking the witness whether the accused made a statement. When, however, that st
defence should state
this stage of the proce

"In the absence o
witness or witnesses
examined and re-exami
be entitled to call witn
can be called in support seems to be a moot point Thus, in *Salvage's case* application was made by the defence to call the prisoner to give evidence in support of the allegation that the confession was made involuntarily, but such application was refused by the Judge

"It is difficult to see, however, on what grounds the Court can refuse to hear the prisoner on the question of admissibility

"It is submitted that the prisoner is entitled to call other persons to prove that the confession was made involuntarily, persons, for example, who would say that they were present when the alleged confession was made, but that it was made in response to an inducement ... to the

If the Judge has ruled out ... all to the statement must be
made If, on the other hand, he has hel
prosecution will continue their examination
such evidence stopped in order to allow the q
of the evidence to be argued in the absence
statement will, of course, be given It wi
examine the witness again, but before the
ment was made involuntarily, the Judg
the Jury the reason why their retirement was requested, and also his reason deciding to admit the evidence

"The defence in opening will, *inter alia* deal with the question of the ... other

... case cited in 33 Cr L J pp 1 2 (Journal)

When
accused is
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Emperor, 88 Ind C is 283 = 26 Cr L J 1115

Confession to police officer not to be proved

25 No confession made to a police officer* shall be proved as against a person accused of any offence.

Difference between English and Indian Law "Sections 25, 26 and 27 differ widely from the law of England and were inserted in the Act of 1861 (from a

*In the Upper Burma insert " who is a Magistrate," *see* s 4(3) (c) of the Burma Laws Act, 1898 (13 of 1898).

which they have bee[illegible] police for the purpose England confes ions o[f] threat or promise *R* v *Kerr* 8 C & P 176, *R* v *Berryman* (1854) cited in *Roscoe Cr Ev* 19, *R* v *Best*, (1909) 1 K B 692, *R* v *Man* 17 Cox C C 689, *R* v *Kershaw*, 18 T L R 357, *R* v *Dougal*, 67 J P 325, *R* v *Leibling*, 2 Cr A R 315, *Rogers* v *Hawkins* 19 Cox 122, *Ibrahim* v *R* (1914) A C 599=18 C W N 705 P C., [illegible] 206, *R* v *Hirst*, 18 Cox C C 374, *R* v [illegible] *Harris*, 24 Cox C C 66, *Darling J* said [illegible] be done to induce or threaten, but short of that, if the person is not in custody, it is certainly not the law that the constable may not make enquiries which may lead to his getting evidence from a person which he may use against the person" But a constable has no right to elicit admissions from those he suspects *R* v *Mathews*, 14 Cr A R 23, see also *R* v *Voisin*, (1918) cited in *Roscoe Cr Ev* 51.

Reason of the Rule This law is applicable only in India The following extract from the First Report of the Indian Law Commissioners shows the reasons which prompted the Legislature in enacting ss 25 and 26 The Police in the province of Bengal are armed with very extensive powers They are prohibited from enquiring into cases of a petty nature but complaints in cases of the more serious offences are usually laid before the police *daroga* who is authorized to examine the complainant, to issue process of arrest, to summon witnesses to examine the accused and forward the case to the Magistrate or to submit a report of his proceedings according as the evidence may in his [illegible] lence taken by the [illegible] sessions of 1832 and [illegible] abundantly shows [illegible] ses of extortion and [illegible] y exercised by the [illegible] the conclusion that [illegible] the facilities which

[illegible] ssession of such [illegible] Regulation XX [illegible] y confession it [illegible] ns for preventing

character of the confession confessions are frequently extorted or fabricated A

by getting up a case against parties whose circumstances and character are such as are likely to obtain credit for an accusation of the kind against them This is not unfrequently done by extorting or fabricating false confessions and when this step is once taken there is of course impunity for the real offenders

25. result of which is to constitute a written document This of course will not prevent a police officer from receiving any information which any one may voluntarily offer to him, but the police any statement made by a party accused

As regards sections 25 26 and 27 v *Babu Lal*, 6 A 509 at pp 521 522 I have stated the effects as introductory of the observations which I am about to make that the rules contained in ss 25 26 and 27 of the Evidence Act were not originally treated in British India strictly speaking rules of evidence, but rather as rules governing the action of police officers, and as matters of criminal procedure I may take it that no such rules existed either in the Muhammadan Law or in the English rule of evidence the only two systems to which the Courts resorted for guidance on questions of evidence in criminal matters' Then after making mention of previous legislation on the subject he added at p 523 These legislative provisions leave no doubt in my mind that the

accused persons Section prisoners accused of offences *Solam* v *Emperor* 43 Ind Cas in *Queen* v *Hurribole* 1 C 207, 4 A 198 (204) The reason confession made by an accused it be made in the immediate apprehension that a police officer persons may unwillingly excite terror in their minds and extort false and involuntary confessions and his duty to investigate criminal cases and to detect offenders and bring them to justice may make him feel tempted to obtain confessions from accused persons by threat promise or other improper influence *Queen Empress* v *Bij* 2 C W N 71

Origin of the section As far back as the year 1817, the Legislature repealing the older rules upon the subject passed Regulation XX of that year which *inter alia* had for its object the

can be as in the rule

section provided that no compulsion is to be used either towards parties or witnesses for the purpose of obtaining any

ned not on any occasion or
prehended upon a criminal
s of a prisoner by holding
sunding or inti-
any species of
landholder or
farmer, or by any other person whatever, whether with a view to extort a confes
sion or to procure information will subject the offender to ex... punishment,
on con... ying down
these ... whenever a
confes... lice *thana*
the sp... o darogah's
report ... event mal
practic... ns in order
to gain ... XX of 1817
remained undisturbed in the statute-book up to a recent time when they were
l Procedure Code of
s 19 of Regulations

... The next three sections 148 149 and 150 contained even
more important rules which perhaps did not properly belong to the province of
of Criminal Procedure but to that of Evidence ...

... person accus...
amounts to a
fact discovered

only fit and p...
Evidence which
150 of Act XXV of 1861 were exiled from t...
they found no place in the new Code Act ...
proper place as ss 25 26 and 27 of the
Admissions They have been imported bodily
in the Code of 1861 they are ...

Scope of the section In section 25 the criterion for excluding the con
To whom was the confession made? If
officer the law says that such confes
in evidence because the person to whom
ving such a confession, and he is more

25. over
Queen
R 11

made, in the first instance, to two policemen, and taken down in writing, and the prisoner was then brought before the Deputy Commissioner of Police Mr *Lambert*, in the Police Office in Calcutta, when he again affirmed the truth of his former statement to Mr *Lambert*, and Mr. *Lambert*, in his capacity of a

confession made by a prisoner in custody, to any person other than a Police Officer, shall be admissible, unless made in the presence of a Magistrate I am of opinion that is the true meaning of the 25th section Its humane object is ... any undue ... to which ... for reading ... *R*, 11 ... 198, *In re* ... cer by an ... *a fortiori*

it is inadmissible against a co accused *Emperor* v *Hari Singh*, 12 Bom L R 899 = 8 Ind Cas 622 = 11 Cr L J 690; *Nga Phakin* v *Emperor*, 36 Ind Cas 480 = 17 Cr L J 512 This section is absolute *Kodangi* v *Emperor*, A I R 1932 Mad 24 A confession contained in a statement made by an accused person to a stranger in the presence of a Police Officer while he was in the custody of a jailor does not fall within the purview of s 25 or s 26 of the Evidence Act and is admissible in evidence *Nadu* v *Crown*, 3 P R 1914 Cr = 214 P L R 1914 = 15 Cr L J 480 = 21 Ind Cas 365 A confession made by an accused to a private person in the presence of the Police is inadmissible in evidence against him *Chanan* v *Emperor*, 20 Ind Cas 468 = 37 P W R 1913 Cr = 320 P. L R 1913 = 14 Cr L J. 596 Section 25 of the Evidence Act ... that a confession to a Police officer shall not b... not say that such a confe... a confession may be used ... subsequent judicial confessio... Ind Cas 693 = 6 L. L J 54 "a person" in this section me... only to the proof of a confession as against the maker so it should be ...

confession as a whole is excluded, whether by reason of the section ... much of the information given by the person ... he was an accused and in custody, as distinctly ... discovered becomes admissible *Amiruddin* v *Emperor*, 41 Ind Cas 321 = 22 C W N 213 = 27 C L J 118 = 19 Cr L J ...; but see also *In the Matter of Hiran Miya*, 1 C L R 21; *Emperor* v *Hira*, 21 ... L R 724 A confession made to a Police officer is inadmissible even if the ... *Bahadur* v

was convicted on the evidence of tw
offered them Rs 10 per ball of
large quantity of illicit opium from
had been also enrolled as Police

A confession, therefore, made to
accused of any offence is ina

only to
section 25
the use,
to Police
statement
L T. 1=
examined
this section *Empress* v *Jadabdas* 4 C W N 129 In that case the Court

Confession—Definition of A *confession is an admission made at any*
e, stating or suggesting the inference,
statements which amount to a direct
y statements which
et suggest an in
The factor deter
not the motive of
e of guilt *Mi Ein*
11 Cr L J 153,
338 Confession
an accused person,
which it is proposed to prove against him to establish an offence *Queen*

Police officer, meaning of "In construing the 25th section of the Evidence Act of 1872, I consider that the term 'police officer' should be read not in any strict technical sense, but according to its more comprehensive and popular, meaning" *Per Garth C J* in *Queen* v *Hurribole,* 1 C 207 (215) A Deputy

S. 25. Commissioner of Police in Calcutta is a Police officer *Ibid* Primarily the term "Police officer" in this section means the same as it does in the Police Act but it can be extended beyond the definition in section 1 of the Police Act to cover only those persons who like Police officers coming within that definition, are o
any member of the commu
... for doing so That

Police officer whoever that officer may be
British territory or a Police officer in foreign ...
v. *Nagla*, 22 B 235, *Mabli* v *Emperor*, 87 Ind Cas. 520=26 Bom L R 706=26 C L J 984; see *Salam* v *Emperor*, 43 Ind Cas. 111; *Nadir* v *Crown* 15 Ind Cas 800 A village headman in Burma who is authorized to arrest without warrant is not a Police officer so as to make a confession made to him inadmissible *Nga Myain* v *Emperor*, 3 Bur L J 11=81 Ind Cas 540=25 Cr L J 924 The widest and most comprehensive extension of the term "Police officer" cannot make it include a Kotwar in the *Central Province* *Sukhuaria* v. *Emperor*, 25 Cr L J 147=76 Ind Cas 291=A I R 1924 Nag 29, see also *Bhaguatdin* v *Emperor*, 59 Ind Cas 88=21 Cr L J. 568 A member of a frontier constabulary is, for the purposes of sections 25 and 26 of the Evidence Act, a Police officer, and admission made to him, and not in the presence of a Magistrate by an accused person cannot be proved against the maker *Khuaja Hassan* v *Emperor*, 71 Ind Cas 360=24 Cr L J 136 In the Punjab a village Chaukidar is not a Police officer within the meaning of section 25 of the Evidence Act *Khuda Baksh* v *Emperor*, 43 Ind Cas 84=19 Cr L J 52=42 P. R. 1917 Cr See also *Dal* v *Emperor*, 17 Cr L J 62=26 Ind Cas 654. A *chaukidar*, although he is not a Police officer under Act V of 1861, is one under Reg XX of 1817 and Act I of 1872, and a confession made to him is inadmissible *Empress* v *Indra Chundra*, 2 C W N 637, *Nazu* v *R*, 9 C W N 47

Police
to hi
Sin v

21), a police Sub Inspector (*Addu Sil*
19 W R Cr 51), a darogа (*R* v
police (*R.* v *Luchoo*, 5 N W P 86)
10 B. L R.
v *Babu Lal*, 6
confession ma
There is so ... other
High Courts ... In
excise peon having the power to detain, search, seize and arrest any person whom he believes to be guilty of any offence under the Opium Act or Bombay Abkari Act has powers which are very similar to those exercised by a Police officer
r the provisions of
L R 19, Nanjo
1196=51 B 75=93
n L R 674=97
But the Calcutta
is admissible in
section 25 of the
n *Sao* v *Emperor*,
J 579=A I R.
C W N 831=45
... 151, *Jura Sardar*

v *Emperor*, 52 C L J. 177; *Moti Lal* v *Emperor*, 36 C W N 163; *contra Ibrahim* v *Emperor*, 35 C W N 601; 9 Mys L J 71 following 51 B 18; *Maung san Myin* v *Emperor*, 7 R 771=121 Ind Cas 715=31 Cr L J 303=A. I R 1930 Rang 19 An excise officer is not a Police officer within the meaning of section 25 of the Evidence Act *Emperor* v *Budhu*, 99 Ind Cas 594=A I R 1927 Sind 112, *Tillibai* v *Emperor*, 83 Ind Cas 151=25 Cr L J 1223; *Meclu* v *Emperor*, 88 Ind Cas 32=26 Cr L J 1088=A I R 1925 Nag 340; *Emperor* v *Wazir Singh*, 11 Ind Cas 588=3 P R 1918 Cr=19 Cr L J 361; *Muhammad* v *Emperor*, 39 Ind Cas 977=21 C W N 694=18 Cr L J
3 Cr L J 165=15 Ind Cas 305=5 Bur L.
ot a Police officer and confession made to him
under s 25 of the Evidence Act *Queen Empress* v *Sama Papi*, 7 M 287=2 Weir 235 A confession made to *Ywathugyi* should not be admitted in evidence He is the head of the rural police and has police duties to perform He is, to all intents and purposes, a Police officer though he may not be so designated *Maung Wun* v *Queen Empress*, L B R. (1833—1900) 22

Confession made to a police officer whether admissible A confession made to a Police officer cannot be used in evidence *E* v *Thakur* A W N 1883, 188, *E* v *Pancham*, A W N 1882, 21 1 A 198 Confessions recorded

A Cr 153=106 Ind Cas 442=26 A L J 92 A confession made to another person in the presence of a Police officer, who has asked or instructed that other person to take the confession in such a way as to be his agent, where the confession takes place under such circumstances that the Police officer is in such proximity as to make his presence likely to affect the mind of the confessing person is in substance a confession to a Police officer *Emperor* v *Mt Har Piari*, 97 Ind Cas 44=44 A L J 958=A I R 1926 All 737, see also *Channan* v *Crown* 21 Ind Cas 468 Rule 195 of the Madras Councils Rules of Practice is not a rule of law but merely a rule for the guidance of village Magistrates and
ter the police investiga-
the Magistrate know
Emperor, A I R 1927

Mad 974
Where a house was searched and the recovery list, *held* that the fact of the accus recovery list is not admissible in evidence

8 Lah 326=28 P L R 119=100 Ind Cas 707=28 Cr L J 323 If after

out the route taken by them in going to commit the offence of dacoity and the

25. 178=23 Cr L J 197 A first information of murder was lodged at the Police station by the accused himself on the morning following the murder and in it after stating the narrative of events prior to the night of occurrence he confessed that he had committed the offence
sions of section 25 of the Evidence
in its entirety, yet, in so far as it spo
it was admissible in evidence if and
62 Ind Cas 578=25 C W N 788=
Police by an accused person is admissible to prove the ownership of property in respect of which he is accused *Ganpat* v *Bani*, 55 Ind Cas 62=21 Cr L J 414. Statement made by the accused in presence of a Police officer is admissi
R 724
fession
v *Emperor*, 48 Ind Cas 883=36 P R 1918 Cr
made by a complainant in his first report at the Police station is not admissible as proof of the facts therein mentioned and cannot be used as evidence against the accused in his trial *Dal* v *Emperor*, 16 Cr L J 62=26 Ind Cas 62. Accused went to a Police station and made the report I have killed my wife and her corpse is lying in my house," in consequence of which the Police proceeding to his house, discovered the corpse of his wife in an inner room of the house *Held*, that the provisions of ss 25 and 26 of the Evidence Act apply to the circumstances of the case *Surendra Nath* v *Emperor* 16 A L J 478=47 Ind Cas
in an investigation
made
must be taken to be a
state
ns were put by the
Police officer himself or by somebody else in his presence But incriminating statements made by accused persons while in Police custody, in answer to questions put by a
excluded
from evidence unde
ror, 13 Cr
L J 106=37 Ind
the time
of making an incri
defend
a withdrawal of the plea can be allowed if the accused wishes to withdraw it *Emperor* v *Shuldan*, 28 Ind Cas 145=44 P W R 1914 Cr

The only evidence against the first accused was that in consequence of information given by him
property was produced
theft before the police
conviction of the first acc
not lead directly to the recovery of the property *In re Ippari ham* 3 M L T 333=7 Cr L J 398 Where a confession was made before an inves-

under s 25 of the Evidence Act *Lee Bein* v *Queen Empress*, L B
1892) 479
confession
Act, 1889
committed a
to a Police
was in a pla
was a conf
Evidence of

to a Police officer and
Act *Queen Empress* v *Ja*
made by an accomplice,
tender of a pardon by an Assistant Commissioner acting in his

S. 337, Cr Pro Code was held to be Empress, 10 P R 1895 Cr Section 25 confession made to a Police officer shall not be proved as against an accused person It does preclude an accused person from proving, on his own behalf, a confession made to a Police officer by another accused person tried jointly with him *Ibrahim* v *Emperor*, 12 Cr L J 79=9 Ind Cas 449 Confession to a Police officer of having given false information cannot be it and charged under s 182 and s 211 of *Nga Thet*, U B R (1897 1901) Vol I, 156 or rioting During , and, dmis l the information was not a confession under s 25 of the Evidence Act, and as against the person other than the informant, it amounted to an admission of evidence against them *Hazir* v *King Emperor*, 11 C L J 301=5 Ind Cas 305=14 C W N 593

Where a Police officer read over to the accused the statement which he (Police officer) had taken from others and then told him 'I know the whole thing now,' and the accused, thereupon made a statement in consequence of which he was arrested and his confession was duly recorded *held* that the confession nd voluntary and was perfectly *Hanmat* 3 Bom L R 401 accused person it is illegal or a confession which is open to grave suspicion of having been produced by ill treatment of the police *Khair Din* v *Crown*, 21 P W R 1907 Cr=6 Cr L J 266

ting statement made to a Police officer by an accused person in custody *Queen Empress*, v *Mathews*, 10 C 1022

admis

The evidence for the prosecution consisted of certain confessions made to the Police found some stolen cloth for the Police he confession was inadmissible under s 25 mentioned did not justify his conviction under the section *Empress* v *Nanhe Beg*, A W N 1883, 126

Admissions not amounting to confessions whether admissible when made to a Police officer Every statement is not a confession *Tiho* v *Emperor*, 19 S L R 6=A I R 1925 Sind 257 An incriminating statement to a police officer, though on the face of itself exculpatory is inadmissible *Emperor* v *Chandra*, 5 Cr R 15=49 B 612 89 Ind Cas 1046 The question whether a particular statement whether it be positive or negative, verbal or expressed by conduct, is or is not a confession, must be decided on the facts of each case *Umer Durang* v *Emperor* 86 Ind Cas 410=26 Cr L J 778=A I R 1925 Sind 237 After a fight in which death was caused, several accused drove certain cattle belonging to the deceased to the pound Two of them made a statement to a Sub Inspector of Police that they were in the

S. 26 fight and that the deceased had attempted to interfere with the seizure of the cattle *Held* that the statement did not amount to a confession in a much as it was only an explanatory statement of the circumstances under which the cattle had been seized and was not an admission of guilt but rather in the nature of a complaint against the deceased and was not therefore inadmissible in evidence *Jodal v Emperor* 81 Ind Cas 347 = 25 Cr L J 811 A I R 1923 Lah 232 A statement by one accused to the police that certain property which he produced had been given to him by two other accused who were charged with hi
as being an admission
Act *Emperor* v *She*
A statement made by
confession may nevertheless be used against him and more particularly it is
statement t
it amounts t
under sectic
making the
23 Cr L J
confined to
from which

Ram Gang v *Emperor*
nce Act does not say that
it excludes only confession

to them, there bei
which are statem
statements which
is charged Furt
leading to discovery whether such statements amount to confession
Emperor v *Kanaal Mali* 6 Ind Cas 161 = 15 Cr L J 713 = 41 C 601, *E*
v *Buddhu* 3 N I R
person to a Police
admissible in evidenc
14 Cr L J 252 A
amount directly or indirectly to an admission of any incriminating circu
is admissible in evidence, hence where the accused was found carrying a
box at night and when asked by a policeman on duty about the ownership
the box stated that it belonged to him the statement was held admissible
him
fes
by a
offence For such a purpose confession
other purposes would be admissible under s
(s 21), in his character of one setting up an interest in property in
in litigation, or judicial enquiry and disposal *Queen Empress* v
9 B 131

26 No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person

Confession by accused while in custody of police not to be proved against him

* *Explanation* —In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or in Burma or elsewhere unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 †

*This *Explanation* was added to s 26 by the Indian Evidence Act (Amendment) Act (III of 1891) s 3

† *See* now the Code of Criminal Procedure, 1898 (Act 5 of 1898).

nsed on section 149 of the Criminal **S.**

III of 1891, s 3 The rules cor

in British India

governing the

Queen v. *Babu*

er as rules

Procedure.

, 35 M 397

persons through any undue n

Per Garth C J in Queen

the rule seems to be that the

of coercion for extorting conf

s section deals with confessions made in the

the custody of an accused person that is,

presence of a Magistrate, in which case the confessing person has an opportunity of making a statement uncontrolled by any fear of the police *Per Ainslie J* in *In the matter of Hiran Miya,* 1 C L R. 21 *Section 26 is not to be read* as qualifying the plain meaning of s 25 *Queen* v *Hurribole,* 1 C 207, *Queen* v *Duman,* 12 W R Cr 82 Section 26, cannot be treated as an exception or proviso to s 25, there being no words to justify such an interpretation The criterion adopted in s 26 for excluding confession is the answer to confession made? If the ans the custody of a police offic be excluded from evidence, unless it v *Babu Lal,* 6 an accused person v. *Mathews,* 10 C makes no distinct substantive rule L J 290 This section does not make admission dependent upon knowledge of

M L T 1=13 Cr L J 352=35 M 397=14 Ind Cas 896 But it may be admissible in favour of a co accused *R* v *Pitamber* 2 B 611 *The general* rules applicable to confessions made by prisoners whilst in the custody of a police officer is contained in section 26 and the proviso contained in section 27 *Coomer Sahib* 12 M 153,

T to a Police Superintendent on the day ne...

M was arrested but neither of the other two accused was suspected of having

S. 26.

Magistrate under s 164 of the
evidence. *Nathu* v *Emperor*, A
incriminating statement made in
person while in police custody who is not produced before the Magistrate with a view to record his confession can be proved by oral testimony of the Magistrate when it has not been reduced to writing In the absence of any provision of law making it obligatory on the part of the Magistrate to record a confession it is not a matter required by law to be reduced to the form of a document. *Jograj* v *Emperor, supra*

Police custody —
Magistrate for recording
he had been, remained
should be treated as st
Lakshmya, Rat. Un Cr
her husband was taken into the custody of the police, a friend of hers accompanying her, and the policeman in charge of the woman left her with her friend for the purpose of procuring fresh horse, any confession made to the
policeman was away, would not be admissible
be regarded to have been in the custody
temporary absence of the policeman

while in police custody, was inadmissible under s 26 *Queen Empress* v *Singh*, 12 P R 1900 Cr = P L R 1900, 56 Cr As soon as an accused or suspected person comes into the hands of a Police officer, he is, in the absence of clear and unmistakeable evidence to the contrary, no longer at liberty and is therefore in custody within the meaning of ss 26 and 27 of the Evidence Act *Maung Lay* v *Emperor*, 25 Cr L J 381 = 77 Ind Cas 429 = A I R 1924 Rang 173 The meaning of the words ' in the custody of a Police officer " in this section, cannot be extended by implication to cases beyond what is absolutely necessary, that is, where the person is really under arrest or in strict supervision and is merely allowed to go for a few moments to converse with the person to whom the confession is made But where the accused is not arrested or
supervi
would
be ma
Mahon,

as against the accused
When an accused
confession, it is
under section 164
accused has been in custody If there is no record of that fact, it is

S.

Confessions made in police
made to a Police officer, but not n
Queen-Empress v *Ali Baksh,* S
26 M L J 352=15 Cr L J

which was made by the accused when not in Police custody is admissible in evidence *Harbans* v *King-Emperor*, 8 O C 365=2 Cr L J 811, see also *Raj Kumar* v
by an acc
his house,
back to pc

C L J 524=92 Ind
he was sent by the
which involved an
examination of the patient in private Two police men took the accused from the lock up to the dispensary At the dispensary the police men waited outside on the verandah while the accused was inside undergoing examination at the hands of the doctor, and during the few minutes that he was with the latter he made a confession *Held*, that the confession was inadmissible in evidence under section 26 of the Evidence Act, in as much as the accused remained in the

would be found in a heap of rubbish close to his house and after making the statement he took out the property from the heap in the presence of two police

27. constables *Held* that
admissible in evidence,
in the heap of rubbish
845=24 M L. J 352=15 Cr. L J 533

Where an accused person promised, while in police custody *to re tore the* stolen property, *held*, that the promise was an incriminating statement suggesting the inference that the a
'therefore' a confession
v *King-Emperor*, 20 P

A statement made
if it is an admission of
Queen Empress v *Jaccharam*, 19 B 363; *Queen Empress* v *Nana*, 14 B 260 F B

Confession made in the presence of a Magistrate A confession to a Magistrate while in Police custody is not inadmissible *Nazir Singh* v *Emperor* 9 Ind Cas. 806=27 Cr L J 134=A I R 1925 Lah. 557, *Queen* v *Manmohan* 24 W R Cr 33, *Queen* v *Shahabat*, 13 W R Cr 42; *Queen* v *Nilmadhab*, 15 C 595 A confession made by an accused person before the Administrator in Portuguese territory, who is not a Magist ... 26 of the Indian Evidence Act It is immaterial that the
confession was made was not himself
the case *Emperor* v *Mhalu Rana*, 26 Bom L R 706=1924 Bom 480

Police officer, meaning of The word Police officer in this section ...
"police-officer" in Native St
C 855=Cr Reg 22 of 1896,
22 B 235, *Q E* v *Sunder Si*
257 It is doubtful whether
Nazu v *Emperor*, 9 C W N 174=2 Cr L J 255 The words "police officer" in this section are used in the same sense in which they occur in section 25, and

L J 981 A Deputy Commi
Queen v *Hornbole*, 1 C 215 A v
is not a police-officer *Queen*
Anand Rao, 49 B 492=89 Ind C
Badan Singh v *King Emperor*, 2 P R 1909=7 P. W. R 1909; *Lu per*
Anand Rao, 49 B 642 A police officer in a French Territory is a police officer *R* v *Viraraghava*, 11 M L T 407 A police patel is a police officer *R* v *Rama Birappa*, 3 B 12

Magistrate The word 'Magi
Native States *Queen Empress* v
Kala, 22 B 235, *Queen Empress* v
Ind Cas 257, *R* v *Bhima*, 17 B
in the district in which he has been

Crown 8 P. W. R 1914
, see also *R* v. *Vahali Jetu* 7
n of the French Government is a
licate presence are admissible in
ted to the Magistrate exercising
Panch v *Nath Pillai* v *Emp*
Administrator is not a Magistrate
Emperor v *Mhabli*, 87 Ind Cas 20=26 Bom L R 706

Explanation Previous to the enactment of this explanation by Act III of 1891, it was held that a village Munsiff falls within the purview of this section and as such he was a magistrate *Empress* v *Ramanjiyya*, 2 M 5, see also *R* v *Ranga*, 10 M 295

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such

How much of information received from accused may be proved.

information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved

Principle
any circumstance
to be influenced b
T

been induced to say
ch of the confession as
35 notes (a) to R v
197 This section was
intended not to let in confession generally, but only such particular part of it as set the person to whom it was made in motion, and led to his ascertaining the
Per Straight C J in Queen Empress v
Certain statements, made under certain
, because the Legislature has, in such cases, considered them unworthy of credit, but the taint is removed by the finding upon search, of articles connected with the crime or other facts *5 Mad L Jour Article at p 80* "The prisoner's statement as to his knowledge of the

the admission of the exception to the general rule The fact discovered shows that so much of the confession as immediately relates to it is true" *Queen Empress* v *Babu Lal* 6 A 509 (513, 517)

supports other testimonial exclusions) and the tests worked out are often more or less artificial, but the principle underlies the whole body of rules If now a circumstance appears which indicates that the law's fear of untrustworthiness is unfounded and counteracts the significance of the improper inducement by demonstrating that after all it exercised no sinister influence, the confession should be accepted This is the theory of confirmation by subsequent facts,
about excluding
afess on otherwise
firm it in material
points, the possible influence which through caution had been attributed to the improper inducement is seen to have been *nil*, and the confession may be accepted without hesitation" *Wigmore* § 856

"But it should seem, that so much of the confession as relates strictly to the

L C J. states the reason for such admission thus "Because it leads to the

Origin of the rule The section 150 of Act XXV of 1861 (The Criminal Procedure Code) ran as follows. "When any fact is deposed to by a police

27. officer is discovered *by him* in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not as relates distinctly to the fact discovered by it, may be received in evidence" That section was thus altered by Act VIII of 1869 "Provided that when any fact is deposed to in evidence as discovered in consequence of information received from a person accused of any offence or in the custody of a police officer, so much of such information, whether it amounts to a confession or *admission of guilt* or not, as relates distinctly to the fact thereby discovered may be *received in evidence*" Section 150 of Act XXV of 1861 was re embodied in section 27 of the Indian Evidence Act *Queen Empress* v *Babu Lal*, 6 A 509

Scope of the section In *Mahmood J* held that s 27 can down in s 25, but only that c Cr 13, 9 W R Cr 16, 11 C 6 A 509 (F B) the question *Empress* v *Kuarpal*, A W N *J* said, at pp 520 521 "The question raised by this reference is one of interpretation of the Statute, and it may be briefly stated to be, *whether the* proviso contained in section 27 of the Evidence Act governs only the last preceding section, or also s 25 In order to arrive at a satisfactory conclusion upon this point, it seems to me advisable to trace the history of the rules contained in ss 25 26 and 27 of the Evidence Act, so as to ascertain how these provisions find a place in the Code of Evidence for India I have stated these facts as introductory of the observations which I am about to make that the rules contained in ss 25, 26 and 27 of the Evidence Act were not originally treated in British India as, strictly speaking rules of evidence but rather as governing the action of police officers and as matters of criminal procedure" Then stating that s 150 of Act XXV of 1861 was repealed and re-enacted by Act VIII of 1869 he went on "What was the exact change of language introduced by the new section? Why was it introduced? What was its effect? These are questions which must be considered ...

rendering the language of s 150 a mere ... immediately preceding section 149 which is expressly limited to confessions made by a person 'whilst he is in the custody of a police officer' they (sections 25, 26 and 27) are identical in the rules which they lay down, though the language has been improved by some verbal alterations which require no special mention except the omission of the word or from the clause 'a person accused of any offence *or* in the custody of a police officer' In the place of the omitted word, 'or' a comma has been substituted, officer' a parenthetical clause for confession would fall under the se remarkable and, if it has any ef proviso" But the majority of not only to section 26, but also to information given by the accus ... confession or not as related distinctly to the fact thereby discovered might be proved *Queen Empress* v *Babu Lal* 6 A 509 (F B), see also *Queen* v *Lagura* 19 W R 51, *Reg.* v *Jora Hasji*, 11 B H C R 242, *Empress* v *Rama Birapa*, 3 B 12, *Empress* v *Panchanan*, 4 A 198 *Ilu* v *Queen*, 11 C 635 *Queen* v *Kamalia* 10 B 595, *Queen* v *Nana*, 14 B 260, *Surendra* v *Emperor*, 16 ... 178, *Imaruddin* v *K E* 24, 22 C W N 213, *Superintendent* v *Bhajoo* ... C W N 106. That the view taken by *Mahmood J* in *Queen Empress* v *Babu Lal, supra* is the correct view was reiterated by *Lort Williams J* in *Superintendent* v *Bhajoo Singh, supra* at p 111 It has also been pointed out by ...

C. J. in a very recent case, that an anomalous position has been created by follow- **S. 2**

express mention of it is made therein, see also *Empress* v *Pancham*, 4 A 198 "The reasons given for and against the view that section 27 controls section 25 also apply with equal force to the question whether that section likewise controls lous that an

t receives a y leads to ient may be *g Emperor*, *ng Emperor* *hurm Dutt*, peration of tody of the custody of confession or not, as relates distinctly to the fact thereby discovered may be proved *Per Oldfield J* in *Queen Empress* v *Babu Lal*, 6 A 509 (F B) at p 513, 514 This police officer or by other wn in these two sections 1 of it in accordance with nly to the extent of so stinctly relates to the fact *Per Straight C J* in *Queen Empress* v *Babu Lal* 6 A 509 (F B) at p 544 But *Mahmood J* said in the same case at p 541 'I hold that the rule laid down by the Legislature in s 24 (read with s 28) of the Evidence Act, is a rule absolutely independent of the question of discovery or non discovery to which s. 27 relates, that the state of things in India has induced the Legislature to frame in section 25, an equally absolute rule in regard to confessions made to police officers which are presumed to have been made under conditions prohibited by s 24 that the s prohibited the admission s by the accused whilst in rules but only the last rule *so enunciated, is made subject to the saving clause contained in section 26* rendering confession admissible, if they are not made to the police officer but to a third person, 'in the immediate presence of a Magistrate' which affords a guarantee that the confession was not extorted, that the proviso contained in section 27 is not intended to qualify the absolute rules contained in ss 24 and 26, which relates rsons whilst the In short, I hold the same as the rule laid down by *Lord Eldon* in *Harvey's Case* 2 East P C 658 and that improperly question of

S. 27. in so far as they do lead to such discovery are properly admissible. Wh... be the nature of the fact discovered that fact must, in all cases be itself r... to the case and the connection between it and the statement made must... been such that that statement constituted the information through which the... covery was made in order to render the statement admissible. Other state... connected with the one thus made evidence and thus immediately, but... necessarily or directly, connected with the fact discovered, are not admis... That a witness says that a plan was prepared in his presence is not suff... reason for admitting the plan in evidence unless the witness also says th... his own knowledge the plan is correct. *Rex* v *Jora Hasji*, 11 B H C... 242. In a very recent Calcutta case *Mr Justice C C Ghose* said: "It is clear beyond all dispute that section 27 is one of those sections which con... the three earlier sections namely, sections 24 ... 26. In the ... police officers or whe... confessions are in... have just mention... may in certain circumstances lead to the discovery of the facts, etc in co... quence of the information received from the person in custody. Therefore first thing that has got to be ascertained before section 27 of the Evide... ther or not the information, such as t... other facts came from a person in cu... ation has not come from a person in... 27 would hit the admissibility of s... statement in evidence and under no circumstances that I can think of ha... regard to the provisions of the law, is such a statement admissible in evider... *Durlou* v *Emperor* 36 C W N 373(375).

No part ... a confession not written b... to by is adm... either against ... unless it has to the discov... Act, *Cro... Shuttlam* 14 P W R 1914 Cr (F B), *Duarla* v *Emperor*, A I R 1... Oudh 119-14 O L J 210.

Section 27 of th... deal with what may... fession ... J 631. Sections 24... the proviso made fo... *Po* 2 I B R 108 ... *Nga Sanya* v *King* ... 41-4 Ind Cas 759, *Empress* v *Akarpala*, A W N 1882, 225, ... v *Emperor supra*.

in po... of the ... 00 Cr ... P R 1900 Cr. Wher... wh... to the facts discovered ... was given while th... police custody. *Ganja* v *Empress* 30 P R 1895 Cr.

Bald evidence introduced through the mouth of a prosecution w... prove the confession of an accused under cover of section 27 ought to ... very little credence by the Court more especially when the accused ... charged with grave offence as an attempt to murder and particularly ... more direct evidence to prove the same points are available to the ... and which they do not take care to ...

in the case but indeed receives corroboration in respect of many points, then the confession should be held to be true as implicating the person making it unless he can make up a story to the contrary It is not necessary that the confession of an accused should receive direct corroboration as to the fact that the accused was concerned in the offence It is sufficient that there is such corroboration of the confession as to indicate that the accused had such knowledge of the circumstances of the offence as would suggest his taking
1=68 Ind Cas 17=9 O L. J.

whether by reason of s 26 or 25

information is set the pol
Aminuddin v *Emperor,* 15 (
Cas 321 Section 27 of
also s 24 all three of which

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This section has got nothing ... fact discovered is or is not relevant ... I R 1929 Lah 344 (F B) Recoveries alc ... *Sham*

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force, independently of the confession, would be admissible in evidence *In re Choda Achanna,* 2 Weir 735=3 M H. C 318

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S. 27.

is a result of it. That is the present case. *It cannot be admitted in evidence because the man was not in custody, which of course is thoroughly absurd.* [illegible]

There seems to me to be nothing in section 24 or section 25 to prevent evidence being given 'In consequence of something said by the accused I went to such and such a place and there found the body of the deceased'. In cases under section 27 the witness may go further and give the relevant part of the confession."

Any fact. The fact discovered by a statement must be a material thing and not a mental state induced in another person by that statement. *Emp.* [illegible]

to show how the fact that was discovered is connected with the accused so as in itself to be relevant evidence against him." *Per Straight C J* in *Queen-Empress v. Babu Lal*, [illegible] *dar v. Queen-Empress*, 11 C. 635. The test [illegible] information received from an accused person in [illegible] 'Was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact?' *5 Mad L Jour* p. 80 (*Article*).

Deposed to. It is necessary, in order to bring a case of discovery within section 27, that the fact discovered should be deposed to by the person to whom the statement was made. *5 Mad Law Jour* p. 80 (Article).

Discovered. [illegible] meanings, firstly, [illegible] known before to [illegible] something, the exist[illegible]
It is in the latter, and not in the former, sense that the word is employed in s. [illegible] of the Evidence Act, and this will be made evident upon considering the principle underlying the section. *5 Mad L J* pp. 80, 81. From this definition of 'discovery' it follows that simple statements, or statements made while pointing out the scene where the crime was committed or while producing articles, and showing the connection of the place or thing with the offence, are not rendered admissible under section 27, but only statements preceding the finding, upon search or inquiry, of articles or other facts connected with, or referable to the crime. *Ibid* see also *R. v. Jora Hasji* 11 B. H. C. R. 242, *R. v.* [illegible]

[illegible] re already known to persons other than [illegible] *Latif*, 49 C. 167 = 25 C. W. N. 788. The word discovered is very important. The test is that the fact discovered must be discovered in the sense, that the proof of the existence of the fact no longer rests on the credibility of the accused's statement but rests on the credibility of the witnesses who depose to the existence of the fact. The rest of the

information is not admissible But if the accused wishes to challenge the veracity of the statement that it was on his information that the thing was discovered he

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words deposed to is concerned, they are still governed by the provisions of s 27 which must be construed as favourable to the accused as possible for it is a section which makes an exception against the accused contrary to the general sections, namely 25 and 26 which are in his favour *Karam Din* v. *Emperor,* A I R 1929 Lah 338

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344 (F B)
1929 Lah 338
the word 'information' cannot be used as synonymous with the word 'statement' There is no reason why the word 'information' should have been used instead of the word 'statement in the section if by information' statement alone was *intended The word information' as distinct from the word 'statement' con*notes two things namely a statement or other means employed for imparting

that information' also includes knowledge derived by the person informed from the informant'

Statements made while p
sion of murder made to a
soner's saying "that is the pla
11 B H C R 242, *Empress* v *Rama Birapa* 3 B 12

If the prisoner himself
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3 B 12 (17)
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Queen Empress, 11 C 635

27. In consequence of information. "Whatever be the nature of the fact discovered, that fact must in all cases, be itself relevant to the case, and the connection between it and the statement made must have been such that the statement constituted the information through which the discovery was made, in order to render the statement admissible" *Per* v. *Jora Hasji*, 11 B H. R 242 It

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property. In the cours
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out the spot to the effect that he had buried the property there It was contended that those statements were n
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ment said "As regards s 27,
the property, it is said, was not discovered in consequence of the information given by the accused to the police, but by the act of the accused himself on the

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Courts in dealing with proximate and remote cause of damage, namely, whether what followed was the natural and reasonable result of the defendant's act It being of great importance that the law should, in a matter of such common occurrence, be distinctly settled, I am glad that my doubts have been removed, and this Court is not divided in opinion But to avoid our judgment being applied to circumstances beyond its meaning and beyond the policy of the law to statements that cannot be regarded as proximate causes, I would refer to Lord *Blackburn's* decision, where he discusses *Lord Bacon's* Maxim "It were

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Q B at p 267,
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v. *Babu Lal*, 6 A
R 51, where it was held that
ct of the party, even there it was
he information But in *Empress*
a contrary view In *Empress* v
laid down a distinction between
a discovery by the act of the party, and one from his information See also *Queen Empress* v *Babu Lal*, 6 A 509, *Queen Empress* v *Kamalia*, 10 B 595

The view as expressed in *R.* v *Nana*, 14 B 260, has also been adopted by the Calcutta High Court *Legal Remembrancer* v. *Chema Nashya*, 25 C. 413, *R* v *Pagree Saha*, 19 W. R Cr 57.

The fact deposed to as discovered in consequence of information received or confession made to the police by an accused person must be a fact relevant to the case in which the evidence is sought to be given if it is sought to be admitted in evidence under section 27 *Gokul Chamar* v *Emperor*, 105 Ind Cas 683=28 Cr L J 791=6 Pat 611 If arms are recovered in consequence of information supplied by the accused, the statement made by them are, admissible under section 27 of the Indian Evidence Act *Ali Ahmed* v *Emperor*, 1923 Lah 134

From a person When a fact is discovered in consequence of information ... sons charged with an offence, and when others ... ould not be treated as discovered from the ... ould be deposed that a particular fact has been

information as relates distinctly ... v *Ram Churn*, 24 W R Cr 36 It ... *J* observed "I ... where two person ... or 'they said that,' ... that both the persons should speak at once, and it is the right of each of them to have the witness required to depose ... individually used And I may ... constable as having been made by ... covered a certain fact or certain ... on the witness so that there may be ... In dealing with statements of this ... to the discovery it is of the essen... should be precisely and separately state... this point, and the witness refused ... paid no attention to it" See also *Rama Singh* v *Crown* 50 P R 1915=7 Cr L J 12 Where all the accused persons jointly pointed out the place where blood stains were found and subsequently the place where the dead body of a person was discovered buried such evidence is not admissible at all against any of the accused unless it can be shown who made the discovery first *Faquira* v *Emperor* A I R 1929 Lah 665 *Adam Khan* v *Emperor*, 101 Ind Cas 488=28 P L R 187=28 Cr L J 456, *Ditto* v *Emperor* A I R 1931 Sind 151, *Emperor* v *Shivaputraya* A I R 1930 Bom 244=32 Bom L R 574

In my opinion section 27 of the Evidence Act ought to be strictly construed

were in the custody of the police it is quite clear that the statements of the persons other than the first person who made the statement can not be used in evidence The statement made by the first individual under section 27 and in the circumstances described therein may be treated as evidence against him but it is not allowable under the provisions of the law to treat the evidence of the other persons who may have made statements of the description referred to in section 27 as evidence admissible under the provisions of that section This

persons who m...

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based on the ... police that they are untrustworthy ... rebuts that pre[sumption] ... subsequent discovery ... a guarantee of ... If therefore two ... of both ... subsequent to the discovery are irrelevant. *Crown* v. *Sulleman*, 10 S L R 7 = 17 Cr L J ... 36 Ind Cas 174.

Where a material fact, for instance, the manner in which a theft was committed, has already been discovered by some other means, an accused's subsequent statement relating to the same fact, while in police custody, is not admissible against him under s 27 of Act I of 1872. *Mannu* v *Emperor*, 9 Ind Cas 232 = 12 Cr L J 35 = 3 P W R 1911

Where the Police succeeded in discovering property in consequence of information received from an accused, it is not competent to the Police to replace the property in the place where it was discovered, and to ask the other accused to produce the property, because there is no further discovery under s. 27 Evidence Act as against the other accused *Queen Empress* v *Bishya*, 2 Bom L R 1089.

Accused in Police custody. The words used in section 150 of Act VIII of 1869, (which is re enacted as section 27 of the Evidence Act, 1872) are "a person accused of any offence, or in the custody of a police officer." The only alteration in section 37 is the omission of the word "or" before "in custody" but this only shows that the operation of the proviso is restricted to information from an accused person in custody of the police, and does not apply to information from accused persons not in custody of the police *Per Oldfield J* in *Queen Empress* v *Babu Lal* 6 A 509 (513) The meaning of the words in the Evidence Act ... appears ... it is n... in custo... person ... (b) in custody but not accused besides under the circumstances mentioned ...

and is ... limits ... *Emperor* ... tion in ... under the "(... when the circums... custody person but not accused (c) accused but not in custody, notwithstanding any fact of discovery in consequence thereof

"(2) A confession made to a police officer by a person who is at the time (a) neither accused nor in custody (b) in custody but not accused (c) accused but not in custody, is wholly exc... in consequence thereof A con... is not in custody of the police, could not fall under the purview ... the custody of a police officer (*Queen Empress* v. *Babu Lall*, 6 A 509, ... Mahmood J and see per Oldfield J p 513 ...) ...

became senseless" On receipt of the information the police went to ...

and found the corpse. *Held* that the statement to the police was not admissible S. 2

tion contained in it unless the person who confesses is a person accused of any

King Emperor v *Nga Aung Ba*,
402 = 35 Ind Cas 962. For the
does not necessarily mean detention
or confinement, but submission to custody by word or action under s 46(1) Cr Pro Code may be taken to amount to custody Where the accused, who was suspected after the first report had been made, made a statement and pointed out the dead body to the police and his name was subsequently mentioned in second report *Held* that the accused was not in any kind of custody at the time he made the statement and that it was consequently not admissible under s 27 *Jalla* v *Emperor*, 131 Ind Cas 93 = 32 Cr L J 650 = A I R. 1931 Lah 278

So much of the information as relates distinctly to facts thereby dis
as to the extent of the informa-
he first view is in favour of
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discovery of the fact ...

Superintendent v
'Relates to' means
distinctly' means
"clearly' or 'definitel ... r 'undoubtedly'
In *Queen* v *Pagaree Singh*, 19 W R Cr 51, the accused stated to the Sub-Inspecte ... e deceased) by the neck, and pushed ... a plantain tree, and broke
that the woman then and there
remove the body took from it a
concealed in the neighbouring jungle '
In consequence of this information, the accused was taken to the jungle pointed out by him, and he then produced from a concealed place, the necklace and

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be proved against the accused So it is clear from this case that the Court in this case followed the first view But *West J* in *Reg* v *Jora Hasji*, 11 B H C R 42, took a
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S. 27. this would
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prisoner has said, 'I placed a sword or knife in such a spot,' when it was found that too, though it involves an admission of a particular act on the prisoner's part, is admissible, because it is the information which has directly led to the discovery, and is thus directly and independently of any other statement connected with it But if, besides this, the prisoner has said what induced him to put the knife or sword where it has been found, that part of his statements it has not *furthered, much less caused,* the discovery, is not admissible' T

submitted that the case of *Queen* v *Pajaree Saha*, 19 W R 51 is not reconcilable with the principle laid down in *Reg* v *Jora Hasji*, 11 B H C R 242, *Empress* v *Rama Birapa*, 3 B 12, *Queen Empress* v *Babu Lal*, I. L R 6 A 509 ... *Shikdar* v *Queen Empress* 11 C 635; *Queen Empress* v *Commn Sahib* 13 M 153, *Queen*
Adu Shikdar
to the assault
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discovery
refers to his taking the ornaments and concealing it in the jungle" 5 *Uni Law Jour Article* 12

In *R*
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counsels and at the Bench at the o of very eminent Judges of the High Courts in India *A I R 1929 Journal* 101

In *Sukhan* v *Emperor*, A I R 1929 Lah 344 (F B) the question of the admissibility of an incriminating statement made by an accused while he is in the custody of a police officer was considered The prisoner in that case was tried for the murder of a boy who
his disappearance but the ornaments
recovered from a well At the trial ... Sub-Inspector of ... fact that in consequence of information received from the prisoner he had recovered from one *Illah Din* silver *Karas* (bangles) which were proved to be the *Karas* which the boy was wearing when he was last seen The witness was then asked to disclose the information communicated to him by the accused which caused the discovery of the fact deposed to by him, and he stated that the prisoner had during the investigation, made the following statement "I had removed the *Karas*, had pushed the boy into the well and had pledged the *Karas* with *Illah Din*" The trial Ju
Tek Chand and *Aga Haidar J J*
referred to the Full Bench, the
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S. 27

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cludes, not only the physical fact which can be perceived by the senses, but also the *psychological fact or mental condition of which any person is conscious. It is in the former sense that the word is used in section 27* The phrase 'fact discovered' used by the legislation *refers to a material and not a mental fact* The fact discovered may be the stolen property, the instrument of the crime, the corpse of the person murdered or any other material thing, or it may be a material thing in relation to the place or the locality where it is found Taking the present case as an illustration, the fact discovered is, not the *Taras simpliciter*,
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fact. This condition follows from the phrase discovered in consequence of information' and also from the expression thereby discovered used by the

The information

h the fact As I have pointed out, the wording of the section shows that the requirements of both the conditions specified above must be satisfied before an incriminating statement can be received in evidence These conditions when combined lead us to the
mation is provable which was the
the fact Anything which is

it does, an exception to the general rule
, must receive a strict construction but also conforms to the principle upon which the exception is founded The real difficulty arises in applying the test to the facts of a particular case To illustrate this
of a confession
be separated
by the accused
of judicial opinion, and it has been laid down in some judgments that the

S. 27. whole of the statement can be given in evidence, and that it is not competent to the Court to split up the language used by the accused in conveying the information, to strike out some words which are objectionable and to admit only those which relate strictly to the discovery. There is considerable force in this argu . . . thrown round an accused person . . . dependent upon the . . . nuity of . . . composing the sentence which conveys the information. Suppose a prisoner on being asked about the weapon of offence says "I buried a hatchet in my field. I killed A with it" Now, it is indisputable that the recovery of a hatchet from the field renders only

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be let in as soon as it is amalgamated with the admissible statement. In determining the extent of the statement, which should be provable on the ground of its being the proximate cause of the discovery, the Courts must have regard not to the composition of the sentences in which the statement is concluded but to its substance

"The information received from an accused person is usually proved by quoting the words used by him, and this is certainly desirable in order to ensure accuracy But it is not always possible to observe this salutary rule If the witness, to whom the statement was made, has not reduced it to writing and does not remember the exact words used by the accused, he can depose to it only in his own language And there is no valid reason why he should not be required to do the same, if the admissible portion is so mixed up with the inadmissible one as to render it necessary to give the former in the words of the deponent" *Regina* v *Gould*, 9 C & P 361, see also *Santa* v *Emperor*, 19 Ind Cas 190, *Tara Singh* v *Emp* . . . *Gaure* v *Empress*, 28 P R. 1894 Cr , *G* . . . P L R. 1918, *Gula Khan* v *Emperor*, . . .

In a recent *Calcutta case*, . . . art is concerned the more . . . he section and it appears to be . . . to go in as . . . correct view of . . . think it can . . . containing a . . . drawn betwee . . .

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. . . *Emperor* v . . . r v *Mela*, 10 Lah L J. 531 = . . . A I R 1931 Pat. 115 = 10 *Pat.* 153 the . . . n that case the accused said to the Police . . . was contended that the Sessions Judge wrongly admitted this statement in evidence and that what should have been admitted in evidence amounte . . . dead body will be found in the meline" . . . The question then what was the . . . police. . . . former As I said in my opinion, it was undoubtedly couched in the term of . . . statement which is therefore admissible in evidence To accept the argument of the learned advocate as well as the view expressed in *Superintendent* v *Bhajoo*

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fessional portion thereof given by the prisoner which relates to the fact "includes not only the concrete thing discovered by the investigating officer, but also its
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Emperor, A I.
han v *Emperor*,
of the majority
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the well is wholly inadmissible, as it relates to a separate matter and had no connection with the possession of the ornaments by *Alla Din* which was the only fact discovered. Nor do I think that the statement that the prisoner had removed the *karas* from the boy can be regarded as immediate cause of the discovery A man may remove the ornaments from the boy, but he may not give them to

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ju v *Emperor*,
(1914)
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whole confession of a prisoner
here the confession includes a
the offences charged that part
the discovery of the weapon
Sogiamuthu Padayachi, 50 M.
. *Bhai* v *Emperor*, A I R 1926

expressed by *Horle* and *Jalal JJ* in the minority judgment of *Sukhan* v.

27. I... A I R 1929 Lah. 344 (F B) as well as in *Harnam Singh* v *Emperor*, ... So it is clear that the Full Bench case in ... English Common Law ... the section while the *Madr*... *Iforle* and *Jalal* JJ. ... interp... and ... *Ifor*... Act ... Eng... useful ... effect of section 27, it must ... where is in Eng... a confession made to a police officer by a person in custody is admissible in evidence, provided the prosecution first sh... it has not been obtained by any improper means such as coercion, ... section 26, Evidence Act, proh... confession ... it comes within the ... on the subject pr... rarely arises In ... once it has been ...

... *Prof Wigmore*. "It will be observed ... confession as relates strictly to the ... words, the confirmation admits the part confirmed, and ... falls something short of the logic of the case, for a confirmation on material points produces ample persuasion of the ... the whole It can hardly be supposed that at certain part ... began, and that by a marvellous coin... which a subsequent search (more or ...) confirm Such a differentiation is purely ... mental processes, either of the confessor or of the ... distrusting any part, we should cease distrusting all" *Wigmore* § 857

"If the exclusion of the confession rests altogether upon the probability that the confession is untrue, as we have seen, then if the prosecution produce evidence tending to show and sufficient to warrant the jury in finding that it is true, it ought to be received, for in such cases the reason of the exclusion is done away with All the Courts recognize the propriety of this reasoning, but illogically decline to pursue it to its logical results If one, accused of larceny, being put to torture, confess the crime and produce the goods from his own possession or disclo... their concealment, and they are afterwards found in the place ... evidence the fact of the finding of the ... you may not in the same ... the prisoner's statement that he deposited ... But, I assert, in the case ... tends to corroborate ... declaration ...

confessed to be ... admissible

A statement ... under section 27 ... only

The words ... so much of such ... distinctly to the ... information received, may be ...

175 Such portion of the confession made to the ... to the discovery of any fact are admissible under section 27 of the ... *Jajana Dhanuk* v *Emperor*, 5 Pat 63 = 93 Ind Cas. 884 = 7 Pat L T ...

e also *Emperor*

of Police that
committed
Held that
were all parts
of one transaction and the words used by the accused were admissible in evidence *Bahadur* v *Emperor,* 88 Ind Cas 7=26 Cr L J 1063=A I. R 1925 Sind 289

A statement made by an accused may be proved under section 27 of the Indian Evidence Act, 1872, so far as it relates to any material fact discovered in consequence,
statement was made
Naina Malai
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direct effect of
y *Ramasami Boyan, In re,* 11 L W 8=54 Ind Cas. 479 The accused made a statement during

who is afterwards proved to be a dacoit is not the
aning of s 27 of the Evidence Act. The test of
of the Evidence Act, if an information received from an accused person in the custody of a police officer, is whether the fact so discovered was a direct natural and necessary consequence of the information so received *Salam* v *Emperor,* 14 N L R 192=43 Ind Cas 111=19 Cr L J 79

Under s 27 it is legitimate to record evidence that an accused person said "I will point out certain property" if such statement leads to a discovery, but it
cused said 'I will point out
are of the booty in the dacoity"
W R (1918) Cr =44 Ind Cas
The King Emperor, 105 P L R, 1908=21 P W R 1908 Cr

It is not all statements made by an accused person connected with the production or finding of property
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27. *Emperor,* A !
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and very probably b ... by the consideration as observed by
Fforde J in *Hornam*
Act has been drafted,
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useful guides to the interpretation ... where is in Englan
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that he stole them and concealed them at the place, if he make this statement
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distinctly to the fact which is deposed to as discovered
information received, may be proved *Illahibux* v *Emperor,* A I. R 19
175 Such portion of the confession made to the investigating officer as lead
to the discovery of any fact are admissible under section 27 of the Evidence Act.
Jagan a Dhanuk v *Emperor,* 5 Pat 63 = 93 Ind Cas. 884 = 7 Pat L. T 390 = 27

different purpose in s 27 When the Legislature wished to make an exception to the absolute rule, it did so by a separate section, namely section 28, which declares under what circumstances a confession rendered irrelevant by s. 24 may become relevant Statements that are irrelevant under one section of the Act may be relevant under some other section of the Act No confession made under inducement, threat or pr
provided for by s 28 *King E.*
a confession must be taken

in the confession which it disbelieves
Cr L J 785

Did inducement come into existence at all The inducement is almost always addressed to the person in question, and thus becomes known to him as a
on It was intended to be
for him as an induce-
dressed to the person, but
mine whether it was in fact present as an inducement? This will of course be a pure question of fact for the Judge, and no ruling can serve as a precedent, the conduct and language of the person will show whether he had the inducement in mind The important
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Was the inducement brought to an end,? "Here" says *Prof Wigmore* ' five questions may arise (1) Must it be shown clearly that an improper
Are there any situations
, and thus the inducement,
n? Can the same person who has offered the inducement put an end to it so as to make admissible a confession afterwards made to himself? (4) Are confessions made subsequently, but to a person different from the one offering the inducement, to be treated as not made under the inducement, or must it be shown to have been negatived by the second person? (5) What suffices, in general, to end the inducement? *Wigmore § 855*

Subsequent ending of improper inducement There must be strong and cogent evidence that the influence of the inducement really has ceased In *R v Sherrington*, 2 Den C C 123, *Patteson J* said ' There ought to be strong evidence to show that the impression, under which the first confession was made, was afterwards removed, before the second confession can be received I am of
lered to have made the
first, the interval of
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ld forgive her if she
was taken before a Magistrate and, no one

receivable in evidence, as the promise of the mistress must be considered as still operating on the prisoner's mind at the time of the statement, but that if the mistress had not been present it might have been otherwise *R v Hewit*, 1 Car & M. 534; *R v Rue*, 13 Cox Cr 209 So the general principle is universally conceded that the subsequent ending of an improper inducement

S. 28. must be shown, it is as umel to have continued until the contrary is shown *Wigmore* § 855, see al o *R* v *Cleverton*, 2 F & F 833 This inducement may be removed by sub equent caution *R* v *Hornbrook*, 1 Cox Cr 51 *R* v *Ha r* 1 Cox Cr 361, *R* v *Collier*, 3 Cox Cr 57; *Benj m's Case*, 1 Ir Cir C R 117 *R* v *Bryan*, Jebb Cr 157, *R* v *Howes*, 6 C & P. 101

Can inducement be irrevocable? The next question raised by *Pr Wigmore* is whether there is any situation in which it cannot be shown that inducement, once offered has been brought to an end? In answering th question he said "There is nothing permanently irrevocable in an inducement, whether it has been brought to an end is, as all concede, alwa open to inquiry" *Wigmore* § 855

A person who has offered inducement can put an end to it. It has n been decided specifically whether the same person may put an end to an induc ment of his own creating But there is no reason why he cannot *Wig* § 855 Where a Magistrate told a prisoner that if he did not strike the fat blow and would tell all he knew, he would u e his influence to pro ect him b afterwards communicated to the prisoner a l tter from the Secretary of Sta declining to give pardon
C & P 221 *Nort I*
think that this declarati
with Magistrate after
given by the Coroner mu t be taken to have completely put an end to all th hopes that had been held out"

Inducement offered by one person and confession made to another "There is on principle no reason for assuming that a promise or a threat made by one person will be treated by the accused as equally to be attributed to some other person who had no share in the other s conduct and shows no power or inclination to corroborate his promise or threat Neverthele s, the inducement may on the facts, prove to be in effect the second person's as much as the fir one s. It should thus be a ques ion to be determined in each ca e, no general rule can be laid down *Wigmore* § 855, see also *Carty's Trial*, (Ire) 26 How St. Tr 889 *R.* v *Bell*, *McNally Ev* 13 *R.* v *Tyler*, 1 C & P 129, *R* v *Clewe* 4 C & P 223

What suffices in general to end an inducement If the impression produced by the promise or threat is clearly shown to have been removed—*e g*, by lapse of time or by an intervening caution given by some person of superior (but not of equal or inferior) authority to the person holding out the inducement—a confession subsequently made will be strictly receivable *Phip Ev*, ... Where a pri oner confessed some r

ort *In* 107 *R* v *Bate* 11 Cox ...

Magistrate had told the prisoner that, if he would make a disclosure, he do all that he could for him The prisoner after he was committed made a statement to the turnkey of the gaol who had held out no inducement to him to

as the ir
caution
superior

prevent the superior from carrying his promise into effect' *Russ Cr p 2181*, see also *R* v *Gilham* 1 Mood 136, *per Littledale J* Where a collecting pan-

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removed therefrom *Emperor* v *Ganesh*, 74 Ind Cas 261=50 C 127, *Queen* v *Luchoo*, 5 N W P 86, *Reg* v *Navroji*, 9 B H C R 358

In the opinion of the Court It is for the Court to decide whether the impression caused by inducement threat or promise has been fully removed So where promises or threats have been once used of such a nature as to render a confession inadmissible, all subsequent admissions of the same or like facts will be rejected, unless from the length of time intervening, from proper warning of the consequences or from other circumstances there be good reason to presume, that the delusive hope or fear which influenced the first confession has been effectually dispelled *Joy on Conf* 69, *R* v *Hewett*, C & Marsh 534, *R.* v *Cooper*, 5 C & P 534, *R.* v *Rusa*
it appears to the satisfaction
away with before the confession w
Ev § 221 So, where the prisoner had been induced, by promises of favour to make a confession, which was for that cause excluded but about five months
by two Magistrates that he
ade a full confession this
Case, 5 Halst 180 In this

the length of time intervening or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears under the influence of which the original confession was obtained were entirely dispelled *Guild's Case*, 5 Halst 180, *R.* v *Cheverton* 2 F & F 833 But otherwise the evidence of a subsequent confession made on the basis of a prior one unduly obtained will be rejected *Com Harman* 4 Burr 269 In the absence of any such circumstances the influence of the motives proved to have been offered will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will therefore be rejected *State* v *Roberts* 1 Dev 259, *Greenl Ev* § 221 If there

2 Q B 12=62 L J M C 93=17 Cox Cr 641, See also *R* v *Rose* 18 Cox Cr 717=67 L J Q B 289 *R* v *Smith* (1897) *Roscoe Cr Ev* 47

Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc

29 If such a confession is otherwise relevant it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or

. 29. when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

Rule criticised "The rule of procedure" says *Mr. Chamberlayne* "which rejects so-called 'involuntary' confessions induced by threats or promises by those in authority is based entirely upon an [illegible] In reality, like other rules of procedure, it is [illegible] tive law controlling the normal exercise of the [illegible] As at present conducted it proceeds upon [illegible] and even, as has been suggested, frequently operates against him by substituting private, irresponsible investigation for responsible official inquiry. The rule assumes that those in authority over legal criminal proceedings ought, in the public interest, to refrain from placing pressure upon the free will of their prisoners. What injur [illegible] of private persons is none [illegible] actually a person in [illegible] he sees fit in connection [illegible] by way of hope or fear be not one as to a benefit or injury connected [illegible] proceedings it is not important that it be held out to the accused by one in authority. Neither situation brings into operation the special work of procedure or substantive law in this connection. This consists in rejection without weighing the statement itself."—*Chamberlayne's Ev* § 1538.

Scope Confession procured by deception or under promise of secrecy are not, on this account alone, rendered inadmissible. This, of course applies to confessions which otherwise satisfy the conditions prescribed for admissibility [illegible] of obtaining a confession [illegible] regard to it *R* v *Shaw* [illegible] onfession inadmissible. It [illegible] a confession obtained by fraud or [illegible] *Mc* [illegible] been [illegible] however [illegible] the staten [illegible] merely bec [illegible] Magistrate, [illegible] even though [illegible] the

Promise of secrecy "If no inducement has been held out relat[illegible] the charge," says *Mr Taylor*, "It matters not in what way the confession has been obtained" *Taylor* § 881. It is not necessary that it should have been the prisoner's own spontaneous act. So it will be received, though it were induced by a solemn promise of secrecy, even c[illegible] *R* v *Shaw*, 6 C. & P 372; *Com* v *Knapp*, 9 Pick 496, (5[illegible] the prisoner had been committed on a [illegible] him, 'I wish you would tell me how you murdered the boy, pray [illegible] prisoner said "Will you be upon your oath not to mention what I tell you. The other prisoner went upon his oath, and he hoped, if he told that he might [illegible] It was [illegible] made a statement [illegible] inadmis-

S. 2

s. 1538 (a)

Deception A free and voluntary confession is not inadmissible because it was originally obtained by an artifice practised on the accused by officers having been in charge, or by other persons, if the means employed were not calculated to cause him to make an untrue statement. *People* v *McMohan*, 15 N Y 384 So it is no ob
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gave it to the visiting *Garrow B*, held that the
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Act expressly says that a confession made in consequence of deception is not to be excluded" *The question, h*
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29 always been in regard to confessions made by a person when under arrest to those in authority over him, they have not gone so far as to exclude them simply because they were procured by deception provided they were voluntarily made. They are careful, however, to leave the credibility of the witness who practised the deception and the circumstances under which the confession was made to the consideration of the jury." In America it has been held that a confession procured by a person who by falsely representing himself to be an attorney obtained the confidence of the prisoner, was inadmissible *Cotton* v *State*, 87 Ala. *Jones* v *Commonwealth*, 77 S W 63 "A man who will deliberately ... says *Underhill* "ingr
betraying the
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confession of
the downfall of
of a very high
thing is really g
evidence" *In*
where *Itony J* said
but as a matter of law
called forth an admissi
Cr 228

False personation A confession is none the less admissible because ... ter of the person to who ...

sympathetic fellow prisoner He may ... the admissibility of the confession is ... *Li* § 1538(b)

Confessions over heard statements made while asleep A person wh... may over hear the remarks of a prisoner made to himself or to another per... as his wife or an attorney or spiritual adviser, who is incompetent as a witne... to privileged communications may testify to what he has heard *Rex* v *S...* 6 C & P 510 see also *Queen* v *Sajina* 7 W R Cr 56, *R* v *Gardner* 11 Cr A R 265—But not to incriminating declarations made during sleep for the declarant is then unconscious of what he was saying *People* v *Robi...* 19 Cal 40 (*Am*), *R* v *Elizabeth* Kent Sum Ass 1839, *Gore* v *Gibson* 13 M & W 623, *Best Ev* 11th Ed 511 A confession constituting a part of a prayer may be proved by one who overheard it, though he may not be able to prove the whole prayer *Woodfoll* v *State* 85 Ga 69 (*Am*) A confession mad... to another prisoner, under the erroneous impression that one prisoner cannot testify against the other, is not for that reason inadmissible *State* v *Mitchell*, Phil (N Car) p 447 (*Am*) A confession to a fellow prisoner in jail, procured by the latter's spiri... not
to be rejected
v *State*, 55 Ga
was again char...
cating *H* were read by a sergeant to the three together, purposely to ... the admissions, though evidence of what then took place is strictly admissible the trial Judge, if satisfied of such a purpose ought to exclude it *R* v *Gardner* 11 Cr A R 265, *R* v *Grayson* 16 Cr A R 7, *R* v *Pilley* 16 Cr A R 1... *R* v *Turner*, 19 Cr A R 191

Misleading inducements Illegality Not only may deception treachery any unfair treatment" says *Mr Chamberlaine* "be employed for the attainment ...

reliable and trustworthy, merely, because obtained by means of an ... violation of the prisoner's privilege against compulsory self incrimination is

entirely without support in legal analogy The confession, viewed as extorted by one act of duress, stands in a different position It is not the act of the declarant Accordingly, he is not responsible for it" *Chamberlayne's Ev* § 1539

When he was drunk. Confessions made by the accused when under the influence of liquor are not thereby rendered inadmissible *R* v *Spilsbury*, 7 C & P 187 In the last named case *Coleridge J* said "I am of opinion that a statement made by a prisoner while he was drunk is not therefore inadmissible, it must be obtained either by hope or fear This is matter of observation for me, upon the weight that ought to attach to this statement when it is considered by the jury" This is the rule, even where the intoxication was produced by liquor given to him by the officers having him in charge for the sole purpose of

cated as to be incapable of understanding what he says or does his confession should not be used against him *Com* v *Howe* 9 Gray (Mass) 110 *Eskridge* v *State*, 25 Ala 30 The question as to the mental condition of the accused at the

the confession the Court would not submit the confession to the jury at all *McKelvey's Ev* § 92

Some recent cases of America, however reject confessions thus obtained because of the trick practised But the general rule has been sustained even where the accused was suffering from *delirium tremens* if he was mentally and physically able to describe past events and to state his own participation in the crime The intoxication of the accused at the time of making a confession may

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this is subject to some exceptions which will be found collected in the case of *Molton* v *Camroux*, 2 Exch 487, *Best Ev* § 529

Confession in answer to questions A confession is also not to be rejected merely because it has been elicited by questions put to the prisoner *Taylor* § 891 But this statement of law must be read subject to the provisions of sections

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form of the question is immaterial even though it assures the prisoner *R* v *Hall* 1 Moo C C 152, *R* v *Thornton* 1 Moo C C 27, *R* v *Kerr* 8 C & P 179, *per Park J* A confession, in other respects admissible is not made so because it is not the spontaneous utterance of the prisoner The fact that a confession was obtained by the employment of persistent questioning alone exclude it, (*State* v *Penney*, 113 Iowa, 691) but the practice confession by putting questions after questions to the accused is conducive to the procurement of truth, and the mode in which the

S. 29 was elicited may always be considered by the jury to determine whether they shall believe it. *Underhill Cr Ev* § 110 In *R* v *Ellis*, Ry & Moo 432, *Littledale J* admitted a statement of an accused on examination before a Magistrate without threat or promise but upon questioning and after refusal to allow counsel. The case was decided by following an unreported ruling of *Holroyd J* and disapproving *Wilson's Case* i e *R* v *Wilson*, Holt N P 597, where *Richards C B* in disallowing such statements said "An examination of itself imposes an obligation to speak the truth; if a prisoner will confess, let him do so voluntarily". *Mr Joy* also adds his authority as to the practice in his book on confession *Joy Confession*, 40 see also *R* v *Dabby*, 5 C & P 530, *R* v *Lucas* 7 C & P 177 *R* v *Wheeley* 8 C & P 250, where this practice was accepted indirectly. An answer given by the prisoner to a question put to him by a Magistrate was rejected by *Earle C J* in *R* v *Berriman*, 6 Cox Cr 388, *Queen* v *Nabadip* 1 B L R Cr 15.

The mere fact that a statement in a confession was elicited by a question put by the Magistrate recording it does not make it irrelevant as a confession. But the fact may be very material to an enquiry as to whether the confession is voluntary or not. *Barendra Kumar* v *The Emperor*, 14 C W N 1114 = 37 C 467. In *King Emperor* v *Promotha* 30 C L J 503 the Court in rejecting a confession obtained by continued questioning observed "His confession in our opinion cannot upon the case made by the prosecution, be said to be voluntary. The evidence is that he was kept at a little distance from the Post Office in charge of a head constable and was being questioned by the Sub-Inspector and that after being in that condition for 3 or 4 hours, to use the words of the learned Judge 'under the continued questioning to which he was subjected he finally broke down'". If there is reason to think that the confession was induced by the pressure of questions by one in authority or in order to escape from his custody it should be rejected. *R* v *Knight* 20 Cox 711 = 69 J P 106.

In England the controversy on this point is now closed by *Rex* v *Best* (1909) 1 K B 692 = 78 L J K B 658 where *Lord Alverstone C J* said "In our opinion it is quite impossible to say that the fact that a question of this kind has been asked invalidates the trial. There are many cases in which the prisoner is entitled to give an explanation as to anything found upon him, and he may be able in answering the question to say and show that the thing found was his own property. In our opinion *Reg* v *Gavin* 15 Cox C C 656 was not properly decided; it is commented on in a note printed at the end of the report. The decision has not been followed to its full extent as appears from *Reg* v *Brackenbury* 17 Cox C C 628. The statement of law as set out in the report is too wide and requires qualification." So this case practically overruled *Reg* v *Gavin* 15 Cox C C 656 and *Reg* v *Male* 17 Cox C C 689. In *R* v *Miller* 18 Cox Cr C 54 *Hawkins J* said that it was impossible to discover the facts of a crime without asking questions, and as he held that the questions there were properly put after due warning he admitted evidence of defendant's answers saying that every case must be decided according to the whole of the circumstances. *Roscoe Cr Ev* 10, see also *R* v *Hirst* 18 Cox Cr C 374 *R* v *Histed* 19 Cox Cr C 16, *Lewis* v *Harris* 24 Cox Cr 66 = 110 L T 337. All these authorities were considered in *Ibrahim* v *Rex*, 83 L J P C 185 = (1914) A C 599 = 24 Cox C C 174. A private in an Indian regiment murdered one of the officers. Shortly afterwards, while he was in custody the commanding officer asked him "why have you done such a senseless act?" and he replied "Some three or four days he has been abusing me, and without doubt I killed him." The confession was admitted. *Lord Sumner* in delivering the judgment of the Judicial Committee (*Lord Haldane L C Lord Atkinson, Lord Shaw Lord Moulton* and *Lord Sumner*) said "if the matter is one for the (trial) Judge's discretion depending largely on his views of the impropriety of the questioner's conduct and the general circumstances of the case" it was not improperly exercised. Then after reviewing a large number of cases, he added "The English law is still unsettled strange as it may seem since the point is one which constantly occurs in criminal trials. Many Judges, in their discretion, exclude such evidence, for they fear nothing less than that the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. Having regard to the particular position in which their Lordships stand to criminal proceedings, they do not propose to intimate what they think the rule of English Law ought to be, much as it is to be

desired, that the point should be settled by authority, so far as a general rule can be laid down where circumstances so greatly vary.

Want of warning A voluntary confession is evidence, to whomsoever it may have been made, . . . that what he might sa[y] . . . was not so warned *R* v . . . *Long*, 6 C & P 179; *R*. . . . *Empress* v *U...eer*, 10 C . . . of the duty of a Magistrate to tell an accused person that anything he may say will go as evidence against him" See also *Queen* v *Nobodeep*, 1 B. L R. Cr 15 = 15 W R. Cr 71 Answers to questions under that section are admissible in evidence, even if the Magistrate has omitted to warn the accused that he need not answer *Dinoo Roy and others* 16 W R Cr 21, 5 Mad H C. App 9. But sub-section (3) of section 164 of Criminal Procedure Code enacts "*A magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence* . . . shall record any such confession unless, upon . . . he has reason to believe that it was made . . . Act XVIII of 1923 . . . C 775 Now the . . . *Balam Singh* v . . . , 6 Lah 183 = 26 . . . *Hari*, 30 C W N . . . *hue Sin* v *King* . . . Lah 325 A statement of an accused, a suspect, made at an inquest before a Coroner is clearly admissible, either as a confession under s 26 or as a statement made by a party to proceeding under ss 18 and 21 of the Evidence Act As regards the objection that such a confession is not relevant in as much as the Coroner did not warn

Pendse referred to section 164 of the Criminal Procedure Code as containing a general principle to the contrary But that is a special enactment applying only to certain statements made in particular circumstances contemplated by s 164.

R v *Ellis*, Ry & Moo 432 and *R*. v *Gilham*, 1 Mood Cr C 186, 191 are mo[s]t

30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such

Consideration of proved confession affecting person making it and others jointly under trial for same offence

S. 30. confession as against such other persons as well as against the person who makes such confession.

* *Explanation.*—"Offence" as used in this section, includes the abetment of, or attempt, to commit the offence.

Illustrations

(a) A and B are jointly tried for the murder of C It is proved that A said— B and I murdered C " The Court may consider the effect of this confession as against B

(b) A is on his trial for the [illegible] was murdered by A and B, and [illegible]

This statement may not be [illegible] as B is not being jointly tried

Principle This section is entirely [illegible] no such provision either in Act II of 1855, [illegible] of 1861 and 1872 Before the passing of the [illegible] of an accused person was only evidence against himself, (*Queen v Kally Churn* 6 W R 84 Cr) and it could not be taken to be corroborative evidence or any evidence at all, against any body other than himself *Queen v Budhu* 5 W R 35 Cr So the confession of one prisoner could not be used as corroborative evidence [illegible]
"Until the [illegible]
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by the confessing person [illegible]
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* This *Explanation* was inserted in s 30 by the Indian Evidence Act (18[illegible]) Amendment Act, 1891 (3 of 1891) s. 4

another, but
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provision, that, when more persons than one are tried for an offence, and one of them makes a confession affecting himself and any other of the accused, the

r the Indian Evidence Act, he
ion, in fact, was one of those rules
, which though well adopted to trials for Jury, are meaningless and out of place on occasions where the functions of Judge and Jury are cont
to consider whether the

prosecutors and under the present system it is better to follow the wise advice of the writer cited by Justice Cunningham, where he says 'The policy of the

dangerous innovation *Per Glover J in Queen* v *Jaffir Ali*, 19 W R. 57 (64) Cr; *Queen* v *Sadhu Mundle*, 21 W R 69 (79) per Phear J · 5 Mad L J Journal
and was a
confession
Lalaram, 81 Ind Cas 817

Sadhu Mund
N S. 19
section 30, Act I of 1872, be 'considered' as against other parties then on their trial with them, but such confessions, when used as evidence against others,

trial jointly for the same offence, can be used under s 30 of the Evidence Act

30. The section is not to be treated as though the words "at the trial" were inserted after "made" and the word "recorded" substituted for "proved." *Queen Empress* v *Tanga*, Rat. Un Cr C 510 = Cr. Rg 30 of 1890 Confessions made by an accused person may be considered against persons who are tried with him, but they cannot be accepted as evidence of any fact necessary to constitute the offence *In re Kaliyappa Goundan*, 2 Weir 711. In order that a confession of an accused person may be admissible as against the other accused tried with him, it is not necessary that the confession should have been made in the latter's presence 2 Weir 745 When this section lays down that the Judge may consider a fact in certain circumstances it plainly declares that fact to be relevant in those circumstances *Gobraya* v. *Emperor*, A. I. R 1930 Nag. 243 (F B) = 26 N L R 229 = 125 Ind Cas. 673

Section 30 does not refer to statements made at the trial but the statements made before and proved at the trial *Govinda* v. *Emperor*, A. I. R 1929 Mad. 28-; *Emperor* v *Mahadeo Prosad*, A I. R. 1928 All 322 = 45 A. 323, *Empress* v *Ashutosh Chakravarty*, 4 C 483 = 3 C L R 270, but see *In re Bali Reddi*, 33 M 302 = 22 Ind Cas 157 = 15 Cr L. J 13, where *Ayling J held* that there was no reason why confession[illegible]
taken into consideration u[illegible]
J. in Emperor v *Mahadev* [illegible]
accused person is entitled [illegible]
called upon for a defen[illegible]
is no mere form but with certain exceptions closes the door to any further evidence against him" "If a prior confession is to be proved, he can attack it by cross examination of the witness who prov[illegible]
the dock after the prosecution case has cl[illegible]
Per Waller J in *Govind* v *Emperor*, *su*[illegible]
Act is not limited to cases where the [illegible]

[illegible]

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K. B 658, a c[illegible]
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3 Cox C C [illegible]
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evidence thus [illegible]
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trate's Court when examined as a witness in the Sessions Court. *Queen Emp* v *Nagu*, A. W N 1891, 184 Section 30 merely enacts a special exception to the general rule that a confession (admission) can be proved (only) against the person who made it It does not limit the operation of s. 32 Illustration (b) to section 30 cannot be construed to have this effect *Aga Po Im* v *King Emperor*, U B R 1906, Evidence 3 = 5 Cr L J 300 Where an accused person makes a confession, the most that could be taken into consideration on such a statement against a co-accused would be, under sections 27 and 30 of the Evidence Act, so much of the information as was the immediate cause of the discovery of

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some relevant fact against him *In re Sankappa Rau*, 18 M. L. J 66 = 31 M 127 = 3 M L T. 270 = 7 Cr L J. 325. Prior to the Evidence Act the rule not

accused. *Shambhu* v *Emperor* A I R 1932 All 228 = 1932 A L J 162

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the other accused and the confession was evidence against them all *King Emperor* v *Dep*, 37 A 347

A person escaping from custody during the trial but, before charge, who has been tried separately after re arrest, cannot be said to have been jointly tried with the person whose trial, from a stage prior to the charge, was separate owing
, first tried, was
joint *Hassan*

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before hand and being present during its commission, were held to be jointly

S. 30. tried for the same offence within the meaning of s. 30 ... 3 P R. person;

mmitted the murder ed upon his trial—the used the statement of ... the first. *Held* that accused person's statement was not admissible against the first, either under section 327, Cr Pro Code, 1872, or ss 30 and 133, Evidence Act *Crown* v *Jhobu*, 13 P R 1878 Cr.

s when the confes- . he be called still join r this section against co-accused. In *Reg* v *Kalu Patil* 11 B H C R 146 ... Court observed ...

which the Assistant Judge, in framing his judgment took his evidence into consideration " *Imperatrix* v *Balu Patel*, 5 B 63; *Venka Sami* v *Queen*, 7 M 10 *Imperat*... 1895 ...

is also ... *Pachayi*, 19 ... *Pirbhu*, 1895 A ...

trial taken with Cas ... person this w... evider...

the trial without convicting those of the accused who pleaded guilty, yet it is unfair to defer convicting them merely in order that their confessions may be considered against the other accused who are being tried with them *Queen-Empress* v *Paltua*, 23 A 53 = A W N 1900, 192; *Emperor* v *Akoraju*, 30 A 540.

Where the statements of two of several co-accused persons followed their plea of guilty, held they were not entitled to be considered as evidence against the other accused persons and that, in those circumstances, they ceased to be statements of persons ... that plea of guilty *Queen* v *Shuldham*, 44 P ...

v *Rerumat*, 33 C 440, ...

essarily end as soon as he pleads guilty ... other

of these courses has been expli
guilty is left in the dock merely to
him, though the Court intends
In such a case, it will not be fair to allow his confession to be considered as

taken into consideration against them under s. 30, Evidence Act, appears to

he is still an accused person and is, therefore, not a competent witness against

trial was good. *Sukdev* v. *Emperor*, 9 C. L J 291=13 C. W. N 552.

A. I. R. 1928 Lab. 880=111 Ind. Cas 387=29 Cr. L J. 835; *Kanhaya* v. *Emperor*, 15 P. R. 1911=12 Ind. Cas. 381=54 P. W R Cr. 1911; *Fakhruddin* v. *Emper* 302; *Emperor*

A a A
confessed ions
Judge subsequently conceded the charge against A into one of abetment B, who was
new trial.
Evidence
could not be allowed in appeal since the two charges were so nearly related, and there was no such material prejudice as would under ss. 447 to 449 of the

S. 30.

is tried but of a minor offence, it does not satisfy the requirements of the Evidence Act In ... confession made by a ... case but not in the pre... sion was inadmissible ... 70=61 Ind Cas 793 ... of the Cr Procedure C... co-accused, the provis... to a case like the present. *Ambirulla* v *Emperor*, 22 C W N 403.

Two persons were jointly tried, the former for criminal breach of trust and the latter for the abetment of that offence. The only evidence against the latter was the conf... such unsup... sion made ... thug, and in ... tried alone, ... v *Jita Singh*, A W N 1881, 164.

An accused person and another co-accused were tried together for an offence The accused, though only liable for abetment of the offence, was found to have been present at the time of the commission of the offence *Held*, that under s 114 I P Code, the accused stood in the same position as if he himself had committed the offence; that his trial with the co-accused was proper, and that the confession made by the co-accused in such trial could be taken into consideration under s 30 of the Evidence Act against the accused *Thakur Singh* v ...

... having before it the definition ... ld in enacting s 30 Evidence Act, ... d in the latter section included the "abetment of an offence" also if the intention really was that section 30 was to be so understood But if the offence abetted is committed as the result of an abetment and the abettor is present at its commission, the abettor must be held to have committed the substantive offence. *Queen Empress* v *Kalidin*, S C 143 Oudh (but now this objection has been removed by adding of the explanation by Act 3 of 1891); but see *Teja* v *Empress*, 30 P R ...

... *pa*, Rat. Un ... Cr. C 450 ... tried under s. 411 I P ... 457, cannot be considered ... P. Code, are distinct offences ... within the meaning of s 30, Evidence Act *Nga Po Tok* v *K E*, U B. R 1911, 4th Qr 158=20 Ind Cas 136=14 Cr L J 376. Where two persons were ... another of an ... held that ... evidence ... that the ... , though it appeared to the Magistrate ... charged with abetment of the offence with which ... *Empress* v *Hira Lal*, A W N 1890, 63, see also *Maya Singh* v. *Empress*, 9 P R 1886 Cr.; *Nur Ahmed* v *Crown*, 8 P R 1974 Cr, *Badi* v. *Queen Empress*, 7 M. 579, *Empress* v *Bala Patel*, 5 B 63=5 Ind ...

Ghena v. *Emperor*, A. I. R. 1932 Lah. 180.

Confession. This section must be strictly construed. It makes a clear distinction between an admission and a confession It is only under this section that the confession of one of two or more accused, jointly tried for the same offence, can be taken into consideration against the rest. It must be a confession to be so admissible, that is, it must affect both the person confessing and ... must not be con- ... ort of being an ... istruction ... It is one ... is against whom it is tendered" ... A 114; see also *Empress* v *Daji* ... 9 W R ... *Queen* v. *Belat Ali*, 19 ... *Queen* v *Khukree Oara* ... *Queen* v *Nago*, 23 W ... *Choudhury*, 25 W R. ...

for which they are being ... to the section abetments ... A I. R 1931 Mad 177

A statement by an accused person consisting of the vague accusations of a ... who was not charged with ... 5 Cr The confession of a ... he does not substantially implicate himself to the same extent as the other accused, but on the contrary ...

Keshub Bhomia, 25 W R Cr 8, see also *Kusir Bap* v *Emperor*, 14 Cr L J. 586=21 Ind Cas 378 A confession must be one of guilt. The accused must inculpate himself ... 167=94 Ind Cas ... v *King Emperor*, ... Where a person ... makes a confession ... the Evidence Act. *Emperor* v *Aunaji*, 26 Bom L R 614=A I R 1924 Bom 445 Merely because a confession by one of the accused is not a complete and detailed confession up

S. 30. to him, it cannot be rejected against the co-accused *Lalkhan* v *Emperor* A. I R 1924 A. 511. A statement by an accused that he and his co-accused ... the deceased in exercise of their right of private defence, is in no sense a confession and cannot be taken into consideration against the accused ... v *Emperor*, 6 ... =85 Ind. Cas. 371 Confess... recorded in ... Pro. Code, even though made

the conviction of persons based solely on a retracted confession of a co-accused which does not implicate the confessor to the same extent as the co-prisoner *Upendra* v *Emperor* (1918) Pat 175=46 Ind. Cas. 842. Statements made by one set of prisoners, criminating another set of prisoners, when each individual prisoner made a case for himself in which he was free from any criminal offence ought not to be taken into consideration under s. 30 of the Evidence Act against the prisoner of the second set, when the two sets although tried together were tried upon ...
Queen v. *I* ...
before a ...
this section ...
the confe...
L. R. 261=2 Bom Cr C 192=15 Cr. L J 433.

Made "The word 'proved' in s ...
hand" *Per* ...
Imperatrix v ...
section 30 is ... trial' were inserted after ...
word 'made' and the word 'recorded' substituted for 'proved', that therefore ...

Cr L J 305=21 A L J 179=(1923) A I R. All. 323=45 A 323, see ... *Queen Empress* v *Pirbhu*, 17 A 524; *Queen Empress* v *Pallua*, 23 A 53 ...
seems to me that ...
evidence at the trial ...
confession, and to ...
by the section" *M* ...
before a charge is ...
restricted to an unretracted confession ... is proved ...

... 1911 Cr =22 P. W R 1911 Cr.=12 Cr. L. J 267, *Sri Ram* v ...
2 A. L J 100=2 Cr. L. J 59.

accused *Raj Kumar* v. *Emperor*, A. I. R 1929 Pat. 475=9 P. L. ...
Ind Cas 721.

S. 3

v. *Queen Empress*, L. B. R. (1893-1900) 7. The rule that the statement of one

extent as he implicates the other co-accused and who tries to throw the entire blame on the other co accused is of very little value at least as against the other co accused. *Kunja Subudhi* v *Emperor*, A I R 1929 Pat 275 = 8 Pat 289, *Topandas* v. *Emperor*, 25 Cr L J 761 = 81 Ind Cas 249 = A I R 1925 Sind. 116 It is not the law that unless a confessing prisoner implicates himself as fully as his co-accused the statement will not be admissible, the

as the accused. *Suka Raut* v. *Emperor*, 4 Pat L T 505 A confession in order to be admissible under this section, must implicate the confessing prisoner

Bag Shah v. *Crown*, 3 P. R 1879 Cr.

S. 30. to him, it cannot be rejected against the co-accused. *Lakhan* v. *Emperor* A. I R 1921 A 511. A statement by an accused that he and his co-accused took

against the person making the statement, but it may be unsafe to use it against a co-accused *Jasoda* v. *Emperor*, 53 Ind Cas 691 It is not safe to support the conviction of persons based solely on a retracted confession of a co-accused which does not implicate the confessor to the same extent as the co-prisoner *Upendra* v *Emperor* (1918) Pat 175=46 Ind. Cas. 812 Statements made by one set of prisoners, criminating another set of prisoners when each individual prisoner made ought not to the prisoner o tried upon t *Queen* v. *Khu* before a Ma this section the confessio L. R 261=2 Bom Cr C 192=15 Cr. L J 433.

Made "The word proved' in s. 30 must refer to a confession made before hand" *Per Gar* *Imperatrix* v *Ta* section 30 is no word 'made' and confession made trial for the same the other accused The duty of the the guilt of the ac in existence at the time when the charge is made, and the expression 'Judge a confession' is to my mind, inapplicable to the procedure where the asks questions and an accused person gives explanations under a special provided for that purpose" *Mahadeo Prasad* v. *Emperor*, 76 Ind. Cas 10.5 Cr. L. J. 305=21 A L. J 179=(1923) A I R All 323=45 A 323,

under section 24 of the Evidence Act cannot be taken into consideration a co accused as well *Emperor* v *Umda*, 166 P L R 1911=10 Ind Cas 9 P R 1911 Cr=22 P. W R 1911 Cr.=12 Cr L. J. 267, *Sri Ram* v *Emperor* 2 A L. J. 100=2 Cr. L J 59.

accused *Raj Kumar* v *Emperor*, A I. R 1928 Pat 473=9 P. L Ind Cas 721.

Chunder Bhattacharyee, 24 W. R 42. The expression "proving a confession" is inapplicable to the question and answers under s 364 Cr Pro Code *Mahadeo Prosad v Emperor*, 45 A. 323=21 A L. J. 179=A I R 1923 All 332 When a confession is taken in the absence of other prisoners and the latter have no opportunity of denying or even of knowing what their fellow prisoner has said e. g when it has not even been read over to them afterwards, it cannot be proved *Empress v Chunbhanath*, 7 C 65; 121 After proper proof, such confession can be *ess v Lakshman*, 6 B 121 The word "proved" in this section means proved before the case for the prosecution comes to an se or proved in some accused made from the taken into consideration by the Court and such confession cannot be made the basis of the conviction of the other accused *Maradumuthu Padayachi, In re*, 54 M 783=61 M L J 358=1931 Mad 820, *Mahadeo v Emperor*, 45 A 323 but see *Ganpat v Emperor*, 27 N. L R 163=32 Cr L J 1222=A I R 1931 Nag 169=131 Ind. Cas. 686

Court. The word "Court" in this section means and includes in a trial by jury, both Judges and Jury *Empress v Ashutosh Chuckerbutty*, 4 C 348=3 C. L R. 470 (F B)=1 Shome, L R Cr 79

every confession is of that the word "may" consideration if it is so on must be exercised iving it a decision that scretion to exclude a confession by an accused altogether from consideration against the co accused if it is so disposed *Gobraya v. Emperor*, A I R 1930 Nag 212 (F B)=26 N. L R. 229=125 Ind Cas 673

May take into consideration The words "take into consideration" in

partial or qualified admission of guilt on the part of the accused himself and by a limited physical facts pointing to his connection with the crime imputed to him, they are not precluded by law, any more than by reason, from finding of guilty thus sustained *Queen Empress v Bayaji*, Rat Un Cr C 311=Cr Rg 64 of 1886 The words "may take into consideration" mean may treat as evidence The weight to be attached to it as evidence against the accused,

Khanjan v section does confession is e against the may be taken

sayii his c ques one dera

J in *Queen v Chunder Bhattacharjee*, 24 W. R Cr 42 This section does not say that the confession referred to therein is relevant but only says that the Court

s. 30. may take it into consideration against the co-accused The Court may take into consideration such confession with or supplementary to relevant facts which may form the basis of a judgment. As a matter of judicial prudence a confession implicating others must be regarded with suspicion *Sallu v Emperor* A I R 1922 Nag 146 = 65 Ind Cas 561 = 23 Cr L J 129 The confession of a co accused can be taken into consideration, but the Court requires corroboration before acting upon such a confession *King Emperor v Baker* ib 21 C L J 192 = 19 C W N 584 = 42 C 789 = 28 Ind Cas 657 = 16 Cr L J 391, *Mar Crown*, 19 P W R 1916 Cr = 17 Cr L J 156 = 33 Ind Cas 136, *Ghula* ... *v Crown*, 31 Ind Cas 332; see also *Daulat v Emperor*, A I R 1930 Nag ...

rated as evidence of a defective character, and that they require special scrutiny before they can be safely relied on *Queen v Sadhu Mandal*, 21 W R Cr 69 ... are not evidence within the definition ...
Empress ...
S 384, *Queen v Khukree*, 21 ...
Weir 3rd Ed 494 *Queen* ...
C R App 15, *R v Dynaram*, 37 A 217

In *Queen Empress v Naga*, 23 W R 24 Cr *Phear J* said We find the Legislature avoids saying that confessions of this sort are evidence and may be used as evidence ... it says merely the Court may take into consideration such confession *Jackson J* in *Queen v Chunder Bhattacharjee*, 24 W R 4? and *Markby and Morris JJ* in *Queen v Naram Tel*, 27th May 1875 (mentioned and overruled in 4 C 185) also took the same view But in *Empress v Ashu ... Chuckerbutty* 4 C 483 the Full Bench said that the Legislature has not ... calling the confession of an accused person evidence against a co-prisoner ... has ... the phraseology of the Act So according to the F...
does ...
same ...
of evidence wh...
make them ex...
not giving his ...
liberty of cross ...
Rathagan ...
co accused ...
and consi...
existed or ...
circumstances of the particular case to act on the supposition that ...
existed the Court should then ...
J in *ibid* The confession of a ...
of great weight against the oth...
means "may b...
must be treated ...
confession of o...
a joint trial for ...
ib, 42 C 789
and if uncorrobo...
Amir Hossein, 2 C W N 719 A confession under section 30 ... is taken into consideration but cannot be treated as substantial evidence *In the matter of Ram Mulla*, 1 I G ... *Naga* 23 W R Cr 24 The words "taken into consideration" in th... accused are not to have the ...

... fact and though ...

st
m
a
or

S. 30.

connection with the crime imputed to him, they are not precluded by law any more than by reason from finding of guilty thus sustained *R* v *Bayaji Kom Julu*, 11 Ind Jur N S 381; see also *Empress* v *Sundra*, A W N 1881, 38

sions which affected the accused by connecting or tending to connect him with the crime *Scott C J* remarked (pp 469, 470).—'If the confession (of a co-accused) is corroborated by other evidence it matters not whether, in proving the case at the trial, the confession precedes the other evidence, or the

of each case' On this point *Scott C J* differed from a doctrine of *Macleod J* in *Emperor* v *Gangappa Kandeppa*, 38 B 156=21 Ind Cas 673=15 Bom L R

evidence Both decisions agree that the confession of co-accused could not

l In *Emperor* v

is nothing in s 30,

after taking the

Courts of India

had laid down a rule of practice which had all the reverence of law that a

n as leading

based on the

attacharya v

A I R 1927

If evidence of

degree of proof referred to in section 3 of the Evidence Act has been received or not *King Emperor* v *Nga Po Tha* U B R 1913, 2nd Qr 170=21 Ind Cas 166=14 Cr. L J 566, *The Nayan* v *Queen Empress*, L B R (1893 1900) 368 No higher value can be put upon such a confession than upon the statement of an accomplice *Emperor* v *Abani*, 8 Ind Cas 770=15 C W N 25=11 Cr L J. 710=38 C 169

S. 30. although such evidence is admissible in evidence under section 30 no ... can be given to it unless it is corroborated Queen v Jaffar Ali, 19 W R Cr 57 Queen v Kunjoo, 20 W R Cr 1, Queen v Sadhu Mandal, 21 W R 69 Queen v Naja, 23 W R 21, Queen Empress v Dosa Jiva, 10 B 231 So, such a confession must be ... evidence before it can be acted upon Queen ... Imperatrix v Ga ... 11 Ind Jur N S 20, ... Weir 3rd Ed 499 Queen v Bajoo Choudhury 25 W R 63; Queen Empress v Khandu, 15 B ... Empress v Bhawani 1 A 664; Empress v Ramchand 1 A 675, Keher Singh v Emperor, 59 Ind Cas 913, In re Lilaram, 81 Ind Cas 817, Reg v ... 1 M 163=2 Weir 740, In re Kuppam, 9 Cr L J 30=5 M L T 300 ... v Amir Hossein, 2 C W N 741, Rajhubir v Emperor, 11 O C 3... In re Ramasami Boyan 54 Ind Cas 479, Queen v Malapa 11 B H C R 19, Queen Empress v Jadab Das 27 C 295=4 C W N 129, ... v Emperor 10 C W N XVI, Mlunya Behari v Empress 5 C W N ... Emperor v Gangappa, 38 B 156 Nga Po Kaul v Emperor, 95 Ind Cas 71 ... Cr L J 718=A I R 1926 Rang 127, Nga Po Kya v Emperor 12 Cr L J 465=11 Ind Cas 1001, Queen v Dubaroo, 13 W R Cr 14, Kamal v Emperor, A I R 1932 Lah 73 Confession is not sufficient evidence of co-accused's guilt Manna Lal v Emperor, A I R 1925 Oudh 1 The confession of a co prisoner can not per se sustain conviction and in order to achieve that object it must be corroborated aliunde by independent evidence in some material circumstance Kher Singh v Emperor, 59 Ind Cas 913=22 Cr L J 161 It must be corroborated by independent testimony and in material particulars Ramasami Boyan In re, 11 L W 8=54 Ind Cas 479=21 Cr L J 79, see also Emperor v Azimuddin 57 Ind Cas 462=21 Cr L J 638 Emperor v Sabit Khan 51 Ind Cas 537=43 B 739=21 Bom L R 418 20 Cr L J 479 But there is no rule as to what constitutes sufficient independent corroboration in a particular case That must depend upon the circumst...
the st...
must
conse...
tion
when those confessions are retracted at the trial is very low, as pointed out Yasin v King Emperor, 28 C 689=5 C W N 670 and in Lalitmohan's case (Emperor v Lalitmohan, 10 Ind Cas 1583=38 C 559=15 C W N 95 Per Heaton J in Emperor v Sabit Khan supra Ugappa v Emperor 30 L W 403=1929 M W N 272=A I R 1929 Mad 491 "Very possibly there may be material to ... ... reason place is not

21 W R 69 Reg v Balthu 1 B 475, R v Kalappa Weir 3rd Ed 494 ... v Dosa, 10 B 231, Queen Empress v Rama Satar, 8 A 306, Pame M ... v Emperor, 89 Ind Cas 889=26 Cr L J 185 The rule as I understand it ... upon

nt eye witnesses or of
...sions by the co-prisoner
implicating him, but the difficulty arises in case of circumstantial evidence
...ien it consists of circum-
...s?

... support a conviction from the co
prisoners—it was sufficient corroboration A similar view seems to have been

corroborative 6 Mad L J Article 97 But in *Empress* v *Ashutosh Chakra-uttu*, 1 C ...

old that an
...d's confes
onstituting
tion, is to
he question
support a

ling about
Emperor,
fessing
state-
Cr L
alone
... before
ull, In re, 20 L W 202=25 Cr L J 1041=81
The self inculpatory confession of an accused
act upon which alone the conviction of his
. Nor can such a confession even if it be
corroborated by other evidence which is insufficient ... st in the
...nviction
Judge is
and as
r, 26 N L
ill not be
I R 1925
corroborated
by the confession of another accused as against the accused person who has not confessed at all; but the confession of one co accused may furnish the corroboration of the confession of another co accused as against the latter and *vice versa* *Gangaram* v *Crown*, 60 Ind Cas 786=22 Cr L J 290, *Emperor* v *Gangapa*, 15 Bom L R 975=2 Bom Cr C 143=21 Ind Cas 673=14 Cr L J 625=28 B 156 *Emperor* v *Budhu*, A W N 1881 18 The conviction based on the confession of a co accused not corroborated in material particulars by independent evidence is illegal *Amir Shah* v *Empress*, 20 P. R 1880, *Empress* v *Pirua*, A W N. 1885, 320, *Empress* v. *Bhawani*, 1 A 664; *In re Kappan*, 5 M. L T 355=9 Cr L. J 308=7 Ind Cas. 547.

the only evidence
evidence, which,
... *Kishen* v *King-*

S. 30. There is
uncorroborated
against him
caution and cir
on its truth or fa
it *Aga Tun* v *Emperor*, 11 Cr L J 179=19 Ind Cas 179=6 Bur L T 41

Value of retracted confession
is sufficient evidence for convictn
it to be true As regards the per on
any corroborative evidence form i
127 Ind Cas 871=A I R 1930

Ind Cas 185

Retracted confession and co accused. And retracted confession is admissible but should have no weight attached to it unless either corroborated in material particulars or unless the tribunal comes to the conclusion that the statement as a whole is a truthful statement In either of these cases
retracted statement n
co accused *Sheona*
The Evidence Act
tracted confession
deration against the accused though it may be that less weight would be a
to a retracted confession *Gour Chandra* v *Emperor*, A I R 19 9 C I II
Mahomed v *Emperor* 81 Ind Cas 62 A retracted confession is evidence and there is no provision in this section by which a confession is to be received one way or another The use to be made by a Court of a confession whether retracted or not is a matter of procedure rather than law, the business of the Court being to make up its mind in accordance with the dictates of common sense whether it is safe to believe the confession or not. *Mt Amna* v *Emperor* 130 Ind Cas 641=A I R 1931 Lah 196

But a mere retracted confession of a co accused cannot be sufficient to sustain the conviction of another accused *Pala Singh* v *Emperor*, A I R 19 3 Lah 329=29 Cr L J 267=107 Ind Cas 614 Because "experience and common sense show that in the absence of corroboration in material particulars
it ... cum tan
in ... rent of the
retr ... ession not
wit ... v *Emperor*
30 ... R 1911
but ... ted confe
sio ... king then
car ... *Dile Jra*
v *Emperor*, 8 Pat L T 566=101 Ind Cas 881=28 Cr L J 497=A I R 19
Pat 257 A retracted confession is not th ... of an accomplice within
the meaning of section 133 of the Evi
40 C L J 551=A I R 1925 Cal 406
law with regard to a retracted confessi

series of cases of which *Emperor*, 28 C 689 and *Emperor*, should carry
ted confession should
... it

not made
the maker
fullest cor
demanded
v *Emperor*, 2 Pat L T 776=60 Ind Cas 56=22 Cr L J 200

S. 30

Where a confession made by an accused person is subsequently retracted by him and he does not implicate himself
one of the conspirators, held the confes

v. Imperator, 62 Ind Cas 515=22 Cr L J 529, Emperor v Narain, A. I R. 1931 Oudh 83=131 Ind Cas 72 Where the confession of a co-accused retracted before the trial, was not corroborated in a material particular viz, the connection of the other accused with the cause of the death, that other accused must be acquitted In re Manicka Padayachi, 14 L W 174.

The retracted confession of accomplices may be taken into consideration under s 30, where there is evidence tending to conviction, but they cannot form the basis of a conviction when there is no evidence whatever Reg v Timaya, Rat Un Cr C 108, Queen Empress v Sahadu, Rat Un Cr C 771, Alya v Crown, 5 P R 1911 Cr=11 P L R 1911=27 P W R 1911, Emperor v Kheshri, 29 A, 931 So the retracted confession alone of an accused is not sufficient to justify a conviction of a co accused but where such confession
reasons
s known
used, the
evidence is admissible and is strong piece of evidence against the co-accused Wazid v Emperor, 32 Cr L J 42=A I R 1930 Oudh 412, see also Sheo Ratan v Emperor, 111 Ind Cas 771=A I R 1929 Oudh 162, Arjan Singh v Emperor, 30 P L R 616=119 Ind Cas 325, Rahamot v Emperor, 11 Lah L J. 5=113 Ind Cas 65, Sordora v Emperor, 125 Ind Cas 638 Confessional statements of accused cannot be used in corroboration of the evidence of the approver in as much as tainted evidence is not made better by being corroborated by other tainted evidence Daulat v Emperor, A I. R 1930 Nag 97=31 Cr L. J 153

Against such other persons as well as against the person making the confession A confession by one of several prisoners which is irrelevant or is

latter Imperatrix v Pitambar, 2
admissible under ss 24 26, against
(provided it otherwise satisfies its

Jour Article 108 In the case of a
a maker under s 27, it is admissible,
only when the admissible part is a
ects himself and other persons' If the
both persons, it cannot be first rejected as against the co prisoner, on the ground that the whole confession was unduly

corroborated and the mere discovery for the
conviction of A, in the last case abo f (apart
from evidence to show that propert nd prob-
ably put there by him) corroborate A in the
theft Ibid

Confession of
of an accused perso
considered as the s
to in section 133 of th

S. 30. be examined as a witness This being so, the provision that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an

the wordings of the latter section that it contemplates that the accomplice be examined as a wit
not illegal merely
accomplice, has no a
into consideration as against a co-accused jointly tried with
accused under s 30 All the Chartered High Courts of India have held that an accused person cannot be convicted solely on such a confession made by an accused *Empress* v *Karimbux*, 9 C P L R 37 Cr, *Empress* v *Govinda* 9 C P L R Cr 35 So it is clear that such a statement cannot alone form the basis of a conviction but that it could only be taken into consideration along with other evidence in the case. *Emperor* v *Lalit Mohan*, 38 C 559=10 Ind Cas 582=15 C W N. 593; *Queen* v *Chunder Bhuttacharji*, 24 W R Cr 42

testim
probat
Gangappa Kardeppa, 21 Ind Cas 673=38 B 156=15 Bom L R.
Cr C 143=14 Cr L J
'I think it will be a
Reading, L C J in *R* v
115 L T 473=25 C

ation as lending support to other evidence in the case But if there is evidence in the case, it is not a proper basis for a conviction It is not strengthened by the fact that it is supported by the other confessions whether they have been made in such circumstances as to preclude the theory that there has been connivance between the persons making the confessions or not *Nga San Ngein* v *King-Emperor*, U B R (1917) 1st Qr 3 Statements of co-accused persons are not entitled to even as much consideration as the testimony of an accomplice *Queen Empress* v *Nana Raju* Rat Un Cr C 408=Cr Reg 9 of 1889, *Queen Empress* v *Uma*, Rat Un Cr C 370-Cr Rg. 19 of 1888 *Empress* v *Ganapabhat*, Rat Un Cr C 456 The practice when there is a joint trial, of refusing to accept the plea of guilty and proceeding to try the accused in order that his confession may be taken into consideration against his co accused is illegal and an abuse of the process of the Court *Muhammad* v *The Emperor*, 35 C W N 490 *Queen Empress* v *Lakshmayya* 22 M 491, *Q E* v *Pirbhu* 17 A 529 *Q E* v *Paltua* 23 A 53, *Emperor* v *Kheorje*, 19 B 195, *Q E* v *Pir* 19 B 195, *Subramaniya* v *K E*, 25 M 61, *contra Q E* v *Ch Pavonola*, 23 M 151, *Suldeb* v *K E*, 13 C W N 552, *Kesho* v *Emperor* 13 Cr L J 742

Explanation —Under the explanation to section the word 'offence' always includes abetments and attempts *In re Periya swami Moopan*, 54 M 75=59 M L J 471=129 Ind Cas 645

desire to obtain
wise produce But this course is not essential *Muhammad* v
C W N 490=A I R 1931 Cal 341

S. 3

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provision hereinafter contained.

Admissions not conclusive proof, but may estop.

Admission—meaning of. The word "admission" as used in this and in the previous sections is rather misleading. "The law of Evidence" says *Prof. Wigmore,* "has suffered in its most vital parts, from an ailment almost incur-

[illegible]

mass of nsider the Procedure issions as such admis sions may operate as a waiver relieving the opposing party from the need of any evidence and any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admission he may be entitled to (*Vide Order XII, rule 6, Civil Procedure Code*) So judicial admission

[illegible]

ment of parties which become in themselves the foundation of independent right for other persons, by virtue of some doctrine of substantive law, —in other words from binding *estoppels, warranties* and *representations* *Wigmore* § *1057.*

[illegible]

at liberty to prove that such admissions were mistaken or untrue, and is not nduced by them m disputing their and that tran- *n* v *Ram Sebuk, enath* v *Bindo* 13 M I A 585; 18 W R 485, 21 W R 422, d Cas 33 An

[illegible]

estoppels of judicial admissions have no quality of conclusiveness, and on principle cannot have. *Wigmore* § *1059*, *Loveridge* v. *Botham*, 1 B & P. 49;

S. 30. be examined as a witness. This being so, the provision that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, has no application to the case of an uncorroborated confession taken into consideration as against a co-accused jointly tried with the confess[illegible]

the wordings of the latter section that it contemplates that the accomplice [illegible] be examined as a wit[illegible]
not illegal merely [illegible]
accomplice, has no a[illegible]
into consideration as against a co-accused jointly tried with the confess[illegible] accused under s 30 All the Chartered High Courts of India have held that an accused person cannot be convicted solely on such a confession made by an accused *Empress* v *Karimbux*, 9 C P. L R 37 Cr ; *Empress* v *Govinda* 9 C P L R Cr 35 So it is clear that such a statement cannot alone form the basis of a conviction but that it could only be taken into consideration along with other evidence in the case. *Emperor* v *Lalit Mohan*, 38 C [illegible]

Gangamma Kardeppa, 21 Ind Cas 673=38 B 156=15 Bom L R [illegible]

ened by the fact that it is supported by the other confessions, [illegible] have been made in such [illegible]
been connivance betwe[illegible]
Ngein v *King-Emperor*, [illegible]
persons are not entitle[illegible]
accomplice *Queen Empress* v *Nana Raju*, Rat Un Cr C 468=Cr [illegible] *of 1889*, *Queen Empress* v *Uma*, *Rat Un Cr C* 370=*Cr. Rg.* 19 of 1889, *Empress* v. *Ganapabhat*, Rat Un Cr C 456 The practice when there is a joint trial, of refusing to accept the plea of guilty and proceeding to try the accused in order that his confession may be taken into consideration against his co-accused is illegal and an abuse of the process of the Court *Muhammad* v *The Emperor*, 35 C W N 490 *Q. E.* [illegible] *Empress* v *Lakshmayya*, 22 M 491; *Q E* v *Pirbhu*, 17 A 529, *Q E* v. *Paltua*, 23 A 53; *Emperor* v *Kheorje*, 19 B 195, *Q E* v [illegible] 19 B 195, *Subramaniya* v *K E*, 25 M 61; *contra Q E* v *Paronolu*, 23 M 151; *Suldeb* v *K. E*, 13 C W N 552; *Kesho* v *Emperor* 13 Cr L J. 742

Explanation —Under the explanation to section the word 'offence' always includes abetments and attempts *In re Periya swami Moopan*, 54 M. 75=59 M L J 471=129 Ind Cas 645.

[illegible] pass a sentence completely [illegible] joint trial to give evidence [illegible] his evidence with a mind [illegible] ling punishment and the desire to obtain immunity to himself at the expense of the prisoner might otherwise produce But this course is not essential *Muhammad* v *Emperor*, 35 C W. N 490=A I. R 1931 Cal 341

S. 31

Admissions not conclusive proof, but may estop.

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provision hereinafter contained.

Admission—meaning of. The word 'admission' as used in this and in the previous sections is rather misleading. "The law of Evidence," says *Prof. Wigmore,* "has suffered in its most vital parts, from an ailment almost incurable,—that of confusion of nomenclature. The term 'admissions' exhibits this misfortune in one of its notable aspects." *Wigmore § 1058.* According to that learned author the term "admissions" as mentioned in these sections should be termed "quasi admission." "The true admissions, in the fullest sense of the term" says *Prof* [illegible] totally distinct principle." *Ibid* [illegible] a method of [illegible] is kind of [illegible] mass of [illegible] nsider the [illegible] Procedure [illegible] ssions as [illegible] h admissions may operate as a waive[illegible] any evidence and any party ma[illegible] fact have been made, either [illegible] for such judgment or order as upon such admission he may be entitled to. (*Vide Order XII, rule 6, Civil Procedure Code*). So judicial admission, is a formal act, done in the course of judicial proceedings, which waives or [illegible]

[illegible] ment of parties which become in themselves the foundation of independent right for other persons, by virtue of some doctrine of substantive law,—in other words from binding *estoppels, warranties* and *representations*. *Wigmore § 1057.*

[illegible] rodits, in greater or less [illegible]

[illegible] at liberty to prove that such "admissions" were mistaken or untrue, and is not [illegible] nduced by them [illegible] m disputing their [illegible] and that tran- [illegible] n v *Ram Sebuk,* [illegible] *enath* v *Budo,* 13 M I A 585, [illegible] 18 W R 185, [illegible] a, 21 W R 423, [illegible] d Cas 33. An [illegible]

[illegible] estoppels of judicial admissions have no quality of conclusiveness, and on principle cannot have. *Wigmore § 1059*, *Loveridge* v *Botham,* 1 B & P. 49;

31. *Newton* v *Belcher*, 12 Q. B D 921 924, *Newton* v *Liddiard*, 12 Q B. D ...
Such an admission does

where it has been acted upon by the party to whom it is made *Jiban Choudhury* v *Doolar*, 18 W R 347, *Prosonnodoy* v *Chairman Dacca Municipality* 20 W R 233, *Vasant* v *Puttu* 14 B 313, *Chandra Kant* v *Pearce Mohan*, 5 W R 209 Admissions resemble presumptions in th... unless the party again... by them or explain the... the essence of an estoppel that the party who is estopped cannot bring forward any evidence to contradict his former conduct—in other words, an estoppel is a conclusive admission *Cf R.* v *Del Lem* (1896) 2 Q. B at p 270, *Powell Ev* p ... *Dharmu* v *Gunar*, 10 B H C 311

Scope of the section Admissions by a party to the record out of Court are evidence and primary evidence, of the facts so admitted *Roscoe N P Ev* 61 The value of the admission depends on the circumstances under which it was made, ... no further ... p l *Ev* 61 ... are within sections 115 to 117 of the Evidence Act, they are not conclusive, ... evidence open to rebuttal or expla... And this applies equall... ance with the circums... established, and must ... held binding The party may confess its untruth, he may show ... that the response which formed the admission was made not in a serious but in jocular manner or that the admission was made in ignorance of the true state ...

Rep 220, *Thomas* v *White* 1 Tyro & G 110 Express admissions of a ... to the suit or admissions implied from his conduct are evidence and strong evidence against him, but he is at liberty to prove that such admissions were mist... unless anoth... the ... clain... *Abdul Karim* v *Rashiuddin* 131 Ind Cas 903—A I R 1931 ...
Admissions cannot be rebutted or explained by other statements of the declarant made at another time, for such other statements are not admissible for that purpose, unless they form part of *res gestae* *Lee* v *Hamilton* 3 Ala 5 9 *Roberts* v *Trawick* 22 Ala 490 *Burr Jones* § 296 Informal admissions may be either in writing or oral or even by conduct They may have been made in business correspondence or casual conversation long before any litigation began or was even contemplated, and with no intention of making a binding adm... but if They are therefore more easily explained away than formal admissions sufficiently clear they shift the onus of proof *Powell on Evidence*, 430

This section declares that admissions are not conclusive proofs of the ... s. An admission is the ... the witnesses are closely ... re is a certain ... on ... iss ons may operate is an ... l of saying that ... not

The person ... was mistaken and untru... When the admission is duly proved and the person against whom it is proved does not satisfy the Court that it was mistaken or untrue, there is nothing in the

Evidence Act, and there is no general principle or rule of law, to prevent the Court from deciding the case in accordance with it *Maung [illegible] v. Ma Tha Yi*, U. B. R. (1897-1901) Vol. II, 377, see also *Serajuddin v. Johur Jan*, 131 Ind Cas 555=53 C L J 222, *Abdul Kareem v. Bishaludin*, 131 Ind Cas 903=8 O W N 306=A I R 1931 Oudh 216 What a party himself admits to be true may reasonably be presumed to be so Where the defendant is not a party to the deeds, and there is, therefore no estoppel the party making the admission may give evidence to rebut this presumption, but unless and until this is satisfactorily done, the fact admitted must be taken to be established The express admissions of a party to the suit, or admissions implied from his conduct, are evidence and strong evidence against him, but he is at liberty to prove that such admissions were mistaken

them unless another person [illegible]

In which case the party [illegible]

person (and those claiming under him) and that transaction, but as to third parties he is not bound *[illegible] Chandra v. [illegible]*, 9 Bom L R 267=11 C. W N 321=4 A L J 102=5 Cr L J 115=17 M L J 103=2 M L T. 100. Those admissions which have not been acted upon, either because they were originally made without any intention of being acted upon, or because for any other reason they, in fact, remain unacted upon or have not altered the situation of the opposite party are not conclusive, though they are receivable in evidence

whether the person who made the admission was or was not acquainted with the incidents of the property when he made the statement. *Dinabandhu v. Munnu Lal*, 32 Ind Cas 443 An admission by one defendant against another, which admission the Court finds to be collusive, cannot relieve the plaintiff from the burden of starting his case against the repudiating defendant, nor can it shift the burden of proof to the shoulders of the latter from off the plaintiff *Sheikh v. Ma[illegible] Das*, 6 W R 299 Where there is no privity of contract between the parties an admission made by one party will not bind another. *Ganesh Das v. Dularan*, 1[illegible] Ind Cas 7=12 L L J 187

Admissions not conclusive proof. Under this section admissions are not conclusive evidence of the matters admitted. *Jagannath v. Kalidas*, 8 Pat. 776=10 Pat L T 191=A I R 1929 Pat 215, see also *Sadu v. Jadu*, 131 Ind. Cas 128=32 P L R 245, *Secretary of State v. [illegible]*, A. I. R 1929 Lah 748, *Dawinlar v. Lachmi*, A I R 1930 Lah 905 A party is not bound by his own representations wher[illegible]

If treated as admissions [illegible]

that they were not true [illegible]

sion is conclusive only, [illegible]

made *Janan Chowdhur[illegible]*

where its circumstances [illegible]

Ramsebul, 12 W R.

Where the defendant wants to make [illegible] plaintiff is at liberty to show the real nature of the transaction *Musammat Lotufunnissa v. Gour Saran*, 18 W R. 455 493 An admission not explained, though not conclusive, is strong evidence. *Hunsa Kour v. Sheo Gobind*, 24 W R. 431; *Sankaracharya v. Manali*, 51 Ind Cas. 876; *Ambar Ali v. Lutfe Ali*, 21 C. W N 996 A deliberate confession though not operating as an estoppel casts upon those making it the burden of explaining [illegible] rately asserted was not the fact. [illegible] 5 B L R. 529; *Sreenath v.* [illegible] , 24 W R. 431; *Vir v. Harnam*, [illegible] 184=11 C W. N 381 P. C.

S. 32. If the defendant admits any sum to be due, that admission, irre pective of the proof offered by the plaintiff, is sufficient to warrant a decree for that amo t in the plaintiff's favour *Ishan Chunder* v *Noboduecp* 6 W R 132 *Sec* *Dhur* v *Sreenath* 18 W R 331 If in a suit for specific performance of an agreement, the defendant admits the terms of the agreement and its execution, the plaintiff need not put the document in evidence nor prove its execution *Burjorji* v *Mancherji* 5 B 153, *Mc Gowan* v *Smith* 26 L J Ch. 8, see also *Alexander* v *Mir Mahomed* 5 B L R 5 9 (P C)=14 W R P C 29-13 M I A 438

The weight to be given to such admissions depends on various circum stances If the pleading is sworn to and hence it is deliberate and sol statement of the party its admissions may afford evidence agai t l not easily rebutted When the allegations are made on information a belief they are still admissible in evidence, as this fact only detracts fr the weight of the testimony *Doe* v *Sleel,* 3 Camp 115, *Pope* v *Allis* 1 U S 363

... trial Court or an appeal, where properly pr s... ed in a transcript or case made so long as they remain a part of the record I the statements or admissions were made by himself of by his counsel under a honest mistake or misapprehension of what the facts really were, and he desires to be relieved from the effect ... Court for leave to withdraw such adm... to do so make a showing of good faith should be granted or denied in the f... an action is in *that action* conclusivel... expressly makes in the pleadings, or are formally entered into for the purpose of dispensing with proofs *Bur Ju* ... § 274

... character are entitled to great weight, but they are not conclusive again t ... and do not constitute an estoppel *Doe* v *Sleel,* 3 Camp 115 *Cameron* v *Lightfoot* 2 W Black 1190, *Studdy* v *Sanders,* 2 Dowl & R 345, *De W...* ... *dale* v *Milburn* 5 Price 485 ...

be... ca... *Acuton* v ... The doctri... have turn... rest upon... embrace al... ein it c... purely... and...

eking the int... to the rul... *s Legal* ... *Lord Ke*... with ... truth ... private...

tying under oath is more than a wi... behalf ... n of the judicial power in his ... which *contraria non est audiendus*' ... 130, expresses in technical language ... man should not be permitted to ... the san... transaction, or in ... o c... ng allegations accord... *Smi*... oston *Eleva ed Ty Co,*

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WINESSES.

S. 32.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears the Court unreasonable, are themselves relevant facts in the lowing cases:—

ses in which statement of relevant fact person who is dead innot be found, etc., relevant

(*1*) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that rson's death comes into question.

hen it relates to se of death,

Such statements are relevant whether the person who made em was or was not, at the time when they were made, under pectation of death, and whatever may be the nature of the ceeding in which the cause of his death comes into question.

(*2*) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary urse of business, or in the discharge of professional duty; or of acknowledgment written or signed by him of the receipt of oney, goods, securities or property of any kind; or of a document ed in commerce written or signed by him; or of the date a letter or other document usually dated, written or signed him.

s made in course of iness;

(*3*) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

against interest of ker;

(*4*) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and ien such statement was made before any controversy as to such ght, custom or matter has arisen.

gives opinion as to blic right or custom matters of general erest;

(*5*) When statement relates to the existence of any relationship* [by blood, marriage or adoption] between persons as to whose relationship* [by blood, marriage or adoption] the person

relates to existence relationship,

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* These words in s 32, cls (*5*) and (*6*), were inserted by the Indian Evidence t Amendment Act (18 of 1872), s 2

S. 32. making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised

(6) When the statement relates to the existence of any relationship* [by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised

or is made in will or deed relating to family affairs,

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (*a*).

or in document relating to transaction mentioned in section 13 clause (*a*),

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

or is made by several persons and expresses feelings relevant to matter in question

Illustrations

(*a*) The question is whether A was murdered by B, or

tively to the murder, the rape and the actionable wrong under consideration, relevant facts

(*b*)

An kept in the course of business, er and delivered her of a son is a relevant fact

(*c*) The question is, whether A was in Calcutta on a given day

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended A at a place mentioned in Calcutta, for the purpose of conferring with him upon specified business is a relevant fact

(*d*) The question is, whether a ship sailed from Bombay harbour on a given day

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London, to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact

(*e*) The question is, whether rent was paid to A for certain land

A letter from A's deceased agent to A saying that he had received the rent on

on a certain day The fact that a letter written by him is dated on ... relevant.

* These words in s 32, cls (5) and (6), were inserted by the Indian Evidence Act Amendment Act (18 of 1872), s 2

(h) The question is, what was the cause of the wreck of a ship

A protest made by the Captain, whose attendance cannot be procured, is a relevant fact

The question is, whether a given road is a public way

statement by A, a deceased headman of the village, that the road was is a relevant fact.

The question is, what was the price of grain on a certain day in a particular market A statement of the price, made by a deceased banya in the ry course of his business, is a relevant fact

(k) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(l) The question is, what was the date of the birth of A

A letter from A's deceased father to a friend, announcing the birth of A on iven day, is a relevant fact.

(m) The question is, whether, and when, A and B were married

An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A on a given date is a relevant fact

(n) A sues B for a libel expressed in a painted caricature exposed in a shop window The question is as to the similarity of the caricature and its libellous character The remarks of a crowd of spectators on these points may be proved

... as witnesses Sections 32 and ... which exclude hearsay The ... esirability of getting the person, ... der that he may be examined as a witness in the regular way But this is practically impossible in many cases *Markby Ev* 32 So the first principle on which these statements are admissible ...

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such evidence is receivable, are consonant with reason and general convenience *Nort Ev* 174

Nature of Hearsay as an Extra Judicial Testimonial ...

utterance in his hearin ...

qualified to testify, so th ...

... stimony to it In other words,

S. 32 been asserted on the extra judicial occasion in question by the extra judicially stating or narrating witness" *Book* VI, Ch IV of *Bentham's Rationale of Judicial Evidence* The Hearsay rule tells us that B's assertion cannot be accepted because it has not been made at a time and place where it could be subjected to certain essential tests or investigations calculated to demonstrate its real value by exposing such latent sources of error *Wigmore* § 1361

Form of Hearsay In respect to form hearsay statements may properly be regarded in one of two ways The rule of exclusion applies indifferently to them all As distinguished from each other by the nature of their source unsworn statements in their assertive capacity may be treated as composite or individual

Composite hearsay may be defined as a compound or blended extra judicial declaration of an indeterminate number of people so mingled that the separate voices can no longer be distinguished

Individual hearsay, on the contrary, may be regarded as an extra judicial statement shown to have been made by a particular person or set of persons So far as classified by means of the which through which the utterance is presented to the tribunal they may be conveniently considered as being oral, printed or written *Chamberlayne's Ev* § 2737

Composite Hearsay Composite hearsay, as above defined, usually presents itself to the tribunal, with increasing vagueness as Reputation, Rumour or Tradition Individual expressions of opinion, though persistent, do not constitute reputation *Chamberlayne's Ev* § 2738

Hearsay Rule and its exceptions—its Historical development etc There is a great head of the law of Evidence' says *Prof James Bradley Thayer* "comprising indeed, with its exceptions much the largest part of all that truly belong there forbidding the introduction of hearsay The true historical nature of the rule is hinted by the remark of an English Court, two centuries ago and over when they checked the attempt of a woman to testify what another woman had told her The Court,' it was quietly remarked 'are of opinion that it will be proper for *Wells* [illegible] (*Elizabeth Canning's Case* 19 How St Tr 38[illegible]

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thought, or 'believed,' or had heard from others, or had inferred [illegible] of the
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We find these used by a complaint witness as far back as [illegible]
evidence to the jury in 1721 Such declarations in early times, and even in [illegible]

S. 3

times, had a pe… say seems alwa… loped, used to… know what the… stances, was … the aspect of family reputation; and reputation was often reckoned an adequate ground for judicial action. In the thirteenth century we find a witness, in proving another person's age, giving as the basis of his testimony the fact of the mother's recording the age in the records of a Priory, which record he had seen. In matters affecting a whole parish or a large number of persons, the hearsay and reputation of those belonging in the given community was always regarded as good.

"There was another class of unsworn statements which had always been resorted to in judicial proceedings and admitted to the jury, namely, written ones, entries in registers, in a person's books, in the account books of the stewards, in a merchant's books, in contracts, deeds, wills, and other documents. Documents had always been shown to juries,—long before witnesses were received to testify to them. In the early days they did not stick, it would seem, at showing the jury any document that bore on the case, without even thinking of how the writer knew what he said, … ently authenticated were one … one. It appears, then, that … pro-hibition came in under … in, or rather, so to speak, stayed in, simply because they had always been received, and no rule against hearsay had ever been formulated or interpreted as applying to them. Such things, continuing at the present day, are *e. g.*, the admission of old entries and writings in proof of ancient matters, written declarations of deceased persons against interest, and in the course of duty or business; and, to … a thing … of 1800, … qualified … ly never … s in them … tion, there … deceased … rations of … has the … made; or … ed, such … same fact itself admissible, and declarations of present intention or present physical sensa… subject. … w relating to hearsay from … and from an uncertainty whether and how far … ictly limited, … to hearsay is … In a leading … question of … 'I base my judgment upon this that no … ery case when a document could be received, and clearly, unless it is to be brought within some one of the exceptions, it would fall within the general rule that hearsay evidence is not admissible.' (*Sturla v. Freccia*, 5 App. Cas. 623) On the other hand, *Sir George Jessel*, in a very different tone, in 1876, had declared it to be the Court's duty to extend the exceptions to the hearsay rule, out of 'regard to the reasons and principles which have induced the tribunals of this country to admit exceptions in the other cases' (*Sugden v. St. Leonards*, 1 Pro. Div. 154). It seems a sound general principle to say that in all cases a main rule is to have extension, rather than exceptions to the rule; that exceptions should be applied only within strict bounds, and that the main rule should apply in cases not clearly within the exception. But then comes the question, what is the rule, and what the exceptions? There lies a difficulty. A true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever

S. 32 been asserted on the extra judicial occasion in question by the extra judicially stating or narrating witness" *Book* VI, Ch IV of *Bentham's Rationale of Judicial Evidence* The Hearsay rule tells us that B's assertion cannot be accepted because it has not been made at a time and place where it could be subjected to certain essential tests or investigations calculated to demonstrate its real value by exposing such latent sources of error *Wigmore* § 1361

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[illegible] state it if they did, were not to say what [illegible] inferred from what [illegible] now call circumstantia [illegible] ween the function of [illegible] discriminate and define [illegible]

doctrine, *rules which* were coeval with the doctrine itself or much [illegible] example, it seems always to have been true, in cases of homicide, that the dying declarations of persons killed were reported and acted on in judicial proceedings. We find these used by a complaint witness as far back as 1202, and used in evidence to the jury in 1721 Such declarations in early times, and even as late

S. 3

times, had a peculiar credit allowed them
say seems always to have been resorted to
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hibition came in under the head of written entries or declarations; they came in, or rather, so to speak, stayed in, simply because they had always been received, and no rule against hearsay had ever been formulated or interpreted as applying to them Such things, continuing at the present day are *e g*, the admission of old entries and writings in proof of ancient matters, written declarations of

persons against interest were received, and, in England even oral declarations of deceased persons in the course of duty or business And not only has the scope of these old titles been enlarged, but new exceptions have been made; or perhaps they are rather old ones coming to be recognized and formulated; such
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should apply in cases n
question, what is the rule,
true analysis would prol
hearsay rule the exception,

S. 32. is relevant is adm
exceptions, but
this classification
rule would have i
that it shows a sp
particular instances, while rejecting it generally. For example there is, some

to say the contrary or as part of a series of statements or a class of them wh
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be as parts of the
fact itself *pars rei gestae* lying under the course of hearsay, but received, by way
of exception, on account of this special intimacy of connection with the adm
sible fact This part of the subject presents an instructive spectacle of confu
sion resulting from the desire on the one hand to hold to the just historical
theory of our cases and on ... that be n
aware of the size and complex ... entire
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Theory of Hearsay Rule The principle of exclusion of hearsay evidence
Credit being derived from attestat n
fountain from whence it flows and
when there was such a speech made ... for rat rely

to be affected by it, had no opportunity of cross examining him' *Ibid* cf
Wigmore § *1362* "It seems agreed that what a stranger has been heard to say
is in strictness no manner of evidence either for or against a prisoner not only
because it is not upon oath but also because the other side, hath no oppor r
of a cross-examination' *Hawkins Pleas of the Crown* *C H C 46* § 44 In
also the objection of *Pelham in R*
Wright v *Tatham*, 7 A & E 313, *Co*
an oath furnishes some guarantee for
of cross examination gives an opportunity of testing the foundation
value of it' In the same case *Alderson B* said "The general rule is th
facts are to be proved by testimony of persons on oath and subjected to cr
examination In *Grasham Hotel* v *Manning* Ir R 1 C J 125, *O Brien J*
said "The statements and declarations of opinion received in evidence in
this case were made by parties not examined upon oath or subject to cross
examination and would not be exempted from the general rule excluding
hearsay evidence

In some of the cases great stress is put on the right of cross examination "In
In *Dysart Peerage Case*, L R 6 App Cas 503, *Lord Blackburn* observed

S. 3

the evidence of a man who is not pro- not be cross examined, as a general rule ... *Ley v. Earl of Anglesea*, 17 How St Tr ... So "the general rule is that ... that such statements are ... r ascertaining their truth,—the author of the statements not being exposed to cross examination in the presence of a Court of justice, and not speaking under the penal sanction of an oath, with no opportunity to investigate his character and motives, and his deportment not subject to observations" *Marshall v. R. Co*, 48 Ill 476, see also *Berkeley Peerage Case*, 4 Camp 406 *Doe v Ridgeway*, 4 B & Ald 54; *R* v. *Davlin*, Jebb Cr C 127; *Smith v. Blakey* L R 2 Q B 326, *R v. Jenkins*, L R. 1 C C. R 193; *Sugden v. St Leonards*, L R. 1 P D 154.

'Of the two main facts' says *Mr Chamberlayne*' which impair the probative force of an unsworn statement used as hearsay, lack of oath and the absence of cross-examination probably the later is, at the present time regarded as being by far the more serious Indeed, the importance of the oath is more frequently regarded as an incident of cross examination, than as a valuable guarantee for truth in itself considered While, therefore, lack of sanction of an oath is spoken of by judges as being an infirmative consideration in relation to hearsay of practically co-ordinate importance with absence of cross-examination, such can scarcely be regarded as the fact The real reason for thus joining the two requirements of oath and cross examination is that cross-examination, in a juridical sense, takes place under oath An extra judicial statement give under oath, is as objectionable to the present rule, if not tested by cross examination, as an unsworn statement would be" *Chamberlayne's Ev* § 2712.

Reason for Hearsay Rule—Inherent weakness—Absence of cross examination. The absence of a cross-examination is a more serious matter Not without

withstood the probing of a well conducted cross examination A proponent whose witness is stating the truth can ask for no better help for the establishment of

regarded

break a p

is composed is sound or rotten In much the same way, in the absence of the searching test which cross-examination alone makes practically possible, the tribunal has, as a rule, no satisfactory data upon which to estimate the probative

h circumstances judicial admiss-

being misled A presiding Judge

ring that such a statement was irrelevant, without probative force, or that the jury could not reasonably act upon it

On the other hand, the use of a rigid rule of procedure to the effect that however necessary the extra judicial statement may be to the proponent in prov-

S. 32. that instance, that the statement offered is free from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of

for the evidence—may be examined more closely, taking first the latter

(1) Where the test of cross examination is impossible of application by reason of the declarant's death or some other cause rendering him now unavailable as witness
statements w
The question
the latter or t
policy of ch

test of cross-examination

(2) There are many situations in which it can be easily seen that such required test would add little as a security, because its purposes had been already substantially accomplished If a statement has been made under such circumstances that even a scep
ordinary instance) in
on a test whose chief o
exists, the statement cou
from that person was

the Hearsay ex

Jessel M R in *Sugden*
w of some other country
ersons who are dead in
all cases where they were made under circumstances in which such evidence ought properly to have been admitted, that is, where the person who made them had no interest to the contrary, and where they were made before the commencement of the litigation That is not, however, our law As a rule the declarations whether in ons, are not admissible in evidence at this subject, so frequently has it shut ently could it have ca a most crying and intolerable injustice, that a large number of exceptions have been made to the general rule Now I take it the principle which underlies all these exceptions is the same In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty In the next place the declarant must be disinterested, that is, disinterested in the sense that the declaration was not made in favour of his interests And, thirdly, the declaration must be made before dispute or litigation, so that it is made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases" *Chamberlaynes Ev* § 2763 notes

a greater or less necessity for reso (1) The person whose utterance offered may now be d
unavailable for the
palpable reason. It
seven ensuing ones
out in the rules, but the general notion is clear and unmistak

acknowledged in these exceptions with more or less directness and strictness . . . but we cannot expect, again or at this time, to . . . the same or other sources This appears more or less fully in the exception section 6), for reputation, and it (as in the first case) with the entire some valuable source of evidence . . . convenience, can be predicated But the . . . 1121, *Chamberlayne's Ev* § 2761 Hearsay . . . here is better evidence There are certain . . . their very nature, admit of the production . . . ationship character, custom, prescription and . . . R. Act X Rule. 30.

Second . . . second princi[illegible] untested, is [illegible] cross-examin[illegible] . . . ability of accuracy and . . . not quite equivalent to . . . The cir-

stances presuppose. It is merely that common sense and experience have from time to time pointed them out as practically adequate substitutes for the ordinary test, at least, in view of the necessity of the situation *Wigmore* § 1422

Witness qualifications, and other Rules, also to be applied to statements admitted under these exceptions The Hearsay rule is merely an additional test or safeguard to be applied to testimonial evidence otherwise admissible T[illegible]

declarations The English ruling in *R* v. *P[illegible]* [illegible]

ion it is relevant, though, possibly

Scope of Section 32 This section provides an exception to the general

may have spoken hastily, inaccurately or even falsely Moreover the person who is really responsible for the statement did not make it on oath ; he was not

S. 32. cro -examined upon it, and the Court had no opportunity of observing his demeanour when he made it. It is a fundamental principle of our law that evidence ...

are as follows :—Statements written or verbal, of relevant facts when made by a person (a) v ... incapable of ... an amount of ... to the Court unreasonable, are admissible : (1) when it relates to the cause of his death or (2) when it is made in course of business, or (3) when it is against the interest of the maker ; or (4) when it gives opinion as to public right or custom, or matters of general interest ; or (5) when it relates to existence of relationship, or (6) when it is made in will or deed relating to family affairs, or (7) when it is made in document relating to transaction mentioned in section 13, clause (a) ; or (8) when it is made by several persons and express feelings relevant to the matter in question In the absence of the conditions prescribed by section 32 of the Evidence Act a plaint filed in a prior litigation is not admissible to prove a statement by a superior landlord *Lakshan* v *Tukin*, 39 C L J 90=28 C W N 1033=80 Ind Cas 357 A recital in a document is admissible in evidence against parties who are not parties to the document, only where the conditions laid down in section 32 of the Evidence Act are fulfilled. *Ram Sarup* v *Bhagwant Prosa* ... be admitted as corroborative ... of collection of rent at a certain ...

... re corroboration ... *Chantter Rai* v *Kailash Behari* 44 Ind Cas 422

Requisites of admissibility under section 32 Statements oral and written made by persons not parties to the suit, and not witnesses therein, are not admissible ...

... of the rule itself The first of these is that of necessity ; i e the situation in which it is no longer possible to subject the person to oath and cross-examination, so that if his statements are to be had at all, they must be had without applying these securities (i e securities guaranteed by oath and cross-examination) for trustworthiness The law on the subject is thus laid down by *Tindal* C J in *Garwood* v *Dennis*, 4 Bing 328 "It is objected that however impressive the declaration of a man of character may be, yet the law admits the word of no man in evidence without oath The general rule certainly is so, but subject to relaxation in cases of necessity or extreme inconvenience" The second notion is that, even though a necessity exists for relaxing the Hearsay rule, nevertheless this is not to be done unless there is in the particular case of declarations offered, some ... which shall—in some degree, at ... otherwise required *Greenl* ... Conn 507, *Loomis J* said ... oath and the test of cross-examination as a pre-requisite ... verbal testimony, unless it discovers in the nature of the ca... or test equivalent for asce... ing the truth" So statemen... by persons who are dead or other... pacitated from being ca... are admitted in the cases me... 32 and 33 *Steph*... principle of necessity t... ding hearsay is relax... under which statements ... e section guaran... ness of the statements ... 3. The whole ...

ossible in the
17 "Section 32
y persons who
The object of
those restrictions and the reasons for them are plain The basic principle of legal evidence being that the Court must always have the best, it follows that where persons can be, they must be brought before the Court to tell what they know at first hand Their veracity can then be best tested by the art of cross-examination Where however witnesses cannot be brought before the Court
idence of a kind that a Court
The conditions which when
, are imposed upon its admis-
its truth As there is no
tement will not be
, t e ordinary course,
a true statement."

Per Beaman J in *ibid*

Written or verbal The rule as regarding hearsay is so sweeping that it excludes all written hearsay irrespective of the mode in which it is presented—very often in the form of official records, but more frequently according to the particular commercial transaction to which it relates Of course the fact that the written hearsay is in the form of letters or telegrams does not avail to make it admissible The fact that hearsay is printed no matter in what form, does not alter the application of the rule *Burr Jones* § 298 So considered as hearsay, an unsworn
consideration
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§ 2756 As
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of the exceptions to that rule

"'Verbal' means by words, it is not necessary that the words should be spoken If the term used in the section were 'oral', it might be that the statement must be 'confined to words spoken by the mouth' But the meaning of the word 'verbal' is something wider the words of another person may be so adopted by a witness as to be properly treated as the words of the witness himself" *Per Petheram C J* in *Queen Empress* v *Abdulla* 7 A 385 (397) F B In the same case *Straight J* said 'I am also of opinion that the signs made by the deceased *Dulari* in response to the question put to her, may be given in evidence
erial from which the inference may
properly
oted or negatived the matter of such
questions
s is established satisfactorily to the
that such questions taken with her assent or
titute a 'verbal statement' as to the cause
32 of the Evidence Act I am not
rely technical distinction is to say that while
questions adopted or negatived by a mere 'yes' or 'no' constitute a 'verbal statement' within s 32, they become inadmissible when assent or dissent is expressed by a nod or a shake of the head' But *Mahmood J* expressed a different view in the same case At page 398 he said 'I should accept the
not to interpret the
the meaning of
word' to me
'verbal' cannot mean more than 'by means of a word or words' Nodding the head or waving the hand is not a word" As regards dying declarations *Prof Greenleaf* observes "The testimony here spoken of may be given as well by signs as by words, thus, where one, being at the point of death and conscious of her situation, but
received, was asked
the wounds, and, if s
squeezed his hand,
consideration of the jury" *Greenl Ev* § 159(b) In *Mockabu* v *Com.* 78 Ky.

S. 32. 382 *Hines J* said "Dying declarations are not necessarily either w spoken Any method of communication between mind and mind adopted that will develop the thought, is the pressure of the hand a nod head or a glance of the eye" See also *R v Lowe*, 10 Br C 1,3 9, *R* 12 Cox Cr C 168

Rejection of evidence by the lower Court When the Court had rejected the evidence of certain witnesses on the ground that it was [illegible] and had not conformed with section 32 of the Evidence Act, and on the the evidence it was sometimes uncertain whether the witnesses were from their own personal knowledge or from information derived from but the Court had considered it from both points of view and held it [illegible] the Judicial Committee saw no reason to differ from the estimate which th had formed as to the credibility of the witness in the former case nor, latter case, to question the manner in which the Court had applied the pr of section 32 *Shafiq un nissa v Shaban Ali Khan*, 26 A 581=9 C 105=6 Bom L R 750

Relevant facts. This section lays down that the statement written or verbal, *Per Pither* in *Queen-Empress v* [illegible] examination" says [illegible] employed as hearsay, or, more properly, [illegible] determinate, evidentiary value to a declaration not so tested, has led [illegible] administration as is most clearly seen in connection with the exception hearsay rul [illegible] vancy objectiv subjective, [illegible] to be recei evidence [illegible] the absence o a demonstration of overwhelming forensic necessity on the part of the pro as would warrant incurring some hazard by way of misleading the *Chamberlayne's Ev* § 2725 Facts which are objectively relevant are relevant [illegible] and 5 [illegible] *Bhusana* [illegible] not rele [illegible] "If a fa [illegible] Facts n [illegible] learned [illegible] i e, rel [illegible]

[illegible] I cannot see that the [illegible] other portions of the Ev [illegible] rations is to the dec [illegible] ndoubtedly the identity murderer is a fact in issue in a trial for [illegible] most [illegible] These [illegible] would [illegible] cannot have been the intention Legislature Facts in issue are facts about which there is a question in between the parties and although all relevant facts are not necessarily fa issue, I cannot understand how the facts that are in issue can be other relevant to the determination of the suit, and this I think is clear from language of section 6" But see *Patel v Patel*, 15 B 565

Subjective relevancy If the objective relevancy of a hearsay [illegible] is tacitly assumed as a matter of course the question of subjective relev stands in quite a different p [illegible]

[illegible]

much nicety In connection with two conditions of subjective [illegible]

Adequate Knowledge and Absence of Controlling Motive to Misrepresent, this difficulty is almost entirely confined, in case of hearsay, as of other statements, to the latter. Adequate Knowledge like Objective Relevancy, raises in practice, but little difficulty in its determination. It can be finally settled, once for all almost on inspection. But in the case of Absence of Controlling Motive to Misrepresent, the situation is quite different. *Chamberlayne's Ev* § 2731

Subjective Relevancy—Adequate knowledge A qualification required in case of every witness is that he should be shown or can reasonably be assumed to possess a knowledge commensurate with, sufficient to give evidentiary value to, the evidence which he proposes to offer. Should the matter be one covered by direct observation, it must
facilities and opportunities fo
Where the fact to be stated is o
appear or be justifiably assum
knowledge helpful to the jury. Should it appear that the proposed testimony is not based upon adequate personal knowledge gained from observation or otherwise, it is subjectively irrelevant and should be rejected. The fact may be as stated but cannot be credited. The requirement is by no means restricted to the judicial use of unsworn statements. But it is naturally insisted on in such a connection so far as can reasonably be done. *Chamberlayne's Ev* § 2732

Subjective relevancy—Absence of controlling Motive to misrepresent "The credibility and consequent admissibility of an unsworn statement is thus seen to rest upon its subjective relevancy and this in main, upon the existence of the motive to misrepresent. The question is a crucial one and of some nicety and difficulty when viewed from the standpoint of Procedure. To exhibit to the jury by the aid of cross examination facts out of which may be thought to arise motives tending to pervert, consciously or unconsciously, the desire to truthfully narrate facts known to the declarant is a comparatively easy matter. The provisions of Procedure have been greatly taxed in an attempt to formulate general rules as to what may or may not have been omitted which may to a certain extent supply the place of judicial testing. *Chamberlayne's Ev* § 2733

"**Secondary evidence** In considering the use of hearsay statements at the present day under enlightened judicial administration by the use of reason it would be natural in case of a hearsay statement to adopt the rule that in order for the declaration to be subjectively relevant it must appear that the declarant was not so far under the influence of bias, self interest or other controlling motive to misrepresent as to render it irrational that the jury should credit his story. *Chamberlayne's Ev.* 2733

"In dealing, however, with the exceptions to the hearsay rule where the assertive unsworn statement is treated as secondary evidence, it is important to bear in mind that we are dealing, as it were with the stone age of judicial evolution. The temper of the times during which the hearsay rule and its exceptions were formulated is procedural rather than administrative. Pre-appointed equivalences, the ability to state one fact in the terms of another take the place to which the judgment deduced by reason from legal principles might more properly lay claim. Thus in relation to subjective relevancy Adequate Knowledge in case of a declaration regarding Pedigree must be shown by membership in the family. Absence of controlling motive to misrepresent is established by the fact that the assertion was made before the warmth of partisanship or the beguiling of self interest had been aroused by a *Lis Mota*. In other words, to secure admissibility on account of subjective relevancy the hearsay statement must have been made *ante litem motam*. *Chamberlayne's Ev* § 2733

Primary Evidence
equivalences characteristic
cases in which modern ju

sufficient guarantee
In course of legal
evolution the existence of one of two forces was found to furnish a sufficient guarantee to this effect. These are (1) the Force of Spontaneity and in certain cases (2) the Force of Habit. In either case, experience showed that the

S. 32.

is the probative force of assertive judicial decisions ... happened to modern judicial administration that the evidence is not secondary as originally regarded by procedure but is, under modern conditions, primary there being no species of proof of a superior grade in connection with matters to which they relate" *Chamberlayne's Ev* § 2733

Person "This argument was based entirely upon the provisions of the General Clauses Act which says that 'person' shall include 'persons', it was contended that 'person' in section 32 must be read as persons' I do not think that this ingenious argument is entitled to succeed" *Per Maclean C J* in *Chandra Nath* v *Nilmadhub* 3 C W N 85(89) = 26 C 236 (237) So a statement relating to the existence of a ... document signed by several persons some only ... under clause 5 of section 32 of the E... document is dead, the statement made by ... section 32, if it comes under one or other of its clauses, being thus the statement of a person who is dead *Ibid*

... dered to be sufficient to satisfy ... *an*, 10 Conn 11, *Williams J* said ...

... writing by such a person filed before ... was held to be inadmissible in evidence as ... *Jagat Lal* v *Jogeshar*, 25 A 149 P C Before ... adm ... *Queen* v *Gopalao* 12 W R Cr ... C 236 = 3 C W N 53 So also ... witness who has been fully examined and cross examin... the suit In such a case ... for the admission of the previous statement made by the witness ... *Kusum Kumari* 46 Ind Cas 929 = 5 Pat L J 161 Where a person making a dying declaration chances to live, his statement is not admissible *Emperor* v *Ram Sattu*, 1 Bom L R 434

Who cannot be found ... is in effect unavailable f... disappearance is shown by ... search The only objectio... the possibility of collusion between ... to be satisfied that there had bee... *bona fide*, this objection loses its forc... find a witness, then he is as if were dead ... may be read "so as the party make oath that he did his endeavour to find witness, but that he could not see him nor hear of him" *Anon Godbold* 3 ... In *Oates Trial* 10 How St Tr 1227, 1285, *Oates* "My lord, I will then produce what he swore at another trial ; *L C J Jeffereys* "Why, where is he? Is he dead?" *Oates* "My lord, it has cost a great deal of money to search him out; but I cannot anywhere meet with him and that makes my case so much worse that I cannot, when I have done all that man can do to get my witness ... , when I thought my trial would ... ar of him ' *L C J*, "Look ye ... use to admit of any ... we will indulge you so f... found within the juris... residence or in the country is not sufficient *Thomas* v ... 174 ; *Pope* v *State*, ...

making a dying declaration chances to live, his statement cannot be admitted in evidence as dying declaration under s 32 of the Evidence Act, but it may be relied on, under s 157 of the Evidence Act, to corroborate the testimony of the complainant when examined in the case *Emperor v Rama Sattu*, 4 Bom L R 131

Incapable to give evidence. In a murder case one of the witnesses for the

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se account
ritten state-
ments of relevant facts made by persons whose attendance could not be procured without unreasonable delay and expense, such statements having been made in the ordinary course
and written or signed
238 But the mere
is not a ground for ad
previous statement made by him on the ground that his evidence cannot be procured without unreasonable delay or expense *Kadappa* v *Tirupathi*, 86 Ind Cas 576=21 L W 210=A I R 1925 Mad 111 Vide also under section 33

CLAUSE I.

Dying declarations—Principle of Admission The grounds of admission of dying declarations are (1) death, (2) necessity, for the victim being generally the only eye witness to such crimes, and (3) the sense of impending death, which creats a sanction equal to the obligations of death *R* v *Woodcock*, 1 Leach 500 (504); *R.* v *Perry*, (1909) 2 K B 697, *Phip Ev* 308

The injured person being dead,
ary proof, the testimony of these
ances the charge could scarcely be
made out except by th
facts of the transactions
of the real facts The
received unless there is to be a failure or miscarriage of justice While these

S 32 is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice." *Per Eyre C B* in *R v Woodcock*, 1 Leach 500 501 "Taking men as they are at present the world as ... the guarantees *for truth telling in case* of ... so high as early administration was ... ument in favour of the establishment of the exception that a sense of impending death created a sanction equivalent to the administration of an oath may be conceded Is it quite certain however that the sanction of the oath remains the same at the present time as in earlier days? Changes in religious ... a growing disbelief in the once universally accepted doctrine of eternal ... themselves registered in ... Yet, regardless of the fact ... punishment is still insisted on ... no period of its use have the result ... Perjury has always been a curse of judicial administration ... So ... keener than the ... Even ... the ... therefore ... a species of ext... under which ... an oath is by ... truth telling ... judicial service —*Chamberlayne's Ev* § 2819

Dying declarations when admissible under English Law A declaration made by a declarant as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is deemed, to be relevant only in trials for murder ... and only when the declarant is shown to the sat... of death and to have given ... ation was made *Steph Dig Ev Art 26* So declarations are ... upon charges other than homicide or as to homicides other than that of the declarant The deceased must be proved to the satisfaction of the Judge to ... in actual danger of death ... *v ... Eli ... 309 Sus ex Pr ...* 0, *R v Pirray*, (1909) 2 K B ... de So the application of the ... is strictly and absolutely limited to cases in which the death of the person who made the declaration is the subject of enquiry, or is part of the same *transaction* *R v Mead* 2 B & C 605 So dying declaration is not admissible on an indictment of perjury *Ibid* So when on an indictment ... administering savin to a woman pregnant but not quick with child ... intent to procure ... declaration was ... (the woman being ... the declaration might ... were adm... of enquiry ... L J M ... has been ... are also ... 337 In ... in a cake, ... and his maid servant who was present and had made the cake, ... not afraid of it, and thereupon ate of it, and was in consequence poisoned and died Her dying declarations (made after she knew of her master's death and was conscious of her own approaching death) as to the manner in which she had made the cake, and that she put nothing bad in it and that the prisoner was present eating his breakfast at one end of the table while she was making the cake at the other end of it, were tendered in evidence, and objected to on the ground that the only person whose dying declarations could be received in evidence was the person whose death formed the subject of enquiry at the trial But *Coltman J* after consulting *Parke B* admitted the evidence on the ground

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eath [*Sussex*
R. v *Perry*,
, i e. was in
Leach 500.
s of persons
son making
such declaration
an account to his
Alderson B said
he is in the san
sanction of an oath
ed equal to an oath, but they are nevertheless open to observation For though

the evidence of such declarant inadmissible ' If the above conditions concur, it is immaterial under the English law that the declarant lingered for several days, or even weeks (*R* v *Bernadotti*, 11 Cox 316, *R* v *Craven* 1 Low 77) or

of the name of *Edwards*, very much
been recently executed for a high way
he had
of the
consider-
Villette's knowledge upon
this subject had proceeded from the solemn declaration of a dying man, it was admissible evidence in favour of the prisoner The Court observed "It would be inconsistent with the rules of evidence which are rules of justice, to examine a witness to the declaration of a person dying under the circumstances described
received is, that the mind
, acts under a sanction
el by a solemn appeal to
ined convict, would be
carrying the rule of evidence beyond its possible extent, even if the person were alive, for as an attainted convict, he could not have been admitted to give testimony upon oath, and the dying declarations of such a person cannot, consistently with the principles of justice, be considered as better evidence than his testimony on oath would have been if he had been alive. The fact, however, that a man resembling the person of a prisoner was executed, may
be g
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the w
satisfied', and
be inadmissible.
they were made
F & F 857;
owell, 1 Den 1
Danger existed
The deceased clearly thought he was dying, and had no hope of recovery,

S. 32. There is no ground for holding his declaration inadmissible' In a trial for murder a written declaration of the deceased made under the following circumstances was tendered in evidence for the prosecution; the declaration had been made on oath to a Magistrate's clerk about thirteen hours before death, the clerk asked the deceased before he took down her statement whether she thought she was likely to die; she said ' I think so from shortness of my breath', her breath was then extremely short, the clerk said, "Is it with the fear of death before you that you make these statements? Have you any present hope of your recovery" She said, None' The clerk then wrote out her statement and added to it the above conversation in the form of a statement by the deceased, but he omitted the word "present before "hope" He then read over to the deceased what he had written, and she then added the words 'at present' after "hope and signed the declaration It was held that the statement was not admissible in evidence, as it did not appear to have been made under a settled hopeless expectation of death, inasmuch as the deceased had expressly qualified the words 'no hope' by inserting after them the words "at present" *R v Jenkins* (1869) L R 1 C C R 187 *Kelly C B* in his judgment said "The result of the decisions is that there must be an unqualified belief in the nearness of death a belief without hope that the declarant is about to die. If we can look at reported cases and at the language of learned Judges we find that one has used the expression 'every hope of this world gone' (*Per Eyre C B* in *R v Woodcock*, 1 Lea C C at p 502), another "settled hopeless expectation of death' (*Per Willes J in R v Peel*, 2 F & F at p 22), another 'any hope of recovery, however slight' renders the evidence of such declarations inadmissible (*Per Tindal J in R v Hayward*, 6 C & P at p 160) We as Judges must be perfectly satisfied beyond any reasonable doubt that there was no hope of avoiding death. See also *Will's Ev* 196 There must be a belief ... indeed in an instant or immediate death (as held in *R v Osman*, 15 Cox 1 ... *Lush L J* and *R v Mitchell*, 17 Cox 503, per *Cave J*), but in an imminent ... impending, as distinguished from a deferred one (*R v Perry*, [1909] 2 K B ... *R v Austin*, 8 Cr App R 27), *Phip Ev* 309

History—English Law "This exception' to the rule against hearsay ... most of the others existed long before the rule itself, an example of ... occurring in ... Cr Seld Soc 11, 27; see also Plac Ab 1 ... and Cl. *Glanv* ... stances of its admission ... the establishment ... 6 How ... 1333-4. Dow ... declarations ... in the case of civil ... *Dryden* 1 M & W 615 629) *Thayer* ... Ed) 349 360, *Salmond's Essays* 52, *Wigmore Ev* ... Ed 305

Difference between English and Indian Law In England dying declarations are admissible in criminal cases in the single instance of homicide, that is murder or manslaughter where the death of the deceased is the subject of the charge, and circumstances of the death are subject of the declarations, ... *Anglo Ind Code* Vol II 32... see also 1 East P C 353, *R v Mead*, 2 B ... 605, *R v Hind*, Bell 253 *R v Hutchison* 2 B & C 608. The observations of the Court in *Stobart v Dryden* 1 M & W 613, render it very doubtful whether dying declarations would be admissible in civil proceedings ... *Cr.* 2084, *1 Phill Ev* 290; *Taylor Ev 10th Ed* § 714. But in India they are admissible in civil suits as well as in criminal prosecutions for rape or any other offence [*Vide illustration* (a)] This illustration is probably based on ...

The earlier law admitted dying declaration in civil cases *Jackson v Kniffen*... *burgh*, 1 John 159 163 (1806) Thus it has been received where a subscribing witness being *in extremis* acknowledge the forgery ... will *Wright v Littler* 3 Burr 1244 (1761). So the statement of a dying w... with regard to the paternity of her child ... be have died with a ... her mouth and her ... in her hand" *Douglas* ... ise, 2 Harg Col ... 357, 35... (17...

In that case *Parke B* ... opinion ... which is now ... early exploded) that any ... *remis* was a ... n the ground that the solemnity of the occasion ... t to a declar...

S. 3

Bissorunjun Mookerjee, 6 W R. Cr. 75, *Lalji* v. *Emperor*, 6 P. 747, *Queen* v. *Ujrail*, 2 N. W P 212 In that case where in admitting dying declarations in a case of rape the Court consisting of *Kemp* and *Markby JJ* said. "It seems pretty certain that the law in England on the subject has been much narrowed of late years. There are instances in the older books in which dying declarations have been admitted in civil cases, and in no

rule as laid down in Neither in

the party making the statement is the
apply with equal force to its admissibility in
which dying declarations are admissible
rant is in a
less likely
under the
put on a level with a deposition, technically so called, which is admissible in

is it the reason why this evidence is admitted, but, even if it were so, that necessity is just as likely to exist where the deceased person has been robbed, or raped or assaulted, as where he has been murdered" see also *Queen* v *Ujrail*, 3 N W. P 212 In England, to render a dying declaration admissible, the declarant must have been in actual danger of death, he must have been fully aware of this danger, and death must have ensued *Taylor Ev* § 718, *Sussex Peerage Case*, 11 Cl & F 108, *R* v *Curtis*, 21 T L R 87, *R* v *Woodcock*, 1 Leach, 500, *R* v *Osman* 15 Cox 1; *R* v *Gloster*, 16 Cox 471, *R* v *Forester*, It is not necessary

John, 1 East P C 337; *R* v *Woodcock* 1 Leach 500; *R* v *Morgan*, 14 Cox. 337 But in India the statem
was or was not at the time when
v *Digamber*, 19 W R Cr 44,
v *Premananda*, 52 C 987=29 C
dying declarations for under s
facts made by persons who are dead are themselves relevant facts when the statement is made by a person as to the cause of his death and as to the nature
which
its are
ho are

S. 32. examined in Court before the presiding Judge S 32 provides an exception to ... ce must be given in Court by ... ne sea ... 1932 Lah 14 Before the passing of the Indi ... India was somewhat on the point that of I ... t XXV of 1861, the declaration of a deceased ... the deceased, at the time of making such declaration, believed himself to be in danger of approaching death although he ... 29 of Act II ... shall be recei ... declaration, and then thought himself to be in the danger of approaching death,' etc "Both these enactments, then required that, before a dying declaration is received in evidence, it should be proved that the person making it ...

statement shall be received in ev ... *Tinoo* 15 W R 11 at p 13 see ... 76, *R* v *Syumber Singh*, 9 W ... point even with the English law ... entertain no hope of recovery ... (XXV of 1861) and the old Evi ... tained a hope of recovery By the present Act it matters not whether ... existed even any exception of death at the time of making the declaration ... *Ev* 175; *Empress* v *Blechynden*, 6 C L R 278 A dying declaration made at the time when a person is in a precarious condition does not cease to be ... and become inadmissible under s 32 of the Evidence Act merely because ... few days more *Thakur Singh* v *E* ... =A I R 1929 Lab 64 According ... declarations are admissible when ... on died in a hospital after being assaulted ... o the injuries but was caused by pneumonia ... s, *held* that the dying statement of such person is not admissible in evidence in a trial of the person who assaulted the deceased under s 324 *Wali Mohammed* v *Emperor*, 126 Ind Cas ... 31 Cr L J 1903=A I R 1930 Oudh 249 So also where a woman who was alleged to have been raped and who committed suicide three days after the incident was proved to have made a statement shortly after the rape to one of her relations. *Held* that the rape not being the cause of death her statement was not admissible in evidence under s 32 (1) *Kappinaiah* v *Emperor*, A. I R. 1931 Mad ... 1930 M W N 702.

the necessit ... from any ... i e the dec' ... wrong ass... ... to the cause of ...

(o) Its limitations are heresies of the last century which have no ... sanction of antiquity They should be wholly abolished by legislation ... *Ev* § 1436

Subject matter of dying declaration A declaration made by a declarant **S. 3**

Pt 509 The deceased declarant must be the person whose death is subject of the charge *R* v *Mead* 2 B & C 605, *R* v *Hind*, 8 Cox 300=23 L J M C 117 In *R* v *Mead*, the dying declaration of *Law* after giving an account of the circumstances under which he was shot by *Mead*, proceeded to negative his having been present at, or having had any concern whatever in, the smuggling transaction deposed to
delivering the judgment
cannot be received
ed to a confession by the party himself of a very heinous offence he had committed The same observation applies to the case of *Wright* v *Tettler*, 3

of the charge, *and the circumstances of the death the subject of the dying declaration* ' See also *R* v *Hutchison*, 2 B & C 608 (notes) *R* v *Murton* 3 F & F 492 So the statements of a deceased person made prior to his death as to the cause of his death, or as to any of the circumstances of transaction which brought about his death are relevant as against all the accused *Mama* v *Crown* 67 P L R 1905=2 Cr L J 237; see also *Hur* v *Emperor* 81 Ind Cas 964=4 Lah 151 *Wali Mahomed* v *Emperor* 126 Ind Cas 511=A I R 1930 Oudh 749 The reason of the rule is thus stated by *Kingman, C J in State* v *Lohan*, 15 Kan 418 *Mr Pelfield* states that this evidence is not received upon any other ground than that of necessity, in order to prevent murder going unpunished Its admission can be justified only on

an extent, where the death of any one else than the declarant is the subject of the inquiry, as to justify the adoption of rule admitting such testimony ' So the declaration may not concern any and all topics It must concern facts leading up to or causing or attending the injurious act which has resulted in the
supposed necessity for the
foregoing limitations it will
as introduced by *Serjeant*
East in Pleas of the Crown Vol I p 353, where he said Besides the usual evidence of guilt in general cases of felony there is one kind of evidence more particular to the case of homicide which is the declaration of the deceased after the mortal blow as to the fact itself and the party by whom it is committed Evidence of this sort is admissible in this case on the fullest necessity, for it
present to be an eye witness to the
n of other felonies namely, the party
o further and equally necessary results

(1) If the killing was not secret, or if other and adequate testimony as to the circumstances of the death is at hand nevertheless the dying declaration is admissible even though in strictness it is not needed

(2) Where the fact of the killing is conceded the dying declaration under the spurious principle is by hypothesis unnecessary, nevertheless, this result is not recognized, the declaration is admitted even where the killing is conceded *Wigmore* § *1435*

Where in committing a dacoity the dacoits caused the death of a person the latter's dying declaration as to what was done by those concerned in the dacoity, in which the murder was caused was held to be not only relevant against the person who actually caused the death but also against those concerned in the dacoity *In re P Subbu Tevan*, 2 Weir 750, see also *R.* v *Baker*, 2 M & R. 53

S. 32. The dying declaration must
the mouth of a witness—e g, I
Tay Ev § 720, *R.* v *Sellers*, Carr
be, it must be complete in itself;
to qualify it by other statements, which he is prevented by any cause from making, it will be received *Taylor Ev* § 621. Section 32(1) does not cover only statement made by the person when he is dying from the result of the injury which caused his death but also covers the statement, as to the circumstances of the transaction which r
causing the death was inflicted
50 B 683=28 Bom L R 10
1924 Nag=115, *Emperor* v *Faiz*, 20 P R 1916 Cr.=35 Ind Cas 998=41 P L R 1917, but see *Autar Singh* v *The Crown*, 1 Lah 451=A I R 1924 Lah 253, where it was held that dying declarations are statements made by a dying person as to the injuries which have brought him to that condition or the circumstances under which the injuries were inflicted and as such, statements

person and that treatment is the cause though not the direct cause of the dea the whole affair, ill treatment and subsequent suicide, forms one transaction and, therefore, statements, made by the deceased, as to the cause of his death are admissible in evidence under section 32 (1) of the Evidence Act *Emperor* v *Faiz* 35 Ind Cas 998=20 P R 1916 Cr =17 P L R 1917. The motive for a
crime is of course a rele
Where the statement
reference to the motive
it cannot be deemed
of the circumstances of tl
admissible under s. 8(1)
any act of the deceased
d her make the statement *Venkatsu*
)31 Mad 689 Where the deceased, who had
having wounded him stated that another
u ed, held that such statement was not adm
17 P R 1901 Cr In the proceedings

before a M
witnesses,
prosecution

42=8 C L R. 273 A statement of a witness as to what he heard from

and not by *Surendra Nath*,
574=28 C 39 necessity, i. e that the
injured perso witness and so is likely to
know more or as much about the circumstances of his death than or as any other person So this doctrine does not apply where the object of the trial is to ascertain whether certain persons are the dacoits or not—a matter which has nothing to do with the declarant's death *Nga Te* v *King Emperor*, 20 Ind. Cas 90=14 Cr L J 510

. 25 Cr. L J. 29. "The cases all **S. 3**
a case where the evidence would

observed by him, the in
by the jury so that the witnesses' inferences become superfluous Now since

Ev § 2849, see also *Hanely* v *Comm*, 5 Cr Law Mag 47; *R* v *Scaife*, 1 M. & R 551.

Scope of declaration—Emotion excluded. The dying declaration must be
fore, be
cannot
for the
is free
er have
accused
Cham-berlayne's Ev. § 2850.

the a
officer
ment in respect thereto is therefore admissible, where deceased was in a position to know the truth Indeed, even where a certain element or degree of inference is necessarily present, *e g*, where the assailant is masked, or in ambush the fact

absent, and the evidence as contained in the dying declaration will be rejected In the absence, however, of evidence on the point, intrinsic or extrinsic the

the statement should directly charge the accused with being the assailant Where dying declaration was as to the identity of the accused, it was held that the declarant might be impeached by showing that the deceased was in the habit of mistaking her friends for persons whom they did not resemble *Chamberlayne's Ev* § 2851

Scope of dying declaration—Inference So far as practicable, administration confines the dying
properly take were he a witne
or judgment, is to be excl
employing it Very plain c
statement by the deceased
that he had been told such was his intention The mental state of a third person is not subject to direct observations The statement of a dying declaration in regard thereto may therefore be rejected as an inference The declarant's own mental state, being a subject upon which he might properly testify as a witness, may, however, be established in this way A sufficient adminis-

S. 32. trative necessity for accepting an inference or conclusion in a dying declaration is furnished where a large number of minute phenomena, often so intangible and interblending as to forbid effective individual statement, are given by the declarant in the form of a collective fact, often the only way in which the speaker can well express himself Thus a declarant may properly state that a given shooting was an 'accident' or that he had been 'butchered' by the mal practice of a doctor, and so forth *Chamberlayne's Ev.* §§ 2832, 2833

Testimonial qualification of the
are admissible only as to matters to
if sworn in the case *Taylor Ev*
declaration of a child of such te
doctrine of a future state was rejected See also *R* v *Drummon* 1 Leach
338, *R* v *P*
Donnelly v
witness wou
in *People* v
same footing as the testimony of a witness sworn in the case, and are governed by

must have h
he relates I
ham are not

where a
Court could
npetent wa
under s, 118 of the Evidence Act *Samaidin* v *King Emperor*, 5 O C 246

time or by conviction of crime, or by subsequent or prior inconsistent st
Wigmore § 1446 In *State* v *Thawley*, 4 Harringt. Del 562 general evidence
of the declarant s intemperate habits and of his low state of health at the ti

himself responsible for his own death or that the fatal result was ca
accident or, as the earlier law used to say, by misadventure, may be within t
proper scope of a dying declaration and even add to its probative force. To b
received in evidence a self-disserving statement must, however, fulfil the c
tions laid down for the reception of a dying declaration *Chamberlayne's Ev*
§§ 2816, 2817

Form of dying declaration The f ... in making a

been inflicted on her, that she was at that time unable to speak, but was conscious and able to make signs. Evidence was offered by the prosecution and admitted by the Sessions Judge, to prove the questions put to the deceased, and the signs made by her in answer to such questions. *Held* by the Full Bench (*Mahmood J* dissenting) that the questions and the signs taken together might properly be regarded as "verbal statements" made by a person as to the cause of her death within the meaning of s. 32 of the Evidence Act, and were therefore admissible in evidence under that section. *Queen Empress* v. *Abdulla*, 7 A 385 (F. B)

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questions put, it is admissible in evidence. In such cases, however, the statement should be a true record of what in point of fact occurred, and should bear on its face the questions put and the nature of the gesticulation made in response. *Bulla* v *Empress*, 2 P R 1886 Cr. Where a person whose throat had been cut as a result of which death ensued later, made certain gestures in reply to questions put by the police. *Held*, the gestures were admissible in evidence. The interpretation of the gesture is for the Court alone and the opinion of witnesses as to their meaning is not evidence. *Chandrika* v *Emperor* 1 Pat 401=3 Pat L T 771=(1922) P 535=71 Ind Cas 353. Where shortly after the deceased had received the injury a Magistrate proceeded to record her dying declaration in the hospital and although she could not speak in answer to questions put to her pointed out the accused as the assailant. *Held* that questions and answers taken together might properly be regarded as verbal statements made by a person as to the cause of her death within the meaning of section 32 of the Evidence Act and were therefore admissible. *Emperor* v *Sadhu Churn*, 26 C W N 111=49 C 600=A I R 1922 Cal 109=77 Ind Cas 993; see also *Ranga* v

Ev § 152 (b), *Mocabi*

Steele, 12 Cox Cr C

Patchatt his story, then when dying and being asked what happened, he said, "Tell him, *Patchatt*" and *Dr Patchatt* reported the story in declarant's presence. In admitting

it 'himself'

declaration

a deceased

shown by the witness to have reference to the infidelity of deceased's wife. *Chamberlayne's Ev* § 2811. So it is clear that dying declarations may be communicated by any adequate method of communication whether by words or by signs or otherwise provided the indication is positive and definite, and seems to proceed from an intelligence of its meaning. *Wigmore* § 1445

nd answer is not admis and so must the questions seem to me to be useless

been made for another purpose as the message to the wife of the injured man. No requirement is imposed, for example that the declaration should all have

the deceased to give out names of certain accused ... unsafe to attach any weight to such a dying statement. *Bishan Singh* v *Crown*, 8 L L J 296=96 Ind Cas 215 27 P L R 181=27 Cr L J 903=A I R 1926 Lah. 196.

First Information Report The First Information Report is admissible under this section as a dying declaration where it is the statement of a person

32. who is since [illegible] which resulted in death Ka[illegible] J 475=A I R. 1930 Lah [illegible]; Gayan Singh v *Emperor*, A. I R 1931 Lah 103=1931 Cr C 167.

[illegible] ing declaration is admissible A [illegible] admissible even when the charge is [illegible]

of [illegible]

of l [illegible]

[illegible] Evidence Act [illegible] R Cr 75, that [illegible] of English [illegible]

A dying [illegible] charged with the offence of homicide *Dusadh* v *Emperor*, 6 Pat [illegible] Cas 698=29 Cr L J 106=A I R. 1928 Pat 162.

Dying declarations made by an accomplice The dying declaration of an accomplice is admissible where the prisoner is charged with assisting the accomplice to commit suicide. *R* v *Smith*, (1897) 18 Cox 470, *R.* v *Bexley*, (1906) 70 J P 263, *R.* v *Stevens*, (1904) 4 N S W State Rep 727; Russ Cr 2051 R v *Tinckler*, 1 East P C 353 In *R.* v *Jessop*, 16 Cox. 204, on an indictment charging with murder the survivor of two persons who had agreed to commit suicide together, *Field J* admitted statements by the deceased, made when purchasing poison in the absence of the prisoner, on the ground that the acts and words of the deceased in carrying out a pre arranged plan were evidence against the prisoner Dying declarations in favour of the party charged with [illegible] an influence on the [illegible] 2 Lew 150, *Archbold's* [illegible] accomplice, as in an [illegible] v *Sadler*, (1911) [illegible] accomplice incriminat[illegible] admissible under the [illegible] clause but is admissible under clause (3) *Sheik Shafi* v *Emperor*, A. I R 1930 Nag 259=124 Ind Cas 459=31 Cr L J 661; see also *Umra v. Emperor*, A I R 1925 P C 52=6 Lah 45=52 I A 121 P. C.

Proof of dying declaration A dying declaration may be either verbal or written A verbal dying declaration recorded by a Magistrate cannot be accepted in evidence, when it has not been proved by taking the statement of the Magistrate *Sha* [illegible] v *Crown*, 17 P R 1911 [illegible] 1912=14 Cr L J 131 [illegible] 18 Ind Cas 883 When what purpo[illegible] person is not taken down by the com[illegible]

[illegible] *Haider Ali*, S C 29 [illegible] the dying declaration of a deceased p[illegible] [illegible]stable is admissible in evidence un[illegible] [illegible] is to put in the document itself and [illegible] [illegible]ot to allow him to give evidence orally as to [illegible] C P L R Cr 14. So a dying declaration [illegible] [illegible]ertified in Court that he had recorded it [illegible] proof of its own contents, and it is unnecessary that the person who recorded it should repeat exactly what was said [illegible] *Singh* v *Emperor*, 7 Lah 91=92 Ind Cas 167=27 Cr L J 215=A I R. 1926 Lah 310, *Emperor* v. *Balaram Das*, 49 C 358=A I R. 1922 Cal 332

Wh[illegible] may arise whether it is his narration [illegible] ed or otherwise approved it after [illegible] may be offered as his declaration [illegible] the written statement of the pers[illegible] The dying statement of a deceased [illegible] accused; if not so taken,

the writing cannot be admitted to prove the statement made The statement may be proved in the ordinary way by a person who heard it, and the writing may be used for the purpose of refreshing the witness's memory *Empress v Samiruddin* 8 C 211, *Sarat Chandra v Emperor*, 52 C 116=88 Ind Cas 860=26 Cr L J 1211=A. I R. 1925 Cal 821 A declaration made by a person in expectation of

relevant fact to be proved was the statement made by the deceased person admissible under section 32 of the Evidence Act That statement is not the document

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section 512
by the oral
g at liberty

to refresh his memory by referring to the note made by him or read over by him at or about the time the statement was made I would lay stress upon this because in many cases irregularities of this nature have led to a miscarriage of justice or to great delay in the trial of cases I may note that the record by the Magistrate is in English It clearly does not contain the exact words used by the accused which alone would detract considerably from its value as a true

v. *Emperor*, 67 Ind Cas 577=23 Cr L J 417=1 U P L R (L) 43 *Gowridas* v *Emperor*, 2 Ind Cas 841=36 C 659=13 C W N 680=10 Cr L J 186 A dying declaration was recorded in the presence of a witness, read over to the deceased in the presence of the witness and admitted by the deceased to be correct If the witness, who heard that statement swears that the written statement correctly reproduces the words used by the deceased, that is sufficient to prove that the deceased did use the words contained in that statement *Emperor* v *Balaram* 49 C 358=(1922) A I R 38? A dying declaration recorded, in the absence of the accused, by a Magistrate, who held the enquiry preliminary

289 P L R 1912=18 Ind Cas 883 The proper method of proving the oral stat... heard it that... otes he mad... r L J 243 ... 1129 In ... should rep... ent if

S. 32. the presence of the witness, the witness would be entitled to refresh his memory if he so wanted, by referring to such writing; otherwise the writing itself is not relevant unless it is in the nature of a deposition taken in the presence of the accused Where the deceased dictated his statement and it was taken down and he then signed the statement after being satisfied as to its accuracy such writing may be regarded as a statement of the deceased in writing admissible under s 32 of the Evidence Act But even if what was stated was taken down by some one in writing a
witness who heard the
And ordinarily it would
to reproduce from memory what he heard the deceased stated in addition to

R 1870, se
made by t
the accused
Magistrate,
dence Act,
the stateme
stated therei
be verbal o
with the questions have been held to be verbal statements If written precise statements made should be proved either by the person who recorded or by some one who ... Magistrate
mere signature
there must be
dying declarat
examined at th
deceased also
and the dying
person who re
there can be no
was not read
inadmissible
M L J 404 Although a dying declaration is not recorded in writing evidence of what the deceased said is receivable *In re Hanumadu* 2 Weir 7...
... also ... 1921, *Kusal Singh* In re
Weir 753, ... A statement made by the
deceased t... , cannot be used in either
... ied as a witness *Lachmi* v *Emperor*, 3 Ist
A statement of a deceased person as to
... in case of his not having a ...
... *jag Kumari* v *Sita Prosad*, 12 C L J ...
95 Ind Cas 355 Dying declaration of one dacoit about circumstances of dacoity is not admissible against other dacoits *Dannu Singh* v *Emperor*, 85 Ind Cas 613—26 Cr L J 517 = A I R 1925 All 227

Section 164 of the Criminal Procedure The deceased made a full statement, about an assault which resulted in his death, before a Third Class Magistrate The statement was not taken into consideration by the Session
... not competent to
... Jodh. H B J at
... ... v E... ...
... statements made by
... where the case
... Magistrate who

recorded the statements was empowered under s. 164 is immaterial *Rahman* v. *Emperor*, 131 Ind. Cas. 117 = 32 Cr L J 1118. S.

Rule of Preferring Written Testimony. "The principles which determine whether a written report of another person's statement is to be preferred to oral

examination; for such a person has no duty or authority by law to report dying declarations, and it would be solely by virtue of an express duty that a Magistrate's report could be preferred to other witnesses (b) When a written memorandum or report thus made is read over to the declarant and signed or assented to by him, the writing thus becomes a second distinct declaration by him. The first oral statement is not merged in the latter written one, because,

(c) Where the declarant makes one oral statement, and afterwards at another time a second statement, the latter being in writing or reduced to writing, there are here two distinct statements, and either one may be offered without testifying to the other; for the principle of completeness requires only that the whole of a single utterance should be offered together, and in the present instance the

theless making

It is thus clear

written one has

been proved; (2) that, even before or without proving the written one, the separate oral ones are admissible—though on the latter point the Courts are not always explicit' *Wigmore* § 1450, see also *R* v *Reason and Tranter* 16 How St Tr 83 In that case *Pratt L C J* said 'You know in the Court of Chancery when the party is examined on his oath, he gives in a first answer

the same person that enquired of him before, and all this is done in order to perfect and consummate the examination whether you will not take them both together as one entire account given by the deceased?' In the same case *Fortescue J* observed "I think we should allow what was said at other times to be given in evidence, because the first is no examination, because no Justice of the Peace was then present, so that the examination stands distinctly by itself' The opinion of *Fortescue J* prevailed *Wigmore* § 1450

Evidence Act, to corroborate his evidence *Emperor* v. *Ram Sattu*, 4 Bom L R 431

. 32. Stage at which dying declaration should be made The necessity of recording a dying declaration arises only when the hopes of life of the man are given up. *Upendra* v *Emperor*, 129 Ind. Cas. 676=32 C L J 425

English and American ... following (1) The ... all deceit'. There ... be furthered (2) If a belief ... Higher Power upon human ill doing, the fear of this punishment will outweigh any possible motive for the p... tion, and will even counter balance the inclination to gratify a possible spirit of revenge (3) Even without such a belief there is a natural and instinctive awe

... to be shown (profane language) was important in another point of view It strikes at the very foundation of the reasons upon which dying declarations are admitted at all There are certain guarantees of the truth of dying declarations, growing out of the solemnity of the time and circumstances under which they are made . It was clearly the right of the accused to show . . that the deceased in making the statement was not in that frame of mind which the law presupposes and requires in such cases that the deceased was in a reckless irreverent state of mind and entertained feelings of ill will ... towards the accused"

Secon... then... state... child... in her mind could have had that idea of a future state which is necessary ...

... was received ... heaven if he told the truth" ...

under English and American law *Vide Woodcock's Case*, Leach Cr ... *Nicholas* ... "When I ... rule of ... the Jury I think I ought not ... fully convinced that the deceased was in suc... appears from the ... recover, as he was ... kind who have no conviction that their death is near approaching, and that ... very near, and that ... of his ...

I think there is no sufficient proof that he was without any hope ... and that I, therefore, ought to reject the evidence." But even in cases where ... the guarantees of the trustworthiness of dying declarations are present, we

must receive it with certain degree of caution It may be seldom that a dying the his or ack rk- by ury

generally given by relatives and friends of the deceased who had watched by his bed side, and bias in his favour is to be expected And even if given by police officers it should be carefully scanned The declarations are liable to be misunderstood, and to be reported by an unfaithful memory, especially if much time has elapsed since they were made, and the evidence goes to the jury with mind emotions of deep sympathy against the accused There is credulous of the entire integrity of clarant is apt to make his own ...se and to be rid of the importunity and annoyance of those around him, he may say whatever they choose to suggest So, too, as respects the declarant's statements, it is to be remarked that many persons, even in serious conversation, assert as facts those things of which they have only strong convictions and not knowledge derived from senses If the declarant related his opportunities for observing the facts stated and they appear to be ample, this would add to the repeated his statements rationally and speech " *Moore's Weight and Value o,* After a dying declaration, or any other e to be given to it is a matter exclusiv not believe it, ' by rules of law to have been c though they do suppose him to have been thus conscious they may still not believe the statement to be true In other words, their cannons of ultimate belief are not necessarily the same as the preliminary legal conditions of admissibility whose purpose is an entirely different one *Wigmore* § 1451 In deciding as to its credibility the jury should consider all the evidence in the case, including any which may have come to their attention during the preliminary hearing on *voir dire* The credit which the jury may be disposed to give may one of fact, on the So, as to whether a duress is a question for them The jury may reasonably find that the probative force of the dying declaration is increased by the fact that the speaker is not possessed in favour of his own side of the contention The facts stated in a dying declaration thus seem to be not conclusive upon the jury *Chamberlayne's Ev* 2858

Weight for the Jury—Impeachment When the statement of a witness previously made is used as evidence under the provisions of this section then any other statement made by that witness can be used by virtue of s 158 for the purpose of contradicting that witness as if such witness had appeared in Court

S. 32 is clearly within the rights of the accused. The effect, however, of the most conclusive demonstration of the falsity of the dying statement in some particular as where the declarant enumerates among his assailants one who could not have been present, does not affect the adm[illegible] only its weight The accused may [illegible] declaration by showing that the [illegible] other times *Niamat v Emperor,* A. I R 1930 Lah 409=31 P L. R [illegible] *Indeed, it is his right to establish that fact if it is within his power to do so* The existence of such inconsistent statements, even that of a contradictory dying declaration does not warrant the rejection of a[illegible] in evidence or require that it be striken out, [illegible] probative efficiency of the latter Should it [illegible] may, relies upon a dying declaration of the d[illegible] to impeach the latter in any way appropriate to a witness *For this purpose* [illegible] may show, if it can that the declarant has made inconsistent or contradictory statements

The accused may at all times introduce evidence tending to show that the deceased was without a proper sense of moral accountability, or that a sense of impending death would fail to clear his mind of bitterness or falsehood leaving a controlling desire to tell the truth That he was in the habit of using profane or indecent language or suffered from other moral *obliequities e g,* the habit of drinking intoxicants to excess, may be shown Conviction of crime may be a relevant fact in such a connection Similarly, while evidence is not admissible to establish the general bad character of the deceased, the accused may prove as he might in case of a witness, that th[illegible] believed and that this reputation for truth [illegible] where he resided That the actual state [illegible] accused at the time of making his statement was one of great animosity, recklessness and thirst for revenge is also a relevant fact Lack of belief in a future state of rewards and punishments naturally affects, as has been noticed the [illegible] [illegible]arant and the fact may be [illegible] the credibility of his state[illegible] Disbelief of such a nature will not be assumed but must be affirmatively shown. *Chamberlayne's Ev* §§ 2864, 2865, 2866.

Mental state of the declarant. To enable the jury properly to judge of the probative force of a dying declaration, the jury are entitled to be fully informed of the circumstances under which it was made Prominent among these is the mental condition of the declarant. This they are entitled to view from all angles, reaching a conviction of their own as to an actual sense of impending death experienced by the declarant at the time of making his statement and as [illegible]

[illegible] declaration to be admissible, must have been the utterance of a s[illegible] *Chamberlayne's Ev* § 2867.

Value of [illegible] value of dying declarations in [illegible] *nanda,* 29 C [illegible] important · 'In the case of a dying declaration which by the law of [illegible] assumes a character very widely different from what it is under the English Law, which is relevant under the Evidence Act, whether the person who made it was or was not at the time when it was made under expectation of death, and the weight to [illegible] expectation of death which is a guarant[illegible] which it w[illegible] made of it, [illegible]

S.

be relied upon or not" So statements made by a dying man relating to the cause of his death are admissible in evidence against person causing his death, but too much reliance cannot be placed upon the details of such statements as they are hearsay *Emperor* v. *Sadhu Bena*, 76 Ind Cas 389 It is not safe to base a conviction on the uncorroborated dying declaration of a deceased person, for it is well known that the inhabitants of the *Punjab* will often in a dying declaration not only accuse the actual offenders but will also include the names of other enemies. *Bakhshish Singh* v *Emperor*, 86 Ind Cas 826 = A I R 1925 Lah 519, see also *Stephen's History of Cr Law* Mr Justice Stephen also said

known in the *Peshawar* division that a dying declaration as to the cause of the declarant's death is admitted in proof of the matter stated The effect of this was that whenever a man was mortally wounded, and found himself dying

This is very far indeed from the way in which a dying Punjabee looks at the subject His ... of doing ... ns it' ... When ... alue of his dying dec ... as 322 'Dying declar ... rule in England Very often the murdered man himself, before his death implicates every male member of his su

... n *Madappa Kone*, ... trustworthy dying ... of the faculties and proved by the clearest and most reliable evidence to be the exact words of the person making it, and corroborated by the surrounding circumstances, is sufficient to support a conviction for murder under s 302 I P Code *Karim Khan* v *Crown*, 4 P W R 1909 Cr = 9 Cr L J 156 = 1 Ind Cas 100 But a Court sh ... violence ... confusion ... deceased

Crown, 117 P R 1866, *Sher Ali* v *Crown*, 8

202 N Y 494 (500) Much weight must be given to the dying declaration recorded by the Magistrate where it is supported by the consistent evidence led on behalf of the prosecution *Sawan Singh* v *Emperor* 10 Lah L J 281 It ... cts itself in its various ... for the sake of argument ... such declaration is for all practical purposes negligible *Inayat Ali* v *Emperor*, 108 Ind Cas 526 =

32.

dent corroboration of facts and circumstances to prove that offence *Ballu Singh* v *Emperor*, A I. R 1929 Pat 249 In England questions of admissibility arise chiefly with respect to the mental condition of the declarant. To make such declaration admissible in England there must be a "settled hopeless expectation of death not qualified by any prospect of recovery, however slight. In India they are n . under the section ;

h, that statement is relevant not entitled to particular after the occurrence it may for his friend to suggest falsehood But if the man is in bed in hospital for four days after the event and a month before he dies and makes a statement, that statement carries no more weight than if he made it in the witness box, and rather less, because he has never been cross examined Under these circumstances it is incumbent on the ... corroborated

Dying ... regarded as ... to questions, ... & P 238, ... 711, *R.* v *Bottomley*, 118 L T 88; *R* v *Fitzpatrick*, 46 Ir L T 173 ... But in *R* v *Mitchell*, 17 Cox C C 503, *Cave J* said "Where a statement is not the *ipsissima verba* of the person making it but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence, which ... in cases in which the person has no oppor... may be leading qu... declaration there is ... without their force and effect being freely comprehended In such circum... what the form of the declaration should be such ... was the question and what was the answ... suggested by the examining Magistrate and how much was ... person making it ' See also *R.* v ... *Smith*, ... 17 T L R 552 On the other ha... the form of 311=115 L T J 88, *Lawrence* ... question and answer was admissible, although the answers only and not the questions had been taken down In *R.* v *Corbitt*, (1903) Queensland St. Rep ... *Griffith C J* said, that *R* v *Mitchell*, unsettled what had before been the law and followed *R* v. *Smith* saying further that it is not essential that a dying declaration should be proved by ... Pleadings 24th Ed ...

P ... Ind ... is ... to c ... the exact ... statement when W. N 72 ... d contains a note ... ed told the police *Emperor* v *Sikandar*, ... *patric* (1910) 16 Ir L T. R 173, it was ... the weight ... the examinat... gating a wit...

the value and credibility of the declarations. Therefore, it is no objection to their admissibility that they were made in answer to leading questions, or obtained by pressing and earnest solicitation *Russ Cr.* 2092; *R* v *Reason,* 1 Str. 499; *R.* v *Woodcock,* 2 Leach. 51; *R* v *Welburn,* 1 East P. C. 358; *R.* v. *Smith,* L & C. 607, *R.* v. *Steele,* 12 Cox. 108, *R* v *Whitmarsh,* 62 J. P. 683, 711.

it mu
by the
he is
2092
expressed by the declarant; it must be complete as far as it goes. But it is immaterial how much of the whole affair of the death is related, provided the

§ *1448* Administration by no means requires that the extra judicial statement

to appear, the dying declaration will be rejected as incomplete *Chamberlayne's*

26 Cr L J 1256 = 52 C 987 It must be taken as a whole and a portion of it cannot be allowed *Rafiz* v *Emperor,* A I R 1930 Cal 211 = 50 C L J 584; 22 M. L J 435

prisoner there seems no reason to doubt the propriety of admitting a dying declaration which is in favour of the prisoner Indeed, almost every case of man-slaughter, in which such declarations have been admitted, is an authority

him, but rath
"Owing to
for homicide
it has sometimes been argued that the declaration cannot be used by the accused But the argument has no foundation whatever, and has been generally repudiated' *Wigmore Ev* § *1452,* see also *Mattox* v *U S,* 146 U S 151, *Moore* v. *State,* 12 Ala 767; *People* v *Southern* 120 Cal 645, *Com* v *Bednorcilu,* 264 Pa 124

Nature of dying declarations "Where statements are made by the deceased at different times, all may be proved as his dying declarations if all are

administrative precedence over the remainder. And one among several written statements may be proved without producing the others Naturally, there is no

S. 32 preference between oral statements made under similar condition at diff t times' *Chamberlayne's Ev* § 2847

Dying d
captured in i
ration as to th
the circumstances causing his de ... admissible to prove his own participation in the dacoity but was not adm ... against the other accused *Danna Singh v Emperor*, L R 5 A 201 Cr When the declaration of a person wounded by the accused in committing dacoity was made on the 13th August 1899, and he died on the 20th of that month and there was no other evidence
wounds received at
his death, the High C
in evidence *Imperatr x v P dra* 25 B 13=2 Bo L R 331 In a case of murder the staten
presence of a head
1872, that section
who made the state
tion of death *Qu*
certain statements relating to the cause of the
the investigation of a criminal case, *held*, tl
Bahawala v Empress, 17 P R 1886 Cr A
was dying at the time he made it is a dying
term and is admissible under this section, the
lingered for six days afterwards and then died *Thakar Singh v Emp* A I R 1929 Lah 64=10 L L J 163 The statement of a deceased person was recorded in the absence of the accused Subsequently in the presence of the accused, the statement was read over and the accused were allowed to cross examine the dying person *Held* that the statement was not a dying deposition under s. 33 of the Evidence Act, and was not admissible under section 32 (1) unless it was proved by examining the Magistrate who recorded it or some one who heard it made *Njo Po v Emperor*, 14 Cr L J 396=20 Ind Cas 201 Bur L T 68 The statement of a deceased person that she was confined in the house of an accused, that H was keeping watch over her and that another accused had raped her on account of which she had become pregnant and that they were getting ready to give her medicine to miscarry and so to put an end to her life is admissible under s 32 (1), as a statement made by a person as to the circumstances of a transaction which resulted in her death in a case in which the cause of death comes into question *Wahid Bux v Emperor* A I R 19.. Sind 250

CLAUSE II

facts asserted oral declarations

C 277 ...
here ...
Engl ...

namely (i) the necessity th ... a person having personal knowledge, (ii) that it should
entry of any collateral fact
person entering it to record
the Legislature, so that Co
any evidence which falls within the terms of the present section ...
Ev 163

Principle. ... with clause (a) such evidence is admi ... ely, (1) the ... *principle*, and (2) ... *of Trust* ...

Necessity principle On the principle of Necessity this exception ... the use of statements by persons whose testimony, though not necessarily the sole evidence available on the subject, is yet the only testimony now available

S. 3

affords the greatest security for truth Their declarations verbal or written, must, however, sometime
in order to prevent a f

absconded and can no longer be traced, his extra judicial declaration made in the course of business or official duty will be received in evidence *Chamberlayne's Ev* § 2879 Section 32 provides that written or verbal statements made by a person who is dead or cannot be found are relevant facts in certain cases *Rama Swami* v *Rama Nandan,* 22 Ind Cas 627=(1914) M W N 240=1 L W 136.

ments fairly trustworthy

(1) The habit and system of making such a record with regularity calls for
he influence of
racies and to
Dicas, 1 Bing
what is false,
ly incurred

accuracy

(3) If, in addition to this, the entrant makes the record under a duty to an employer or other superior, there is the additional risk of censure and disgrace from the superi
powerful and
Tindal C J. sai
ould be likely
hich the entry
false would
or Ev § 697,
layne's Ev. §§
2888, 2892

32. Section 32 imposes restrictions upon the admissibility of statements made by persons who cannot be brought before the Court to give their own evidence. The object of those restrictions an
principle of legal evidence being
follows that where persons can be
what they know at first hand
of cross-examination. Where however witnesses cannot be brought before the Court, their previous statements are at best indirect evidence, of a kind that
The conditions which
, are imposed upon
s truth. As there is
to be no chance of testing a man by cross examination his statement will not be admitted unless it has been made under conditions which, looking to the ordinary course of human affairs raise pretty strong presumptions that it was a true statement. Thus the whole scope and object of section 32 centre upon securing the highest degree of truth possible in the circumstances for the statement.' *Per Beaman J in Sethna* v *Mirza* 2 Bom L R. 1017 at p 1048.

Statement made in ordinary course of business. This clause provides that a written statement of a relevant fact made by a person who is dead is itself a relevant fact
ordinary course of bu
the exact meaning
more than one place
the existence of any course

4 Camp 193. The course
plaintiff's counting house
methodical cannot carry the
So too by section 114 the Cou
it thinks likel
natural event
to the facts of
public and p
public busine
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was meant to
or business,
illustration (
its well known
tran act on or trade. Aga in the explanat n to ection 47 it is sa
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the Privy
118=4 C
in evidence
none of
or (as in banks) from hour to hour as transactions take place. These
said) are, I think regularly kept in the course of business.'

Having regard, then, to the above considerations there can, I think, be no doubt that the expression 'in the ordinary course of business' in section 32(2) must be read in the same sense. It may in one sense be true that it is in the ordinary course of business, for a mortgaged deed to contain recitals of the boundaries of the land mortgaged. But that would not make the recitals evidence. The question is, whether the mortgage deed itself is a statement made in the ordinary course of business. Looking at the particulars set out in clause (2) of section 32 the nature of the statements 'made in the course of business and

looking at the sense in which the expression is apparently used in other sections
ed deed executed by an
fession, trade, or business'
Act) of an agriculturist
a v *Bharmappa,* 23 B 63
at pp. 65-67. In the same case *Fulton J* at p 70 observed 'It can hardly be said that the execution of a mortgage deed is an act done in the ordinary course of business. Doubtless when a person has determined to mortgage his land, the

v. *Jeonandan,* 13 C. W. N. 71) The phrase was apparently used to indicate the current routine of business, which was usually followed by the person

W. N 71.

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ford,
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v *Rac*
expre
of bus
Mass 481, *State* v *Phair,* 48 Vt 378; *Dure* v *Sayer,* 29 Me 119 So also in America and Englar
"This may be defined
performed in one's
mode of obtaining a l
of doings kept merely for one's personal satisfaction, but it would not exclude

admitted Similarly in *R* v *Cope,* 7 C & P 726, an endorsement of service on an order of the aldermen, the writer's duty being to serve orders and endorse

C L J 155 Where account books are admitted in evidence before the Commissioner under section 32 of the Evidence Act, as having been kept in the ordinary course of business by persons deceased, it is in the discretion of the Court to hold that they are sufficient evidence of the transaction to which the entries *and* 10 Bom
L R. 81 unately died
before 1 32 (2) of the
Evidence Act as being statement made by a dead person in the ordinary course of business and in the discharge of his professional duty *Mohan Singh* v.

S. 32. *Emperor*, I L R 6 All 49=55 Ind Cas 647=26 Cr L J 551—A I R 19?5 All 413 *Jama wasil baki*, and *Jamabandi* papers can be admitted in evidence under this clause but it must be clear that the persons who made them are dead and that the papers were made in the ordinary course of business An entry as to the rate of rent cannot be distinguished from other entries therein as are not made

...

business one, nor even that it should be a secular one, it follows that a register marriages or the ... , is admissible *Kennedy Doyle*, 10 All Ma ... "An entry made in performance of a ... valuable than one made by clerk, or messenger or notary or attorney or solicitor, or a physician in the course of his secular occupation "

A deed of conveyance was tendered in evidence which purported to be the mark of G, as vendor, and which was duly attested by four witnesses however, denied that she had ever executed the deed, and said that the mark was not hers All the attesting witnesses were dead A witness was called who kn

...

11 B 690 In a suit to recover loss sustained on the sale by plaintiffs, of goods consigned to them by the defendant for sale by their London firm account sales are good *prima facie* evi... substantive evidence put fo...

...

26 Bom 253. Entries in ... *jajman* cannot be admitted under this section as the register is not of such a character as to enable the Court pronounce affirmatively ... the ordinary course of business *Ma* ... C)=16 M L J 511 ... mark is that of the executant is admissible in evidence under this clause the writer is dead and it is proved that the document is written by him. *Lal* ...

...

v *Rangayan*, A I R 1923 P 111=67 Ind Cas 57 Where a family pedigree was sought to be proved by books kept by a family chronicler, *held* that under section 32 (2) they would be admissible as books kept in the *ordinary course* of business by a professional ... such a book *Mohan Singh* v ... Ind. Cas 235; see also ... *Gobind*, 48 Ind Cas 375 But entries in the diary of a deceased ... relating to birth and death are not admissible under this clause ... *Gobordhan*, (1919) Pat 352=37 Ind Cas 421=2 Pat L J 42

Statement includes verbal statement The statement may be written or verbal (vide s 32) The general prevailing doctrine in America requires the declarations to be in writing; the exception relates to entries strictly speaking, and does not extend to oral statements *Wigmore* § 1523 In England, however, it seems settled that an oral statement is equally admissible ... By the *Sussex Peerage Case*, 11 Clark & F. 85, *Lord Campbell* says at p 113 ... law of England the declarations of deceased persons are not generally admissible unless they are against the pecuniary interest of the party making them. There are two exceptions First, where a declaration, by *word of* mouth or by

writing, is made in the course of business of the individual making it, there it may be received in evidence, though it is not against his interest" See also *Stapleton* v. *Clough* 2 El & Bl 933, 937; *Eddie* v *Kingsford*, 14 C B 759 (763) In *Reg* v *Buckley*, 13 Cox Cr Cas 293, which was a trial for murder, the prosecution offered to show the verbal report of the deceased, who was a constable, to his superior officer as to where he was going on the night of the murder. It seems he had reported that he was going to watch the accused, who on a previous occasion had been convicted of larceny, chiefly on the evidence of the deceased It was held admissible But in a recent case it has been held by one English Court, that a declaration made by a physician

ssible, and it

uson, 22 T

Review 301

Since in that

jurisdiction the third motive of trustworthiness (vide *supra* under the head circumstantial guarantee of trustworthiness) is regarded as most important, and the statement must be made under a duty to a third person, it may be conceded that an oral statement would be scarcely inferior to a written one in trustworthiness In this country, however, where that limitation does not obtain, the trustworthiness of an oral statement would seem to be far inferior to that of a written one, especially as affected by the second reason for the rule (*vide supra under the head circumstantial guarantee of Trustworthiness*) Nevertheless, in the actual conduct of business by subordinates in mercantile or industrial houses (practically the only class of persons by whom oral reports are regularly made), the elemen where it does exist English

, there is

written statements and of the

made in most of the other

exceptions" The words 'and in particular" in s 32 (2) seem to point to the superior force of written over verbal statements *Nort Ev.* 177

Section 32 (2) and section 34 In *Rampyaribai* v *Balaji*, 28 B 294=6 Bom L R 50, the plaintiff relied on entries in the hand writing of her deceased husband kept in the ordinary course of business The lower Court rejected certain items for want

the judgment observed

support of her claim

The accounts are relevant both under section 34 and under section 32(2) of the Indian Evidence Act, 1872 The learned Judge has considered that corroboration

the accounts without corroboration the only point being that the law does not require corroboration' See also *Musst Rani* v *Firm Bahadur*, 62 Ind Cas 946 So also where entries in *Jama bandi* papers began over 70 years before the action was tried, the presumption was that the person who made them was dead and could not be called and as they were made in the ordinary course of business by the land-lord's agents, they were relevant without any corroboration, as evidence against the tenant under sub section (2) of section 32 of the Indian Evidence Act which does not require corroboration as under section 34 *Dhukha Mandal* v,

. 32.

persons who ... Chantar v *Kailash*, 44 Ind ... pers may be evidence u ... they can be admitted, a ... is dead and the entrie ... med th v *Nawab Khaja Habibulla*, 31 C L J 68 = 47 C. 266 = 56 Ind Cas. 38, *Dulu* v *Jogadish*, 90 Ind Cas 564 = A I R 1926 Cal 359 *Jonah Biswas* v *Sita Kumari* A I R 1927 Cal 855 But in *Gopesuar* ... Cal 854, *Mr Justice Mookerji* said "The ... entry relevant under s 34 and one relevant under s 32 cl (2) ... former case the person who made the entry may be available as a witness while in the latter case he is not I find it very difficult to appreciate on what ground the legislature could intend to exempt entries relevant under s 32 cl (2) from the disability that it imposed on entries relevant under s 34 by the second part of that section, and personally I have always felt inclined to take the view that such entries, no matter whether they are relevant under the one section or under the other, are not to be considered as alone sufficient to charge any person with liability"

English Law A declaration is deemed to be relevant when it was made by the declarant ... the discharge of professional duty ... 3 B & Ad 82 ... irrelevant ex... the ordinary c... by a person duly authorised to make them *Steph art* 27 The leading ... this rule is the case of *Price* v *Earl of Torrington*, 1 Salk 285 = 2 Smith L C 320 The short report of it in *Salked* is as follows "The plaintiff being ... the *Earl* of *Torrington* for beer sold and ... to charge the defendant was, that the usual ... that the draymen came every night to the clerk of the warehouse and gave an account of the beer they had delivered out which he set down in a book kept for the purpose, to which the draymen set their names, that the drayman was dead but this was his hand set to the book, ... and this was held good evidence of ... singly, without more' That cas... Previous to that in *Pitman* v *Maddox*, 1 Lord Raym, ... Judge the plaintiff produced ... shop book written by one of ...

to be good evidence within the year alone *Thayer Cas. Ev* 511

Origin In England, formerly a party to an action was not permitted to testify in his own behalf An apparent exception to this rule, however existed in the application of the so called "shop-book rule" In early times in England parties were permitted to show, by entries made in their books, the sale of goods or performance of labour, ... doctrine that a Statute of 7 Jac 1, C 12 was pass... The relevant portion of the ...

before the same action brought, except he or they, their executors or ...

tors, shall
said debt,
or admini

year next after the same wares delivered, money due for wares delivered, or work done" Later developments narrowed the rule to the cases where the entries

less, seemed to
be a witness
ntries made by
he entries was

required by the clerk who made them, if living and within reach; if he was not, proof of his handwriting was considered sufficient *Pitam* v. *Maddox*, 1 Ld. Raym 732; *Price* v. *Earl of Torrington* 2 Ld Raym 873 The rule with respect

as evidence through no absolute necessity, but by reason of a presumption of necessity only, inferred from the nature of commerce' See also *Woodnath* v *Lord Cobham*, Bomb 180, *Ford* v. *Hopkins*,
continued to go in, when the entries were the
dead. There is reason to think that the
when made in a stranger's books grew out of the practice in the case of a party's own "shop books' *Thayer Cas Ev 509*

jected on the ground that
he is responsible *R* v
558, *Trotter* v *Maclean*,
on v *Walmesley*, (1904) 2
d surveyor, employed by

en a duty to do the very thing
recorded *Smith* v *Blakey* L R 2 Q B 332 See also *Polini* v *Gray*, L R. 12 Ch D 411 *Lyell* v *Kennedy* 35 W R. 725, *Sturla* v *Freccia*, 5 App Cas 623 In *Chambers* v *Bernasconi* 1 C & J 451, the Court rejected the

which the person is employ
the entry relates, and then

S 32. the duty must be proved by other independent evidence *Bright* v *Leferton* 2 Deg F & J at p 614 *The Henry Coxon* 3 P D 156, *Doe* v *Turford* L R ? Q. B at p 332, *Perc*
R 347 Personal c
towards any person
of costs delivered by him are not admissible on the ground that it was his duty to keep proper books, or that they were made out in the cour e of duty *Pow Ev* 321 see also *Bright* v *Lejerton* 2 Deg F & J at p 617, *Hope* v *H* (1893) W N 21, *Ecroyd* v *Coulthard* (1897) W N 25, *contra Rawl s* v *Richard* 28 Beav 370 The acts must have been done by the declarant and not by third person *Smith* v *Blakey*, supra, *Ryan* v *Ring* 25 L R Ir
In *Polini* v *Gray* supra, *James* L J held that entry must not be to some thing said learned or ascertained by the declarant, but something done by, or to him and in *Lyell* v *Kennedy* supra *Brown* L J approved the statement *Phip Ev* 7th Ed 270 The office or employment to which the duty is attached may be private, as in the case of ordinary clerk or public as in that of a Sheriff (*Chambers* v *Bernasconi* 1 C M & R 347) of a notary public (*Poole* v *Dicas* 1 Bing N C 649), or of a Magistrate (*Wa* v *Little and another*, 29 L J Ex 267) *Wills Ev 2nd Ed* 180 The duty must have been to record or otherwise report it at the time *Smith* v *Blakey Supra*, *Polini* v *Gray* supra, *Doe* v *Turford*, 3 B & A 890, *Ryan* v *Ring* 25 L R Ir 184 *The Henry Coxon*, 3 P D 159, *Poole* v *Denne* (1903) 2 Ch 538, *Sturla* v *Freccia* (1880) 5 App Cas 623 (640) 'This limitation' says *Prof Wigmore* 'is a reminiscence of the early history, and is needlessly strict.'

Duty to a third person—Necessity under this section Under the Indian Evidence Act, the report or record need not be made in the course of a duty to a third person "The stat
Act must relate to a
so far as the question of
with the performance c
Whether this fact naturally finds a place in the narrative what is the nature of duty and its connection with the fact the statement of which was a matter of duty and whether this connection was such as to
information or observation must however
ting the weight due to such evidence when
Field Ev 7th Ed p 98 So in India the following observation of *Denham* in *Chambers* v *Bernasconi* 3 L J Ex 373=1 C M & R 347 has no application 'We are all of opinion that, whatever effect may be due to an entry made in the course of business any officer reporting facts necessary to the performance of a duty the statement of other circumstances however naturally they might be thought to find place in the narration, is no proof of those circumstances' A register of marriages kept by Istahad since deceased who celebrated a marriage, and in which register was entered the amount of the dower, was held to be admissible and relevant as evidence of the sum fixed, being an entry in a book kept in the discharge of duty within section 32, cl (2) *Zakeria* v *S*
19 C 689=19 I A 159

Indian Evidence Act
made at or near the
in order to
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the tr

declarations in the cour of [illegible] to prove [illegible]
at the time it purp
Similarly in *Poole* v *I*
any doubts whether
ought to go down to tr
Ryan v *Ring* 25 L
v *Peck* 1 Stark 3-6,

S. 3

not made until two days after the event it was held not contemporaneous *The Henry Coxon*, 3 P. D 156 But in *Price* v. *Torrington*, 1 Salk 285 a record in the evening of an act done in the morning was admitted in evidence. The provisions of the Indian Evidence Act contain no similar restriction as to the admissibility of this kind of evidence; but in determining the weight to be allowed to it in particular cases, it will always be important to consider how far the statement or entry was contemporaneous with the fact it relates *Field Ev. 7th Ed* 98; *Cun Ev Tenth Ed.* 163

Personal knowledge The declarations are only evidence of the precise

of which consequently he had

In *Brain* v *Preece*, 11 M & W

£4 15s for coals alleged to have

been sold by the plaintiff's testator to the defendant At the trial it appeared

person of the name of *Baldwin* to make entries in the books from what he, *Yem*, told him Both *Harvey* and *Yem* were dead, but in order to prove the delivery of the coals, *Baldwin* was called as a witness who produced the book, and stated that he made it out from *Yem's* directions and that every evening he read over

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dictation by another man who is dead, is widely different As regards the case of *Price* v *Lord Torrington*, it is better to adhere to that case as it stands, and

a deceased

it the entries

relate to an act or acts done by the deceased person and not by third parties" There can be no doubt that the general principle of testimonial evidence should

person who had no personal knowledge of the supposed facts recorded *Avery's Executors* v *Avery*, 19 Ala 195, *Walling* v *Morgan Co*, 126 Ala 326 In the

regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception [illegible]

S. 32. Court, *Melville J.* said at p 616 "But the Indian rule of evidence (Evidence Act, section 32 clause 2 and section 34) simply requires that entries in accounts should, in order to be relevant, be regularly kept in the course of business and although it may be no doubt important to show that the person making or dictating the entries had, or had not a personal knowledge of the facts stated, this is a question which, according to the Indian rule of evidence, affects the value not the admissibility, of the entries" But in *Jagat Pal Singh* v *Jogeshwar Baksh Singh*, 25 A 143 P C a geneological table purporting to have been made by a person since dead, but which was shown to be merely an exhibit binding on him for th

judgment *Lord Robertson* at p
different position Its alleged at
But the exhibit in question is
Gurdat in a claim made by him
proceeding was to make himself
this admittedly was untrue I

ut His relation to the document is
from the personal knowledge and belief
statement of a deceased person which
is admissible in evidence For aught that appears, the geneological table in
question might never h
been entirely the worl
this observation of the
of which require "speci
To reject a declaration
would cause great incon

sale of this produce? Are
not the entries thus made in the usual course of business of this extensive
trading establishment, and as a part of th
who prove them not only the best,
practicable to secure? We have no hesi
and convenience require them to be admitted The weighers, wharfingers and
numerous subordinates who handled this cotton kept no books They report to
the clerks who keep the books of the concern, and their functions are performed
remember the multitude of trans
npose a different rule upon th
commerce and amount to a denial of
justice"

Extrinsic proof Extrinsic proof must be given of the death or other disability of the declarant *Duki* v *Jagadish*, 90 Ind Cas 551, *Chandra* v *Kailas*, 44 Ind Cas 422 = 4 Pat L W 213

be properly
C & P
ere, how
uced from proper custody, the hand
ate one, be presumed (*vide*
been acted on in the case of declara

we have nothing to do in this c : must also be proved by extrinsic .. proof of acting therein is sufficient , .. , *Phip. Ev.* 279

. : . it is made in writing, there Any mark or sign that is . *North Bank* v. *Abbot*, 13 Pick. 417 ; *Wigmore* § 1531.

Cases under clause (2). A mortgage bond purported to be executed by three persons who were all dead at the time of the suit The signature of each of an it ese statements were proved to have been written by a deceased professional bond-writer who wrote the whole document in the ordinary course of business The two attesting witnesses are also dead and the signature each of them was satisfactorily proved to be in his handwriting *Held* that there was sufficient proof of the execution of the bond, and that the statement in writing of the deceased bond-writer was relevant under s 32(2) of the Evidence Act *Harta* v. *Manak Chand*, 11 N L R 9=27 Ind Cas 866 In order to prove that a certain reply to notice had been signed and sent by the 1st defendant, plaintiff's *Karyasthan* was called, who deposed that he was told by the writer of the notice in question that he wrote it at the request of the 1st defendant The writer was made the statement to the plaintiff's the writer's business *Held*, that the the Evidence Act *Kolongorath* v 33.

On a trial of a lading for the purpose sent from Delhi to C in Calcutta, advising the despatch of the goods, was tendered in evidence under section 32 cl 2 of Act I of 1872, but the Court refused to receive it, and intimated a doubt whether it fell within the instances specified in the section *Queen* v *Tarinee Charun Dey*, 9 B L R App 42 In a suit on a bond, the defendant,

though admissible under section 32 (2) of the Evidence Act, have very little probative value when they are not signed by the transferors and are not supported by the evidence of persons who purport to sign them as witnesses *My Po Nyein* v. *Maung My*, 27 Ind Cas 777=8 Bur L T 85 A statement made in a deed of conveyance or mortgage deed is not made in the course of business within the meaning of cl (2) of s 32 *Abdulla* v *Kunj Behary*, 14 C L J 467 In a regis adjoi in a was Evid statn executed by a deceased person in the ordinary course of business and consisting of an acknowledgment written or signed by him of the receipt of money, is admissible in evidence under s. 32, and not under s 13 *Ahmad Shah* v *Jamat Ahmad*, A I R 1928 Oudh 218; but see *Abdul Ali* v *Rejan Ali*, 19 C W N 468=21 Ind Cas 618; *Soraj Kumar* v *Umed Ali*, A I R. 1922 Cal 251 Where

ordinary course of business and they are admissible under s 32, sub-section (2). *Abinas* v. *Pratul*, 55 C. 1070=32 C. W. N. 759=108 Ind. Cas 585=A. I. R.

S. 32 1928 Cal 448 The entries in *Jama Wasil baki, Jama bandi, Sheya* and *Karcha* papers ar
Nath 47
lands in
recited t
v *Kumu*
ficate of
Melapi v *Walayot*, A I R 1930 Oudh 97 An endorsement on the cover of a registered letter that the
and had been refused by
would be admissible either under s
requirements of those sections are fulfilled *Gobinda* v *Dwarkanath*, 20 C L J 455 Where it is proved that a village watchman has been sending weekly reports of deaths in the village, an entry in the report as to the death of a person on a particular date can be presumed to be correct and can be used as a proof of the fact of death at that time
Cas 883 A statement of a
not be admissible under s 11

Account Books In a suit by a landlord under section 105, Bengal Tenancy Act for settlement of fair and equitable rent the tenants produced dakhilas to prove that certain holdings had been held
than 20 years In order to rebut a
landlord tendered in evidence certain ac
lower Court admitted them under s

office in the absence of the tenants and they were uncorroborated
sufficient ground for refusing to attach any value to the entries in those books as evidence *Mon Mohan Roy* v *Hari Nath*, A I R 1928 Cal 408 see also *Rampyaribai* v *Balaji Sridhar*, 28 B 294=6 Bom L R 50; *Dulha Mandal* v *W N Grant* 16 C L J 24=16 Ind Cas 467, *Altauh* v *Tarak Nath* 16 C L J 328=17 Ind Cas 266=17 C W N 774, *Umed Ali* v *Khaja Habibulla*, 47 C 266=56 Ind Cas 38=31 C L J 68 The fact that collection papers may be admissible under section 34 of the Evidence Act does not prevent them also being admissible under section 32 of the Act if the conditions prescribed by section 32 are establ
Though an entry in
tion, no corroborati
Maniel Chand v *Parakujo* 9 Mys L J. 337

Dakhilas Receipts of rent purporting to have been given by the former landlord

as genuine is not to be legally presu
disputed by the landlord *Kirtibas*
be expected that a *ryot* should in
landlord
that they
owner or
genuine,

Ram Jadu v *Laksmi* 241,
Mohiuddin, 9 W. R 241,
unendra, 82 Ind Cas 974,
Banoo, 12 W R 34,
12 W R. 30; *Indra* v *Golak*, 12 W
shown to be authentic, are *prima facie* evidence of payment of rent, but not conclusive evidence. *Amir Baksh* v
9 W R 189

v. *Kali Prasanna,* 26 C 832 (838) But section 95 of the Bengal Road cess Act (IX of 1880) is not exhaustive. It was intended to restrict the operation of s 21 of the Evidence Act, and a road cess return may be admissible in evidence as
: is made the return *Chalho Singh* v.
Gource Sankar, 22 W R 192, *Hem*
A. 177. The road cess return filed
by a person in his capa
sible in evidence in favo
be regarded as a perso
v *Ajodha,* 39 C 1005
Swarnamoyi v *Sourendra,* 12 C L J 11=89 Ind Cas 717=A I R 1925 Cal 1189

Deposition of Patwari. A deposition made by a *Patwari* of a village in
ent under the Bengal
32 of the Evidence Act
yan v *Dwarka Prosad,*
9 Pat. L T 679=109 Ind Cas 136=A I R 1928 Pat 129

clause See
e illustration
rtion of the

CLAUSE III

Scope of clause (3) This clause makes declarations against interest admissible in evidence Illustrations (e) and (f) apply to this clause This section makes three classes of declarations against interest admissible in evidence namely, Ist, where they affect the declarant's pecuniary interest, 2ndly his propri
chargi
179.

sible against the interest of the person through whom he claims *Ram* v *Khagendra,* 31 C 871 P C=9 C W N 71 Under this clause the tests of admissibility of statements against interest made by deceased persons are that (1) the deceased must have had personal knowledge of the facts he was stating, (2) the facts stated should have been to the immediate prejudice of the deceased (3) the statements must have been, to the knowledge of the deceased contrary to his interest, and (4) the interest must be either pecuniary or proprietary *Ramanathan* v *Murugappa,* 33 Ind Cas 969=3 L W 216=(1916) 1 M W N. 208

English law According to English law declarations against interest are statements made by deceased persons adverse to their pecuniary or proprietary interest; and the guarantee of their credibility consists in the fact that they are
iterest, since it is the general experience of
de are likely to be true *Middleton* v *Milton,*
Atkin, (1833) 1 C & M 410 (425), *R* v
I C 63, 67, *Brady* v *Atkinson,* (1879) 13 Ch
interest in other sense as for instance an

32. v *Exeter*, (1869) 4 Q B 311, *Hayes J* observed: "Having regard to the gr[illegible] changes that have in recent times been made in admitting the evidence of [illegible] interested witnesses, when alive, it would be most objectionable to lay down any narrow restrictions upon the reception of declarations in any way against inter[illegible] which have been made by persons since deceased, and which are frequently the only evidence that can be obtained on the subjects to which they refer and where the Courts are frequently obliged to supply the want of evidence by presumptions"

In *Taylor* v *Witham*, 3 Ch D [illegible] is no doubt an established rule i[illegible] agai st the interest of the man who [illegible] death for all purposes What is [illegible] I adopt the view of *Baron Parke* in t[illegible] C 333, that it must be *prima facie* [illegible]

speaker is admi ible even if when the fact are f rther examined, it m[illegible]

making it and "not an admission which may or may not turn out at some [illegible] quent time to have been against his interest" See also *Smith* v *Blakey*, L R 2 Q B 326, *Massey* [illegible]
In *Tucker* v *Ol*[illegible]
608, *Lord Justi*[illegible]
that the stateme[illegible]
In this state [illegible]
Court of Appe[illegible]
Company, (191[illegible]
sought to be put related to an acknowledgment of paternity and a promise [illegible] by the deceased to marry the mother of the child, who claimed compensation under the "Workman's Compensation Act," as a dependant on the deceased *Lord Justice Hamilton*, after making an incidental observation that as between the *dicta* of *Blackburn J*, in *Smith* v *Blackey*, 2 Q B 326=36 L J Q B 1[illegible] that the statement must be one which never could be made available for the person himself, and that of *Jessel M R* that it is sufficient that the statement is *prima facie* against the interest of the person making it, he is inclined to the former view, "if there is any real difference between them", proceeds to lay down categorically the tests of admissibility of statements against interest According to the learned *Lord Justice*, (a) the deceased must have had personal knowledge of the facts he was stating, (b) the fact should have been to the deceased s immediate prejudice, (c) the statement mu t have been to the knowledge of the dec ased, contrary to his interest, and (d), the inte[illegible] must be either pecuniary or proprietary The ca e went up to the House of Lords *Lords Loreburn* and *Moulton* ap[illegible] the statement [illegible]
the la[illegible]
to agr[illegible]
A' C[illegible]
this p[illegible]
groun[illegible]

time when she was not of sound mind, memory or understanding Under [illegible] which had been destroyed her husband took a life interest in her estate after [illegible] under an ante nuptial settlement he was, in the events that had happened

entitled absolutely to her estate. A statement by the husband, who had died before the suit was broug ... sound mind when she destroyed ... ing in disparagement of his own ... tles, 27 T. L R 202.

departure from English ... h would subject the decla- ... ble. This seems to be a ... Case, 11 C & F 108 In that case the question was whether A was lawfully married to B A statement

injuriously affect the interest of the party making them Nor it is true, that ... s to certain ... These are ... , in that case ... l be liable to prosecution, that, therefore, the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced." *Nort Ev 184* So "the interest involved must, according to the English Law, be one of a pecuniary or proprietary nature, no other interest will suffice But the Indian Law, as laid down in sub section (3) of section 32 of the Evidence Act, extends the scope of this exception and put a penal interest on the same footing as a pecuniary or proprietary interest." *Per Shadi Lal C J* in *Mahomed* v *Emperor*, A I R 1926 Lah 54 = 89 Ind Cas 252 (258) So a statement which would have exposed the declarant to a criminal prosecution or to a suit for damages, would be admissible as a piece of evidence in any proceeding in which such evidence is relevant to the issue or issues being tried in such proceeding *Per Fforde J* in *Mohammad* v *Emperor*, 89 Ind Cas 252 (254)

Principle The exception presupposes, like most of the others, first a neces-

ely to have been stated untruthfully. *Wigmore* § 1455

, as here applied, signifies the impo ... the same source, the declarant being ... ver the witness is practically unavailable, his statement sho ... his case being regarded as ... must show that a particular fac

Manley v *Curtis*, 1 Price 229, *Phillips* v *Cole*, 10 A & E 106, *Barrows* v *White* 4 B & C 328, *Spargo* v *Brown*, 9 B & C 936 In *Fitch* v *Chapman*, 10 Conn 11, *Williams J* said The cases where such evidence is admitted seem to proceed generally upon the principle that, by th ... principle ... insanity ... from juri ... evidence ... incapacity.

S. 32 v *Blades*, 3 Camp 458, the declarant had suffered from an apoplectic fit and was declared by his physician to be in extremis The question was whether the declaration of such a person
Ellenborough L C J said
and I am afraid to establi
patient is past all of evidence
permitted there cover
this section of the admis
the declarant is lance could not b
procured without an amount of delay or expense, which under the circum
appears to be unreasonable *Asiatic Steam N Co* v *Bengal Coal*, 35 C 751

Subjective relevancy—Adequate knowledge In connection with the with the other exceptions to the hearsay rule, judicial attention is concentrate upon the subjective relevancy shown by the declarant Here as elsewhere the elements of such subjective relevancy are two, Adequate knowledge and Absence of controlling Motive to Misrepresent

Adequate knowledge may ap
surate with the inference or state
sufficient, in the opinion of the pres
men, in acting in accordance with
extent on the part of the declarant must be shown in order to warrant reception of a declaration against interest as secondary evidence of the facts asserted It is not regarded as sufficient, for example, to show that such an extra judicial statement was found, after his decease, among the papers of the person purporting to be the declarant He must be affirmatively shown to have made the statement and it must also appear that he knew what he was talking about *Chamberlayne's Ev* § 2772

Circumstancial Guarantee or Absence of controlling Motive to Misrepresent The basis of this exception is the principle of experience that a statement asserting a fact distinctly against one's interest is entirely unlikely to be deliberately false or heedlessly incorrect, and is thus sufficiently sanct though oath and cross-examination are wanting In *Smith* v *Blakey* L R Q B 326, *Blackburn J* said " When the entries are against the pecuniary interest of the person making the
himself there is suc
admitted after the
Talor 4 L R Ire,
tatement appears
which after the deat
Mercers Admr v
taught us that when one makes a declaration in disparagement of
or interests it is generally true, and because it is so the law has deemed it
the exception to
likely to make a false
posed to be the
, when a person
making a declaration prejudicial to his own interest says something
cessat ipsa lex *Per*
Lah 54=89 Ind Cas
446=57 I A 14 (P C)=34 C W

Origin of the rule In *Anon* Bunbury 16 (1719) rentals or
wed at Winchester and Dor
v *Brock*, 3 Woodeson's
it is said "On a similar princ
idence, because the habit or
Roe d Brune v *Paulin*,
' The contents of the
possession of it, it dimin
interest in the fine on renewal, in the same proportion as it raised the

reserved The paper was written by a confidential agent at least, though it does not appear that he was the immediate steward of the estate at the time but

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in evidence the following entries from the day book and ledger of a man mid wife who had attended the mother of William Fowden junior at his birth, and was since deceased —

Day Book Entries

'22nd April, 1768.

38* Richard Fallows's wife Bramhall Filius circa hor 9 mututin cum forcipe, etc

paid'

Then followed in the same page the entry in question without any intervening date —

'Wm Fowden junr's † wife, 79 ‡

Filius circa hor 3 post merid nat etc

Ledger Entry

'Wm Fowden junr, 1768

Aprilis 22 Filius natus, etc

	£	s	d
Wife	1	6	1
26th Haustus purg	0	15	0
	2	1	1

Pd 25th Oct, 1768"

These entries were tendered in evidence to show the precise day of the birth of Wm Fowden, jun The evidence was objected to But the jury found on this evidence that Wm Fowden, jun was not born on the 2nd but on the 22nd April
should
would
been established for the security of life, liberty and property but in declaring our opinion upon inadmissibility of the evidence in question we shall lay down
ie limits
Warren
ks of a
making
ve been
entries ?

I think the evidence here was properly admitted, upon the broad principle on which receiver's books have been admitted namely that the entry

* The figure 38 referred to the ledger

† This was the designation at the time of the father of Wm Fowden jun in question

‡ These figures referred to the ledger the entry in which follows

. 32.

in his own handwriting repels the claim which he would otherwise have had against the father from the rest of the evidence as it now appears Therefor the entry made by the party was to his own immediate prejudice when he had not only no interest to make it if it were not true, but he had an interest the other way, not to discharge a claim which it appears from the other evidence that he had
beginning with *Warren* v
279, is that if a perso
declaration of that fact, w
his death, if he *could l*
Ibid But in *Gleadown* v
expression reported to h
is 'if he could have been c
not introduced in any
any such qualification and I have great doubts whether I ever used the expr sion If I did, *Scotle* v. *Lord Barrington* and *Bosworth* v *Cotchett*, decided in the House of Lords, are against it" *Thayer Cas Ev* 485

Statements against pecuniary interest 'Statement of a fact against pecuniary interest when its tendency is to take away or lessen the pecu

position is worse

may include both verbal or written ones,
documentary evidence, and particularly in books of account Where the books of collectors of taxes, stewards, bailiffs, or receivers subject to the in pe tion of others, and in which the first entry is generally of money receiv
, within the principle of this rule
llington 3 Brod & Bing 13
Icaton, 4 T R 669; *Short* v *Le*
556, *Dean* v *Caldecott* 7 Bing
133; *Marks* v *Lahee*, 3 Bing N C 408; *Wynne* v *Tyrwhitt*, 7 B & Ald 376.
De Rutzea v *Farr*, 4 Al & El 53, *Plaxton* v. *Dare*, 10 B & C 17 But it has been extended still further, to include entries in private books also, though retained notice in

this exception *Greenl Ev* § 150, *Ridgway*, 10 East. 109; *Middleton* v
a mere memorandum of an agreement
is not sufficient.
attempted to be pro
of his deceased m
them, and of subsequent payments of
for the entries were not made against the
ble unless the service were performed,
nor were they made in the course of his duty or employment *R* v. *Worth*, 4 Q B 132 In general, the interest or burden involved in the fact stated must be a positive one and
of the declarant (
A given fact may
circumstances; for example, that one is a partner may or may not be against his interest according to the state of the firm's assets *Ramses* v *Ramses*, 30 Ala 128, *Humes* v. *O'Bryan*, 74 Ala 428 In the last named case A brought a suit against X and Y as partners Y having died, the suit was pressed against X alone X denied his partnership with Y and to prove his case offered declarations made by Y to the effect that he (X) was not a partner It appeared that the
Y made these
ie declarations
t be noticed,
the absence of
that Humes
st his interest
This is so because, if true, it would entitle, Humes to a half interest in the partnership assets . The assertion, therefore, that Humes was not a partner, having been made at a time when the partnership business had failed, it was a declaration exonerating him from a pecuniary liability for the partnership debts, and, if true, to this extent doubled the ultimate amount of Glover's (Y's) liability " So it is clear that whether a statement is against interest or not depends upon circumstances A statement by Y that X is not a partner is not against the interest of Y when the firm is solvent, but it is so when the firm is insolvent.

of money received by him on behalf of his *cestui que trust*, and for which he was liable, held admissible against the *cestui que trust* *Bright* v *Legerton*, 29 L J Ch 852. In an action by a
statement by the testator
debt is admissible *Watson*
testator are evidence again
trator *Smith* v *Smith*, 7 Car & P 401 In an action of trover to recover a watch, the defendant pleaded that it was not the property of the plaintiff It appeared that the watch had formerly been the property of the father of the plain-

S 32. made it is not sufficient that it might possibly turn out afterwards to have be against his interest *Edwards Ex parte*, 14 Q B D 415

Against Proprietary interest An equal guarantee of trustworthine s furnished when the extra judicial statement is opposed to the propr etary int of the declarant 'By declaration against proprietary interest we mean s a

in the property The principle on which these declarations are rece ved in the presumption of absolute ownership arising from pos ess on Wh n party in possession of land a lmits that he holds a less estate t an a fee s mp as for instance, that he is tenant in tail for life for a term of years, or at w l he manifestly cuts down his own interest ir title, and it is not likely that a man intere t than he claimed or stated *Nort* 192, *Peaceable* v *Watson* 4 Taunt 16 *R* v *Exeter* (1869) L R 4 B 341 *Taule* v *Miles* 27 L K *R* v *Birmingham Blackburn J* said 'It is now well settled that a statem n against interest by a decease l per on is with certain limitations adm evidence in proceedings betw show that where a person *prima facie* evidence of a tena down that interest is admissil against his interest ' Simil declaration of the deceased father of the claimant who had been in the po of the property that he only occupied and managed it for his son was held admissible as being against the interest of the person making it A declara on terest in the land whatever terest in the land whatever *ey* v *Redman* 1 Q B D 11 that a person in possess on of the owner thereof *in fee* *Ibid*, see *Wills Ev* 193 *Welb* v *Winwood* 7 T R 397 The rule therefore

to treating declarations

a question of public way was in issue, the declaration of a deceased land made whilst planting a tree stating that he planted it to show the boundary of road is not evidence of public right, for it is not a statement of gen reputation but of a particular fact. *R* v *Bliss* 7 Add & E 550 *Cf* *Chadwick* 2 Moo & Rob 507 Assertions that one s estate is a leasehold not a freehold or that one s possess on is merely as agent or as trustee another are admissible *Walker* v *Broadstock*, 1 Esp 458 *Doe* v 5 Esp 4 *Doe* v *Jones* 1 Camp 367, *Peacable* v *Watson* 1 Taunt 16 *Nicoll* 1 Bing N C 430, *Doe* v *Longfield*, 16 M & W 513 A declara by the person in possession, that his interest was less than a fee his own life only, would be primary evidence that it ceased to exi t at h s death *Doe d Welsh* v *Longfield*, 16 M. & W 497 To make a declaration proprietary interest in lands evidence after the death of the declaran have been at the time in actual possession *La Touche* v *Hutton*, Ir 166 A declaration or a written entry by a deceased person when occ house that he was tenant at so much rent and had paid it, admis declaration against proprietary interest to prove the fact of the payment of the tenancy *Rex* v *Exeter Guardians*, 10 B & S 133 Declarat

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deceased person, claiming a limited interest under a particular Will of property of which he was in possession, are admissible to prove the fact that the Will had a legal existence, and certain persons were named executors therein *Sly* v *Dedge*, 49 L J. P. 63 On an issue as to the right of L to a fishery, entries of a deceased receiver charging himself with the receipt of rent from a sub receiver, due from

he fishery, are
L J. Ex 1.
admissible in
ons were made
mdas v. *Aju-*

a pecuniary penalty, by wa
imprisonment *Cocl le Cas*
decided, in 1844, was neither
precedents, so a backward

thout bans was received
1476 So it is plain

of procuring fabricated
testimony to such an admission of oral This is the ancient rusty weapon that

a very strong tendency to make any one out side of a Court of Justice believe

S. 32.

the admissibility of such a confession; the
of the two countries do not bind us;
case of declarations against interest is well
against interest as a confession of murder·
than dying declarations, which would

ore that there is no

which declarations
ts not being agan
the declarant to a

against his pecuniary or proprietary interest. *Nort Lv 184* But in ord
make such statement admissible in evidence, the fact stated in the statement
must expose him, to a criminal prosecution or to a suit for damages, at the t
it was made *Stoke's Anglo. Ind. Code Vol II. 874*; see also *Nicholas* v *A*

the Evident
firmed by th
P. L R 1
forgery one
trate died before the commencement of the trial. The
by the Session *Held* that
statement was
to criminal pro
L R 248
Daolat and to
She then died
before the committing Magistrate and t
statements of the deceased were relevant un
she having witnessed an offence and no
officer or Magistrate exposed herself to
Emperor, 16 N. L R 30=56 Ind Cas 582=21 Cr L J. 486

Statements of sundry facts against interest. There are many facts which
in their ultimate effect be against the proprietary or pecuniary interest, though
in their immediate and narrow aspect there may be no such clear character
These facts, however, may never the less be facts so decidedly against inter
that no one would be inclined falsely to concede their existence *If so*, on the
general principle they should therefore be admitted No more precise te

state the terms of the contract with B, was rejected *Blackburn J* ... have
is no more than an admission that he has the care of the three chests which him liable
arrived at the office and the possibility that this statement might make

show the existence of the Will. In *Flood* v *Russel*, 29 L R. Ire.

hich she profited S.
Tyn, (1914) A
a claimant was a
, the deceased's
al Loreborn
ng a legal
Wigmore

§ 1461. In *R.* v *Worth*, 4 Q B 134 an entry of a hiring at a certain wages in the deceased master's private book with a memorandum of payment, was held

to pay conditionally is none the ract is
subject to some conditions imposed of a
contract liability of any sort is on *gmore*
§ 1461

ot merely the
is because the
likely to be
eate a liability

Preponderance of interest—Credit and debit side—No motive to misrepresent In some cases it has been stated on the analogy of other Hearsay exceptions that there must be no motive to misrepresent and this has been put as an additional requirement *Gleadow* v *Atkins*, 3 Tyrw 301; *Marks* v *Lahee*, 3 Bing N C 408 "But" says *Prof Wigmore* 'there is no such additional requirement The real ol
a not uncommon situation,
interest, there is also a

meaning of the entry standing alone must be against the interest of the man who made it Of course, if you can prove *ali unde* that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of the evidence altogether, but the question of admissibility is not a question of value The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for making it, and that though apparently against his interest, yet it was for

account in which the receipts creating liability are on the whole [illegible]
exceeded by the payments or credits in his favour When, in the [illegible]

S. 32 the entry of payment rece
is sought to be used, t
of the account together, t
appears to have a claim
interest This argument,
261, has since been repu

266, by Mr Brougham But [illegible]
is not likely to charge himself [illegible]
so accounts are evidence though the [illegible]
Per Coleridge J in *R v Worth*, 4 Q B [illegible]
see also *Williams v Greaves*, 8 C & P 592

the pr
the d
the correctness of whatever he may say while under that influence [illegible]
words, the statement may be accepted not merely as to the specific fact [illegible]
interest, but also as to every fact contained in the same statement. [illegible]
1465 The leading case on this subject is *Higham v Ridgway* 10 [illegible]
(Vide supra) As for the limits which it thus becomes necessary to set, [illegible]
must be the phrasing of a [illegible]
general [illegible] Judges In [illegible]
Nanson, try is limited [illegible]
against t it the whole statement
In *R v* [illegible] principle that a declara-
tion against interest was evidence as to all that formed an essential part of it
was long since settled' See also *Stead v Heaton*, 4 T R 690, *Doe v C*[illegible]
wright Ry & M 62, *Davies v Humphreys* 6 M & W 153, *R v Birm*[illegible]
1 B & S 763 In *Smith v Blakey* L R
down by *Blackburn J* where he said
of the precise fact which is against interes
up with the statement' In *Doe v Beviss* [illegible]
contained on one side items charging
on the other side items discharging him by showing how the moneys [illegible]
had been disbursed The discharging entries were not admitted [illegible]
end "T
himself,
ing part [illegible]
ing part, it may be necessary to read the whole So where the [illegible]
anything explanatory of the former that may render the whole account [illegible]
sible But that is not the case here' In the same case *Maule J*, said It may
which is intelligible
case recourse [illegible]
charge in the account
him, the items of [illegible]

necessarily resorted to for the purpose of explaining the charge [illegible]
may be evidence" See also *Marks v Lahee*, 3 Bing N C 408, [illegible]
Heaton 4 T R 669, *Knight v Waterford*, 4 Y & C Ex R [illegible]
gate v Emmerson, 10 Q B 326, *Per Lord Lyndhurst in Rudd v* [illegible]
cited 1 Ph Ev 314, 315 *Whaley v Carlisle*, 17 Ir L R N S
Taylor v Witham, 3 Ch D 605, *The Swiftsure*, 82 L [illegible]
Fitzgerald, 11 L R Ir 106, *Sita v Khub* 5 Pat. 168, *Knight v*
Waterford 4 Y & C Ex R 283, 291, 295; *Leelanund* [illegible]
W R 231. The following test is suggested by *Prof Wigmore* [illegible]
back to the living principle, a more useful test appears to be this [illegible]
parts of the speech or entry may be admitted which appear to have [illegible]
made while the declarant was in the trustworthy condition of mind [illegible]
permitted him to state what was against his interest. This being the fund[illegible]

principle, any reference to collateral records which amounts to a repetition or an incorporation of them would make them a part of the admissible statement" Entries made at a subsequent occasion, when the original entries are complete, are clearly excluded *Doe* v *Tyler*, 4 Moo & P 381, *Knight* v *Waterford* 4 Y & C Ex R. 283 (294)

In *Reg* v *Overseer of Birmingham*, 1 B & S 763–31 L J M C 63, *Cockburn J* observed "I should be prepared to say, that as soon as it is established, which it now is on the authority of *Higham* v *Ridgway*, *supra*, and the other cases, that you may receive the declaration of the deceased person as showing, not only something adverse to his interest, but all incidental facts contained in that declaration, so far as they are not foreign to it, it follows as a consequence that those collateral facts may be proved by the declaration' In *Davies* v *Humphreys*, 6 M & W 153 *Parke J* (afterwards *Baron Parke*) said "The entry of a payment against the interest of the party making it, has been held to have the effect of proving the truth of other statements contained in the

rred to therein provided that the

a variety of circumstances If the statement happens to be recorded in a docu

it came to be
making it or an
mplicity in the

It is now, however, well settled that declarations of deceased persons against their interest
so much contained in the
facts stated in them, at
to the declarations, and may be taken to have formed a substantial part of them
see *per Cockburn*
parol declaration
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pauper s st
Smith's Le

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a property
sradh and

mortgagee had
Held the whole
ormer part alone
admissible *Sitaram* v *Khublal* 5 Pat 168=91 Ind Cas 13=7 Pat L T 573=A I R 1926 Pat. 255 But disconnected facts though contained in the same document or statement are inadmissible *Doe* v *Beviss supra Knight* v *Waterford*, 4 Y & Cole 293, *Ningaua* v *Bharmappa*, 23 B 63

When the statement must be against interest The fact stated must of

early engrafted upon the rule, *viz* that an admission of a fac. made by a deceased person which is against the interest of a party making it *at the time*, is evidence of that fact as between third persons. See also *Percival* v *Nanson*,

S. 32. 7 Ex 1, *per Parke B*; *Lalor* v *Lalor*, 4 L R Ire 681; *Ex parte Edwards in Tollemache*, 14 Q B D 415; 416, *Smith* v *Blakey*, L R 2 Q B 326, *Mc y Allen*, 13 Ch D 326 The chief application of this rule was to the creditor endorsement of payment on bonds or notes before the claim was time-barred. The creditor's receipt of payment, in part or in whole, was a fact against his interest, hence his memorandum endorsing upon the instrument the fact of his receipt of payment would be a statement of fact against interest, the fact of payment thus evidenced, would be by implication an acknowledgment (or a promise) by the debtor, and thus would at common law suffice to give a new beginning to the period of the statute of limitations *Wigmore* § 1466, *Stark*
Lord Barringt
C J in *Addan*
a motive for
unimpaired

made after the Statute had run was not evidence, and that the note was barred by the Statute See also *Turner* v *Crisp*, 2 Str 827; *Glyn* v *Bank of England* 2 Ves 43; *Short* v *Lee*, 2 Jak & W. 488, *Gleadow* v. *Atkins*, 3 Tyrwh
Newbold v *Smith*, 29 Ch D 877

When the declarant
to be prosecuted, and so th
sub section (3) were not
clause 3 of section 32 *Nga Po* v *King Emperor*, 7 L B R 33=20 Ind
90=14 Cr L J 510

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be judge
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stances t
admissibility of evidence *Phip Ev* 271

Spontaneity not required No administrative necessity has been perceived for requiring another general safeguard against mistake in or manufacture of evidence, i e, guarantee of spontaneity should also be present, if a statement against interest is to be received *Doe* v *Turford*, 3 B & Ad 890, *Chamberlayne Ev* § 2773

31 L J M C 63 *Fenley* v *Wilkinson*, 13 Ch D 283, *Farmingham*

in the cases" See also *Jagnut* v *Haj*

Exeter v *Warren*, [1844]
in whosesoever han[d]writing
in latter case it is not necessary to call
190-191.

S. 3

Contemporaneousness of entry Declarations against interest are admissible even when they are not made contemporaneously with the facts *Doe* v *Turford*, 3 B & Ad 890, *Smith* v *Blakey*, L R 2 Q B 326, *Whaley* v *Masserene* 8 Ir Jur N S 281

Personal Knowledge The qualifications of the declarant with reference to
the as those of the ordinary witness
v *Nanson* 7 Ex 1, *Tay* § 669,
was held that it was not necessary
knowledge of the fact stated —that
if the entry charged himself, the whole of it became admissible against all
weight, and not
manta, 1 B 610
is applicable to
are by no means
uniform Vide *Doe* v *Robson*, 15 East 31, *Short* v *Lee* 2 Jac & W 488, *Barker* v *Ray*, 2 Russ 76, *Middleton* v *Melton* 10 B & C 317 *Lloyd* v *Powell* (1913) 2 K B 133, 137 C A *Gleadow* v *Atkin* 3 Tyrw 302, *Marks* v *Lahee* 3 Bing N C 420, *Percival* v *Nanson* 7 Ex 1 In the above cases it was held that the declarant must be shown to have had a competent if not a peculiar
ect matter of the declaration *Tay* §

of what the chest, contained Similarly in *Doe* v *Longfield* 16 M & W 514 the assertion of an estate by life interest only was regarded as ambiguous and inadmissible See also *Plaxton* v *Dare*, 10 B & C 19, *Doe* v *Beston* 9 C & P 254

Extrinsic Proof Extrinsic proof must be given of the declarant's death (unless it is presun
necessitate the adm
be shown to have
Short v *Lee*, 2 Jac & W 467, *Plumer M R* said In all these cases (of books by bailiffs etc) the first
wrote them, if you fail in t
Phip Ev 7th Ed 272, s
Curtis 1 Price 228, *Bullen* v
E 56, *Doe* v *Beviss* 7 C

hould
Barry
hand
were
Where
it was
authorised or adopted by the deceased *Lancum* v *Lovell* 6 C & P 437 *Bradley* v *James*, 13 C B 822, *Doe* v *Hawkins* 2 Q B 812, *Re Fountaine* (1909) 2 Ch 382, *Phip Ev 7th Ed* 272 Where, however, the document is thirty years old

or receiver of another, it is necessary, in addition to give some proof that he really occupied an alleged position, except (i) where the agency is a public one, or (ii) perhaps where the entries are ancient produced from proper custody and bear strong internal evidence of genuineness *Tay* § 653 *Phip Ev* 211

Declarations against interest and Admissions, distinguished. Declarations against
received
and conf
trary, are
of the deceased declarant, admitted as an exception to the hearsay rule *Mackelcy's Ev* 316 Such declarations are made, being compelled by truth, and as such they are as trustworthy as if made on the stand under oath and cross-examination *Wigmore* § 1475 The points of essential difference in main are

32. four (1) The admission is a creature of procedure, the declaration against interest is entirely a matter of evidence, i.e. of reasoning (2) Admissions are primary evidence of the facts stated, the declaration against interest is a secondary grade of proof, received only when shown to be necessary to the case of the proponent, the primary evidence being unavailable (3) The admission is receivable in evidence only when the declarant or some one identified with him in legal interest is a party to the suit and the admission is offered against him; the declaration against interest may be made by any one, and is receivable in suits between third persons and though made in favour of the present proponent or one in privity with the declarant. (4) The admission is received although ... , as being off ... nt must have been ... at it was directly opp... failure to observe the ... to his pec... distinction ... cause confu...

Declarations held admissible under this clause At the trial of an ac... for an injunction for stopping up ancient lights it was proved that the ... year for the use of light and that ... agent of the owner of the alleged d... ient tenement the sum of six pence and made a verbal statement that it was for the lights of the house The agent ... now dead *Held*, that this was evidence of payment of the rent by the owner of the alleged dominant tenement *Beuley* v *Atkinson*, 49 L J Ch 153 13 Ch D 283 Where there is a right of entry given for an assigning or und... if a pe... agains... fact ... favour... the entries in the account from being admissible as entr... person who ... *Whaley* v *Carlisle* 17 Ir C L R 792 An entry by deceased person upon knowledge of a fact whereby he charges himself or discharges another upon whom he would otherwise have a claim, is admissible in evidence, even though the party could not have been examined as to the fact in his life time ... *Lee*, 2 Jac & Walk 489 In an action by executors against a son of the testator to recover money received by him from his father, the debtor's ... of the ... account book containing the receipt of interest from the son, was held to be admissible in support of the plaintiff's contention that the money had been lent and not given although the right of the plaintiff without consent to put in the other side, which contained no entries opposed to the advantage of the writer was doubtful *Peck* v *Peck* 21 L T 670 E now dead, was a clerk to the plaintiff ... A book containing entries in the handwriting of E which charged E with the receipt of interest on a sum owing by R and W to the plaintiff was offered in evidence —*Held*, that evidence could be given of E's so doing, as of parol representation made by him against his interest. *Kettlewell* v *Watson*, ... 402 Entries of charges made by an attorney in his books showing the ... when a certain lease prepared for a client of his was executed which ... were shown to have been paid are evidence, after the attorney's death to show ... the lease was executed under a power to lease in possession, and not in ... *Doe* v *Robson* 15 East 29 A deceased solicitor's books are evidence ... charges himself therein with receipts on his client's behalf as being ... against his interests whether or not the entries were made in the ordinary ... To prove that ...

though on a full investigation of all the facts the dec... not to have been detrimental to interest The declaration of a d... to the effect that he had destroyed a Will which gave him a life inter... free hold pr... arising from ... examination ...

to his advantage, because apart from the existence of a Will, he in fact took no interest in the property. *Re Adams, Benton* v *Powell*, (1922) P 240=127 L T.

S.

within the meaning of s 32, Evidence Act and are hence inadmissible *Jagadish* v *Harihar*, 78 Ind Cas 219=10 C L J 39 On the death of a member of a joint Hindu family the other members sued the widow of the deceased for possession of certain properties on the ground that she had no right to them, her husband having died an undivided member The widow set up a division and relied *inter alia*, on a mortgage executed by her deceased husband and attested by the plaintiffs containing
possession of the properties
acknowledgment that they ha
admissible in evidence as a statement against interest under s 32 of the Evidence Act *Gnanamuthu* v *Veilu Kanda*, 19 L W 494=79 Ind Cas 2=A I R 1924
the circumstances
ith the adoption is
under s 32 (3)
of the Evidence Act *Danapati* v *Balsundara*, 36 M 19=18 Ind Cas 989 The *varaspatra* in this case was admissible not only under section 32, clause (3) of the Indian Evidence Act as a declaration made by the widow against her proprietary interest, but also by reason of s 90 of the Act *Hari Chintaman* v *Moro Lakshman*, 11 B 89 Recitals in deeds in favour of one party to suit showing nature of some lands are admissible not only under this clause but also under s 13 (b) *Tikaram* v *Motilal*, A I R 1930 All 290 In a suit for account by the representatives of A, deceased, evidence was adduced of a document

his interest *Zaynub* v *Hadjee*, 2 Ind Jur N S 54 Where the question, whether there was partition between the ancestors of the parties or not, is in issue, the statements made by the deceased ancestors of the parties that there was partition are admissible in evidence as they are statements against proprietary interest of the persons making them *Jairam* v *Narottam*, A I R 1929 Nag 131

gift in a case covered by s 32. *Appasami* v *Rama Tevar* 31 L. W. 776=61 M.

32. L J 881. A statement of a convicted person made about the time of his being hanged that the approver in the case was not involved in the crime may be admissible *Shafi* v. *Emperor*, A. I R. 1930 Nag 259=124 Ind Cas 409 Statement in adoption deed that adopter's sons were suffering from leprosy is admissible to decide validity of adoption and attestation by sons being against their interest is admissible *Nangammal* v *Sankarappa*, A. I R. 1931 Mad ... sive vendors in sale deeds ... belong to them, but was ... land *Tila Ram* v ... A. I. R 1930 All. 299; but see *Aligm Nayakars* v. *Perumal*, 39 L W 472

Declarations held not admissible under this clause An admission made by a bankrupt in his statement of affairs that a debt is due from his, is not after his death, admis ... existence of the ... after paying the ... 13 Q B D 720 ...

... tement by a ... a deceased ... but not by ... mis ible in evidence, either on the general ground of pecuniary interest, or on the general ground of the audit having been made in the ordinary course of business ... v *Moat*, 45 L T ... business done by ... creditor account, ... merely because the ... *Whaley* v ... by a firm ... of the tr... acknowled... on the n...

... himself ...

427=103 Ind Cas. 145=A I R 1927 Bom 133 Statements of ... persons under s 32, Evidence Act, ... conditions specified therein are ... a certain person a statement in the ... more than 20 years before is not admissible under s. 32 ... Hindu w... sible in ... interest, ... long enjoyment of her husband's property *Dalbahadur* v ... C W N 369=A I R 1930 P C 79 ... 51 C. L. J ...

Held, that neither the ...

as the statements in the Will made by the deceased that he had spent a particular **S.**

plaintiff, a statemen

The evidence of
Act would be ad

rietary interest of the deponent, even in a
of title *Shyamanand* v *Rama Kanta,* 32

Will of the purchaser of the title
title *Held* that the recital of *brahmatter* title in the Will was not admissible *Satindra* v *Krishna Kumari* 36 Ind Cas 882 A statement by a plaintiff as a witness to the effect that her father told her that he had mortgaged the land in suit to the defendant is inadmissible under this section *Mi Nga Ma* v *Nga Talak,* 29 Ind Cas 607 = U B R (1915) 1st Qr 56 A recital in a conveyance

not admissible in evidence under this clause. *Harihar* v *Guragranth,* 128 Ind Cas 791 = A I R 1930 P C. 610

Statement as regards boundray In *Rajah Leelanund* v *Mt Lakhaputee,* 22 W
propriet
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ment ad
founded
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interest

Under t
the prop

prietary interest *Karuppanna* v *Kanja Swami,* 107 Ind Cas 293 = A I R 1928

S. 32. It is unnecessary to cite any ...
v. *Ridgway*, 2 Sm L C 307
under the ...
cases the ...
This case ... discussed and followed in the case ... *Lal Iputee*, 22
... v *Bhaimappa*, 23 B 63, which again was followed in the
High Court in case of *Haji Bibi* v. *H H Sir Sultan Mahai*
11 Bom L R 409 = 2 Ind Cas 847, and in our Court ...
Kunj Behury Lal, 16 C W N ...
in *Allahabad* in th...
and all these cases ...
Sidhari Pandey, 1 ...
case of *Ambar Ali* ...
116 = 25 C L J 610 ...

... followed in the case ... A I R 1923 Cal 251, which is purported to ...
Cal 681 and in the case of *Radha Krishna* v *Sarbeswar Nag*, A I R ...
the question of admissibility of such a document under s 32 of the Evidence ...
has not at all been considered " See also ...
44 C L J 587 = 99 Ind Cas 910 = A I R ...
53 Ind Cas 863, *Trimbak* v *Ganesh*, 68 Ir...
Cas 329

In R ...

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... by the then zemindar ... The zemindar relied upon a stateme...
in the mehal, in which there ... many years pre...
question that the original re...
Mr Justice Markby held that ...
cannot ...

... does not appear to me to be a sta...
... of course, it would be his ... interest On the contrary so far as regard...
possible." It is clear that the view ...
consonant with the principle underlyi...
guarantee to the trustworthiness of ...
Couch C J and *Ainslie J* said "We c...
Judge that this statement was not ad...
which the interest in the mehal ...
it is against ...
cut down the p...

... mount of the original ...
... a document of this kind ...
... rts, and the part which is ...
... interest of the proprietor ... either, taking the doc... which is against his inter...

favour. In the circumstances there was nothing to impeach the judgment of *Mr.* **S. 3**
63 and
sion on
Calcutta
even in
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ing the
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s either extin-

and Cas 752,
g any reason
7, it was held
in evidence

land then conveyed was limited by certain boundaries, was an admission that their proprietary interest did not extend over any land outside the boundaries mentioned The entire statement was consequently admissible (*Higham* v *Ridgway*, 10 East 109, *Connar* v *Fi*
Nanson, L R 2 Q B 326, and *R* v *Exe*
is that the statement is accepted, not

interest of the person
rpose boundaries may
how a statement of
that nature can be said to be against the proprietary interest of the person making it, is some what difficult to ascertain ' This view is supported by the following observation of *Sir Richard Garth* in *Brojesuari* v *Budhanudhi*, 6 C 268, where the learned *Chief Justice* observed ' A recital in a deed or other instruments is in some cases conclusive, and in all cases evidence as against the parties who make it But it is no more evidence as against third persons than any other statement would be " See also *Brojomohan* v *Gaya Prosad*, 30 C W N 761, *Chooni* v *Nilmadhab*, 41 C L J 374, *Radha* v *Sorbesuar*, 29 C W N 469

death as a statement against his proprietary interest. *Wills Ev 192* And *a fortiori* if it shows that he has no interest in the land whatever *Ibid* This is based on the well known rule of law, that a person in possession of land is presumed, until the contrary appears, to be the owner thereof in fee simple
Grey v *Redman*, 1
therefore is not
the land occupied
against his interest to deny his possession of one close than it is to assert his

the subject matter of the document cannot be regarded as having been against the pecuniary or proprietary interest of the person making it within the meaning

S. 32 of section 32(3) of the Evidence Act and is consequently inadmissible in ev. *Kumud Kumari v Dilsool Roy* 101 Ind Cas 512 – 15 C L J 53 *Dandajam In re* 8 Ind Cas 968, *contra Lalu Singh v Sahadeo Singh* 36 Cas 610

CLAUSE IV

exposing them to constant contradiction *Phip Ev 7th Ev 285*

declarations are admissible in ev
in ca *he Berkeley Peerage Case*, 4 Cam
Mansj deceased persons who are su
to have had a personal knowledge of the facts, and to have stood quite h
ed are received in evidence In case of general rights, which depend

intervals of time, direct proof of their existence therefore ou
required

Administrative requirements Necessity Before secondary evidence unsworn statements can be received as proof of the fact asserted it is es ent here as in other instances of the use of secondary evidence that the pr proof of the oral testimony of the declarant should be shown to be unavail and that in consequence, a sufficient administrative necessity to procure dary evidence has been placed on the proponent A declaration of this is said to be admissible, 'where no better evidence can be had" *Chamberlay Ev* § 2791

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in a manner the purpose of cross examination After
an ordeal it is reasonably safe to accept the result as an estab
Wigmore § 1583 So the guarantee of its credibility consists in the co

of a large number of persons, all interested in and therefore likely to ascertain the truth of an opinion which if untrue, would be surely challenged *Wills' Ev 2nd Ed 222*; *Wright* v *Doe*, 7 A & E 313 in H L 4 Bing N C 489; *R* v *Bedfordshire*, 4 E & B 535.

Origin of the Rule "At the time of the definite immergence of the Hearsay rule—that is, by the end of the 1600 S there remained in existence a practice more or less loose, of receiving the repute of the community ... of ... pod ... the jury could in any case have considered, had they otherwise known of it, would be unnatural and improbable But with the final shaping of the Hearsay rule's limits, and the conscious statement of specific exceptions, in the first half of 1700 S and with the progress and final s ... doctrine that the jury could consider ... evidence in Court, the use of common ...

by the

Subjective Relevancy—Adequate knowledge Unless the situation presented to a presiding judge is such that knowledge on the part of a given declarant as ...

... of general ... Barnet, C M ... L R Ir ... een, 75 L J ... with respect ... *Ev.* ... imu- ... the ... ving that from their situation they probably were conversant with the matter of which they were speaking" *Bow* v *Allenstown*, 34 N H, 351, 366 When however, the circumstances show that the declaration is made otherwise than upon the declarant's own knowledge it will, even when relating to a public right, be inadmissible (*Devonshire* v *Neill supra*) *Phip Ev 286*

Scope of the Section 'Evidence is to be admitted from old persons . . of what they have heard other persons ...

... affecting classes of the community cannot be excluded, or relaxation the

S. 32. rule against the admission

If the question were
have a right to use and the
that evidence of reputation
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excludin
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interest,
in whicl
J in Hall v *Mayo* 97 Mass 416, *Green* v *Chelsea*, 24 Pick 80; *Dunraven* v *Llewellyn*, 15 Q B 791, *Queen* v *Bedfordshire*, 4 E & B 535 But the d... tion must relate to the general right, and not to particular facts which ... or negative it *R* v *Bliss*, 7 A & E, 550; *Crease* v *Barrel*, 1 C M & R ... *R* v *Berger* (1894) 1 Q B 823, *Mercer* v. *Denne* (1905) 2 Ch ... *Radcliffe* v *Marsdon* 72 J P 475, *Fowke* v *Berington*, (1914) 2 Ch 308, ... 13, Tay § 617 *Phip Ev 7th Ed* 287

The best way to
as far back as livin
regard to the precedin
is not however essen
any evidence of moder ...
admissibility of such evidence *Crease* v *Barrel*, 1 C M & R 919, 930, *Dunraven* v *Llewellyn* 1 Q B 791 (804); *Wills Ev* 229 Facts in issue are relevant facts within the meaning of section 32 of the Evidence Act, and statements made by deceased persons about facts in issue are admissible under the section *Raghubhusana* v *Vidiavarudhi*; 34 Ind Cas 875, disapproving *Patel* v ... 15 B 565

This clause permits proof to be given of a statement of a deceased person that in his family or in the ... of the caste to which he belonged ...
and such ...
been likely
statement b
Parbati v *C*
to give his ...
grounds of that opinion, information derived from deceased persons ... must be the expression of an independent opinion based on hearsay ...

2 L R Ir 159 60, *Phip Ed 7th Ev* 286

Staten ... of individual ...

was always regarded
such is always receival
R 14 So also maps
are also receivable *R* v *Milton*, 1 C. & K. 62; *Wigmore* ...
Alcock v *Cook*, cited, 1 Ph Ev 251
The same rule is applicable in
Dow 297; *Smith* v *Earl Brownlow* ...
2 Ch 303. Maps prepared by o...
matter may also be received. *Hammond* v *Bradstreet*, 10 ...
Fulcher 1 E & E, 111. Copies of Court rolls can also be ... section *Plaxton* v *Dare*, 10 B. & C 17; *Att. Gen* v. *Emerson*, ... 649, *Roe* v *Parker*, 5 T. R 26. So also deeds and leases, between ...

S.

In *Brisco* v
it is as goo
certainly dif
reputation, for a jury are summoned from the country at large, and are not themselves likely to know of the matter Yet where the matter has been before

went by default *Neil* v *Devonshire, supra* Similarly judgments, decrees, and orders of Courts and of similar bodies, if final, are admissible as evidence of reputation *Step Dig Ev Art 30* But here also the persons acting as Judges had no knowledge of the
ing *Rogers* v *Wooc*
v. *Villebois,* 13 M
8 A & E 198; but s
this section a statem
tion i e the fact that no one in the region had ever heard of the right, custom, or boundary being as alleged should be admissible as a negative reputation *Drinkwater* v *Porter,* 2 C & K 182; *Anglesey* v *Hatherton,* 10 M & W 239; *Wigmore* § 1595

Declarations as to public or general interest In proof of public or general rights or customs or matters of public or general interest, statements

s. 32. *Hicke*, 15 Q B ... General rights are those ... which some class of ... interest, as for example those which are based on the customs of manors (... *esston*, 12 East, 62, ... *Barrett*, 1 ... R 919), parishes (*Berry* v *Banner*, Pea 106, *Evans* v *Merthyr*, (1 ... v *Crisp*, 4 M & W 320) or which are connected ... (*Evans* v *Rees*, 10 A & E 151), hamlets (*Thomas Jenkins*, ...) and manors and ancient division of manors (*Barnes Mawson* 1 M & S 77), *Wills Ev* 2nd Ev 222 For the purpose o... rule, the test what is public is as to whether the subject in question ... general sustained, and, as it were, spirited discus... of a correct opinion Where ... although ... So the ... ts of pri... forms the ... subject matter of the ...

The question next arises, about what ... reputation be received as trustworthy The principle already examined ... the answer —that the ... in its nature one about which a trustworthy community reputation ... an active, constant and intelligent discussion by ... residuum of fairly trustworthy conclusions As a ... say that the matter should be one of public, or general or public ... interest, and this is the common phrasing though it varies loosely But this is still only a rule of thumb To decide difficult cases it is necessary still to seek the living principle and ask anew whether the matter is of such general interest to the community that by the thorough sifting of active, constant and intelligent discussion a fairly trustworthy reputation is likely to arise *Wigmore* 1586 see also *R* v *Antrobus* 2 A & E 793 *R* v *Bedfordshire*, 4 E & B 53... Declarations made *ante litem motam* by persons who are now dead in respect of a question relating to a matter of general or public interest even if they be no more than evidence of reputation or hearsay evidence, are admissible *Busoid* v *Aeuaj*, A I. R 1929 Cal 533 ... C W N 439

Interest "The term 'interest' here *does not mean* that which is interesting from gratifying curiosity or a love of information or amusement, but that in which a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected" *Per Lord Campbell, C J* in *Queen* v *Bedfordshire*, 4 E & B 535 The *interest* spoken of in the rule is that of ownership or some lesser prope... in the chattels land or franchises to which an individual may prope... being a member of the public more or less extended ... from ownership is no ground for ... assertions regarding it *Cham*... *Ev* § ...

Boundaries An extra ... to the position ... boundary, being on a matter of ... to have been made by one posse... an *assumption* may be *made in favour of any* ... resident in the community affected by the position of a public ... of actual knowledge may at any time be demanded by the presum... *Chamberlayne's Ev* § 2793

Public custom Where a house in a village is privately sold, proof of a custom in ... the *remainder* of the village gets one-fourth of the purchase ... of a similar custom with regard to sales ... 47 (48) F R ... a let ... infor ... to a ... *Sivanatha*, 17 ... customs ... heads of districts are *often accepted* as ... 439, ... *Ev* 190, see also *Paul Rai* v *Ram Hit*, 1 N W ... *Mahomed*, 3 N W P. 204

Opinion What is *offered must be in* effect a reputation, not the assertion of an individual. But reputation includes and is often learned ...

S.

witness was "What have you heard old men, now deceased, say as to the reputation on this subject?" Thus, though in form the information may be merely what deceased persons have been heard to say about a custom, yet in effect it comes or ought ... putation. *Wigmore* § 1581, see also ... *Porter*, 2 C. & K 182, *Earl of* ... *lebank* v *Thompson*, (1903) 2 Ch 3-; ... putation from deceased persons" But "reputation is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from ... ase it is ... heard ... E 679. In *Mercer* v *Denne* (1904) 2 Ch 534, the suit was for enforcing fishing rights. ... 1639, under an information by the Attorney- ... ich the sea extended was excluded In rejecting ... at p 543 "I am of opinion that these depositions are not admi... right which the Crow... the depositions of ... on the question to ... witnesses in other actions are admissible against strangers amongst other cases, if they relate to a custom where reputation would be evidence, but then those ... eputation and not of matters of ... iorities .. that reputation as ... also *Ireland* v *Powell*, cited in *Reg* v *Bliss*, 7 Ad & E 555 In *Ireland* v *Powell*, *supra*, the question was whether a turnpike stood within limits of a town, and though evidence of reputation was received to show that the town extended to a certain point, yet declarations by old people since dead that those houses formerly stood ... he ground that those ... *Denne*, (1905) 2 Ch

(1914) 2 Ch 308 So the reputation ... "I know the right and custom to ... understand the general acceptance of the custom by the community to be such and such" is admissible The deceased individual declarant is merely the mouthpiece of the reputation Whenever, therefore, individual declarations are

: *Birell*, 1 C M & R 925, *Drinkwater* v *Porter*, 7 C & P 181 But in *Barraclough* v *Johnson*, 8 A & E 99 Lord *Denman C J* said 'I do not agree that it is necessary for persons giving an opinion as to the publicity of a way to state that they found them from reputation although ' reputation The st some extent ' In *I* establish that althc matters of public an inference of fact allows evidence of opinion in respect of any matter of public or general interest, the test being whether the deceased person expressing the opinion was likely to have had knowledge In the case of Mohants, even if they may have had knowledge by means of oral tradition handed down from Mohant to Chela, the opinion would be relevant but not particular facts. *Ram Prasad* v *Shiv* ... 12 Lah 497 = A I R 1931 Lah 16

Opinion must be of competent person. The reputation to be admissible must obviously have been formed among a class of persons who were in a position to have sound sources of information and to constitute intelligently to the formation of the reputation *Wigmore* § 1591 In *Weeks* v *Sparks* 1 M & S 698, *Le Blanc J* said "And the only evidence of reputation which was received was that from persons connected with the district . The rule generally adopted upon qu after a foundation is one the evidence of reputation what old persons who were in a situation to know what these rights are may have been heard to say concerning them ' "Evidence of reputation upon general points is receivable, because all mankind being interested therein, it is natural that they would discourse together about t information *Per Lord Kenyon* in *More* is thus laid down by *Parke B* in *Crease* v

hood But where the right is really public—a claim of ... ted, it seems difficult to ... which all are concerned ... but of course it would ... are shown to have some ... frequently using the road in dispute See also *Duke of Bea*... 4 Exch 467 (469), *Daniel* ...

... influence of bias or of the partisan warmth of feeling developed

statement untrust- to the admissibi- , before the dispute

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have had a personal knowledge of the facts, and to have stood quite disinterested are received in evidence In cases of general rights, which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what has passed in their own time, and to supply the deficiency, the law receives the declarations of persons who are dead Therefore, however, the witness is

them would lead to the most dangerous consequences Accordingly, I know no rule better established in practice than this, that such declarations shall be excluded With respect to questions of prescription, I have known many

be made before even the existence of any actual controversy, concerning the subject matter of the declaration *Davies* v *Lowndes*, 6 M & G 473 (518) So a dispute was . *G*, 30 L J P eclarations, has otton 3 Camp at eceased persons (are admitted) upon public rights, made *ante litem motam*, when there was no existing dispute respecting them, is that these declarations are considered as disinterested, dispassionate and made without any intention to serve a cause or mislead posterity, but the case is entirely altered *post litem motam*, when a con-

has arisen, or

might tend to support the declarant's own title will not of itself be sufficient to exclude them *Doe* v *Davies*, 10 Q. B 314 *Halsbury Vol* 13 p 469 So "there must be, not merely facts which lead to a dispute, but a *lis mota*, or suit,

S. 32. or controversy preparatory to a suit, actually commenced, or dispute arisen, ar that upon the very same pedigree or subject in litigation." *Per Lord Denman* in *Davies* v. also *Slaney* v. *Wade*, 1 Myl. & Cr. 338, 643; *Frederick* v. *Att. G* *motam* may, however, versy on the subject aros

Statement admissible signature of the settlement prepared on the information of the village, it was held clause (1) as well as under section 35 of the Evidence Act. *Baij Nath* v. *Singh*, 12 O. L. J 571 = 2 O. W. N. 872 = L. R. 6 O. 101. Neither clause (4) nor clause (5) of section 32 of the Evidence Act justifies the admission of Hearsay

proved under that section. *Musammat Parbati* v. *Ram Chandrapal.*

CLAUSES V AND VI.

Ev. p. by a much greater latitude persons from whom the S. T. 1166, 1179, ist. 327n; *R.* v. *Eriswell*, [1790] 3 T. R. 707], 1808, little difficulty was made about accepting Soon however, this use of reputation became limited to matters of pedigree and geneology. In *King* v. *The Inhabitants of Erith*, 8 East sible only declaration were held in restricted in *Johnson* v. "But evidence of that kind would namely, family, of relations admissibility of such evidence could before the testimony be admitted, have to the degree of intimacy or confidence that It we look into to the declarations *Berkeley Peerage Case*, 4 Camp. 401 (1811) that the declaration *litem motam*. *Phip. Ev.* p. 298.

Shamlal v Radha, 4 C. L R. 173; Anadi v Nandlal, 46 A 665 So also where

Act Sangram Singh v Rajan Bhai, 12 C 219=12 I A 183 (P C) But this clause does not cover statements of facts made by interested parties in denial, in the course of litigation, of pedigrees set up by the opposite parties Narain v. Chandi, 9 A 467=A W N 1887, 118 "The statement declared to be relevant by the 5th clause is a statement relating to the existence of any relationship between persons alive or dead (the language imposes no restriction), ... is special means of ... by the Calcutta and ... corresponding rule ... n which the question ... een certain persons

Ram Chandra v Jogesua ...
Oriental G S Company ...
Oudh Select Case 265 ...
admission of what for the ... question whether a particular person survived another, and it is obvious that this clause does not justify the ... a man was at the time ... of his family' Parbati v ... ence of relationship, the statements of the deceased relations, servants and dependants

every instance, it must be a question of fact as to whether the person who made the statement had special means of knowledge Rama Krishna v Tirunarayana, A. I R 1932 Mad 198=62 M L J 116 The effect of the section is to make a

I. P Code Wahid Bux v. Emperor, A. I. R 1929 Sind 250.

S. 32. Scope of Clause (6).

evidence on questions of rel .

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have to decide is not
Similarly in a suit
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that the horoscope was not admissible under s 32, cl 6 of the Evidence
Ramnarain Kallia v Monu Bibee, 9 C 613 In delivering the judgment
J said "The document tendered is not a statement relating to the exi ten
of any relationship by blood, marriage, or adoption, between persons decea
It only purports on the face of it to be a statement of relationship betwee
a deceased person and a livi
such a case It is not sup
to the affairs of the family
age of a person who is al
of a family pedigree But I am of opinion that it does not come with
words in the sub-section But there is another objection to the admi
of the document which is fatal Section 32 says that 'statement written o
verb l unreasonable' may be admitted in certain cases On the plainti
evidence it appears that he does ... wrote the horoscope, or the
endorsement on it, and therefo
cannot be found, or become inca
opinion that the document is
Lal, supra, Pethararn C J observ

of relationship,

which any ... n a family pedig
tombstone, such statements are usual
made" *Fa*

Pedigr t family records handed down
from gener ew member of the family died
or was born, but were drawn upon a particular occasion for a specific purpose
... made by the
were

Mathura Prashad, 13 C W N 1 = 10 Bom L R. 1038 = 8 C L ...
Cas. 175 (P C) The point of view with which the decision of the ques
as to proof of a certain pedigree should be approached is that if the docu
mentary evidence on which the plaintiff relies is found to be reasonable, expli
and reliable the oral evidence which consists mainly of the depositions of
the members of the family should also be accepted as trustworthy, being
consistent with the documentary evidence On the other hand if the docu
mentory evidence is not of the character mentioned above the oral eviden

S. 3

Ind Cas
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Sadik Ali, 2
O. C 115

English Law. Declarations relating to pedigrees are allowed where they were made, before the commencement of the suit, by a deceased person provided the person making them was related by blood to the person to whom they refer, or was the husband or wife of such person *McKelvey's Ev* 271, see also *Shrewsbury Peerage Case*, 7 H L Cas at p 26 Under the term "Pedigree" are eml but when forr , marriage, and others or son *v* 447 In *R.* ven on a stri words the declarations of deceased persons respecting the places where their relatives were born, and where they were married resided, went to, or died, cannot be received But in *Shields* v *Boucher*, 1 De G & S 40, *Sir J L Knight Bruce V C* said . 'If the place of birth in *Rex* v *Erith*, had been a geneological fact as it was not,—had been material namely for any geneological purpose, which it was 's Bench might possibly have v *Beauchamp*, Hubl Ev of *Monkton* v *Att Gen*, 1 Deg 98 So 'declarations of the

affinity only, when the pa
in short, which is strictly speaking, matter of pedigree, may be proved as matter relating to the condition of the family by the declarations of deceased ously *Per* such jected with, the question of pedigree, or when they are not required for some geneological purpose (*Haines* v *Guthrie*, 13 Q B D 818) they will be rejected *Phip Ev 7th Ed* 298

(2) like statement in a deed or will relating to the affairs of the family or in any family pedigree etc when made before the question in dispute was raised Section 50 provides that when the Court has to form an opinion as to relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject is relevant *Per Mullick J* in *Bibi Fatma* v *Abdul Kasim*, A I R 1928 Pat 539 = 110 Ind Cas 428 In India it is difficult to prove such facts as the date of birth after the lapse of many years, and it would be unreasonable to demand such a class of evidence as would justly be demanded in England But the evidence must be such as to carry conviction to the mind *Nawal Sha ba Begam* v *Nanhi Begam* 11 C W N 130 (P C) = 1 M L T 429

(by) requiring the facts from the mouth of the witness who has the knowledge

S. 32. of them In cases of pedigree, therefore, recourse is had to a secondary sort of evidence,—the best the nature of the subject will admit, establishing the descent from
Peerage Case, 4 Camp
being impossible to prov
the declarations of de
the reputation must proceed on particular facts, such as marriages, births and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded" In the same case *Lawrence J* observed
the family is
of which) would
In *Stark* v
pose the ground
is that they were matters relating to long time past, and that it was necessary to relax the strict rules of evidence for the purpose of doing justice" So declarations under clauses 5 and 6 are admissible when his evidence is not procurable. Vide *Ram Narayan* v *Monee,* 9 C. 613; *Surjan* v *Sardar,* 5 C W N 19 P. C.

Circumstantial guarantee
ness of such a statement is thus
Ves 511 "It was not the op
tradition, generally, is evidence
persons having such a connection
natural and likely, from their
speaking the truth, and they could
that: declarations in the family, descriptions upon monuments, descriptions in Bibles and registry books,—all are admitted upon principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth" In *R* v *Eriswell,* 3 T R 720, *Ashhurst J* said "It is natural for persons to talk of their own situations and of their families The evidence is in its nature of an unsuspicious kind, it is generally ... or even thought

them are proved to be dead or incapable of giving evidence ... 63, see ... *Mahomed,* 84 Ind Cas 927=6 Lah L J 299=A I. R 1925 *Lah* ... *Prohlad* v *Ramsaran,* 38 C. L J 213.

two points to be
Illustration
ut differs from
of a person
vidence is that
of things, such as geneological trees, tomb stones etc. Clause (5) refers to relationship between any persons (living or dead) whereas clause (6) refers to

S. 3

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not necessary that it should have been made by a person who had special means of knowledge, but it must be contained in a will or deed relating to the affairs of the family to which any such deceased person belonged, or in a family pedigree, or upon tombstone, family portrait or other thing on which statements are usually made" *Field's Evidence 6th Ed.* p 139, *Norton Ev* 188

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whether the statement offered be an individual's assertion or the family repute. *Wigmore* § *1195*; see also *Colbel's Estate*, 51 Mont 455, *Young* v *State*, 36 Or. 417.

Tr 1166, 1179, 1181,
ion in the neighbour-
Wood, 14 East p
remember the case of

plaintiff to J F In delivering his judgment *Best C J* said "Consanguinity, or affinity by blood, therefore, is not necessary, and for this obvious reason, that
o be informed of the state of the family of
relation who is distantly connected by

deceased persons
to have been made
made *post litem m*

Moo & Rob. 28) Similarly in *Crispin* v *Daglion*, 3 Sw & Tr 44, *Sir Cress-*

. 32. *ucll Cresuell* observed "I can well understan l that where a m tter is l kely to be discus ed and well l nown in a family, a member of the fam ly may b allowed to give evidence of it, but in 'this case the plaintiff according to h own
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and also of persons who though not related by blood or marriage to the were intimately acquainted with its members and state, shall be admissible evidence after the death of th declarant
extent as those of decease l members of t

The law presumes against vice an l
strongly in favour of marriage It will
ceremony is invariably insisted upon ye irs after it took place to the class to which the parties belong The law therefore relaxes the rules evidence and in the ab
presume marriage on p
statements of persons
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their general repute
50 of the Evidence Act

Statement mu
during the course of
of trustworthine s
must have been made *ante litem motam* *Wigmore* § 148? In ... *Case*, 4 Camp 401, *Mansfield C J* said 'In the *Inglesca Cause* m ny declarations of deceased persons were given in evidence, but after an attentive exam nation I can not find that any of these had been made after the dispute had occurred

I am not aware of any other authority upon the subject in our law, but the distinction of declarations *ante litem motam* and *post litem motam* is clearly taken in a foreign treatise of great learning, entitled *De Probationib s* I have now only to notice the observation that to exclude declarations you must show that the *lis mota* was known to the person who made them There is no such rule The line of distinction is the origin of controversy and not the commencement of the suit After the controversy has originated all declarations are to be excluded, whether it was or was not known to the witness If a enquiry were to be instituted in e
controversy was or was not kno
would be wasted and great confusi
conceive that the deposition now
same case the reason for the exclusion, is thus stated by *Heath* their minds contest has or g nated ... le or the other been by

& M 160 *Brougham L C* observed "If there be *lis mota* or a ... has precisely the same effect upon a person's mind with *litis contestatio* what person's declaration ceases to be adm ssible ... It is no longer a strong *Lord Eldon* calls a natural eff... If he be because

Wigmore § *1483* So where declarations are made *post litem*

not admissible, erest, S. 3
and not to have C J
in *Doe* v *Ranla* ct of
adoption of th which
the question of adoption was directly in issue, such statements should not be admitted in evidence in the present suit under subsection 5 section 32, as they are not made before the question is dispute was raised *Ramkrishna* v *Tiru-*
M L J 116 Declarararations as to the
inadmissible in evidence if made *post*
ore the commencement of legal proceed
ings, but before even the existence of any actual contoversy concerning the
is made in the obvious interest of the
Mahomed Ikam v *Saiud Mahomed,*

he Roman law, but the term *lis mota*
ement of the action, and was not
t in our law the term *lis* is taken
controversy, and by this *lis mota* is
oversy, and not the commencement
of the suit *Tay* § 692, see also *Berkeley Peerage Case,* 4 Camp 417 *Monkton* v *Att Gen* 2 Russ & My 161 *Gee* v *Ward,* 7 E & B 509 The ground on which evidence of this description is excluded is the supposition that, when a
ly to range themselves
or to have imbibed their
would become tainted
at its very source *Goodere* Camp 417,
Mr Justice Lawrence said "W and even
good will, tempt many who , to deviate
from the truth in the laxity of conversation Can it be presumed that a man stands perfectly indifferent, upon an existing dispute respecting his kindred? His declarations *post litem motam*—not merely after the commencement of the law suit, but after the dispute has arisen, for that is the primary meaning of the word *lis*—are evidently more likely to mislead the jury than to direct them to a

by a man who has an interest

It was once said by *Baron Alderson* in *Wallace* v *Beauchamp* 6 C & P 561 *that it was sufficient if at the time of the declaration the state of facts existed* (for example the birth of a child) as to which the controversy afterwards arose
is to the controversy and to
Although the *dictum* of *Baron*
Scott N R
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xistence of a
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facts which
may lead to a dispute, but a *lis mota* or suit, or controversy preparatory to a suit actually commenced, or dispute arisen and that upon the very same pedigree or subject matter which constitutes the question in litigation See also *Slaney* v *Wade,* 1 Myl & Cr 338 (356), *Butler* v *Mountgarret,* 7 H L Cas 633, *Fredrick* v *Att Gen* 44 L J P & M 1 In *Bahadur Singh* v *Mohar Singh,* 24 A 94 (107) P C the principal oral evidence consisted of statements made by the plaintiff as to their descent the information as to which they had received from their ancestors Objection was taken that such of these statements as were made since 1847 were inadmissible in

S. 32. evidence under clauses 5 and 6 of section 32 of the Evidence Act (I of 1872)

'd that they were a inadmissible,

dispute

exclusion would not apply to what was done in prevention of dispute, even were it in support of the title of the declarant; and although in the belief that his title would be affected by the same circumstances as the party seeking to avail himself of the declaration. Thus in *Goodright* v *Moss*, Cowper. 591, *Lord Mansfield* in receiving such evidence said 'I have known advice given to a father and mother to make attested declarations in writing under their hand of the pres... a time of the truth

In *Moncton* v *Att Gen.* 2 Russ & My. 161, *Lord Brougham* ascribed *L Mansfield's* view of admissibility to the principle that the declaration was— made with a view to their own interest, but to preserve a *constat* as it were, record of facts peculiarly within their knowledge (which is one of the m grounds of admitting such hearsay evidence); see *Lovat Peerage Case*, L R App Cas ... *ham* in *Sa* v *Wade*, ... *Fitzgerald*, 6 Eq R 335 ... by interest parties in ... their opponen *Naraini Kuar* v *Chandi Din*, 9 A 467. So also depositions made for th purpose of another suit are inadmissible if the same point was in issue, b otherwise ...
Wills *Ti*...
(*lis mota*)
Per Lord
Freeman ...
Devonshir...
whose de...
pars jure, ...
open to ...
entitled in ...
the time ... possessor of the ...
admissible for a party claiming through her. *Doe* v *Tracer*, Ry. & M ...

But he admits that this principle must not be pushed too far. Accor... section 32, clauses (5) and (6) such evidence is admissible although the question ...

some feeling of interest, which will often cast suspicion on the declarat... has never been held to render them inadmissible."

Again, any controversy to exclude must be on the particular subject in issue, controversy in a merely analogous one, but not the issue itself, not necessarily carrying with it the elements of mistrust. Thus in a case respecting copy

S.

where the point in controversy is foreign to that which was before controverted, there never has been, a *lis mota*, and consequently the objection does not apply."

1 law, that knowledge Russ & M. pressed, that it is given in evidence as hearsay must only

respecting the such distinction. the party knew of his own personal knowledge, or as is much more frequently the case, to what he heard from others to whom he gave credit; for they are only adduced as evidence of reputation in the family, and that is the only mode in which the tradition in a family can be proved, and the subject matter of that tradition can

511 (514); *Shedden* v. *Att. Gen.*, 30 L J. P. M. 217. But if instead of being

matters within their personal knowledge *Tay.* § 639, see also *Doe* v *Randall,* 2 M. & P. 20, *Slaney* v *Wade,* 7 Sim 611, *Robson* v *Att Gen* 10 Cl. & Fin. 500. So also proof by one of a family, that many years before, a younger brother of the person last seised had gone abroad, that the reputation in the family was that he had died there, and that the witness had never heard in the family of his having been married, is presumptive evidence of his death without issue. *Doe* v. *Griffin,* 15 East. 293.

not therefore necessary. *Monkton* v. *Att. Gen.* 2 Russ. & M. 160; *Berkeley*

S. 32. *Peerage Case*, 1 Camp 416. The difficulties, then that arise are concerned with the line between declarants that may fairly be supposed to be thus qualified

like? Secondly, shall any li
for example, according as the
consanguinity or by affinity?
be supposed to be present whenever there are found persons
facts' 'having an opportunity to know the facts, or holding a relation rendering it very probable that he would learn them truly' If it is so the line need not be drawn strictly at relatives But in the language of *Lord Erskine* the interest of the person in knowing the connections of the family (*Whitelocke* v *Young*, 13 Ves 140) does require the line to be drawn there, excluding non-relatives" *Wigmore* §§ 1486, 1487 See also *Annesley* v *Anglesea*, 17 How St Tr 1160, *Rooms* v *Wolseley*, 2 Lee Eccl, 135; *Duchess of Kingston's Trial* 20 How St Tr 355, *Berkeley Peerage Case*, 4 Camp 401; *Walker* v *Wingfield* 18 Ves 443; *Johnson* v *Lawson*, 2 Bing 86; *Casey* v *O'Shaughnessy*, 7 Jur 140, *Pohin* v *Gray*, L R 12 Ch D. 126 But "such a narrow test seems too narrow Even in England, where so much of personal advancement and material prosperity for the individual depended upon his family rank and his rights of inheritance, it seems too much to say that *only those* who have the immediate property interest in learning the family history can possibly have adequate information; for family physicians and chaplains, old servants, and intimate friends may, in cases be equally and sufficiently informed" *Wigmore* §
1487 The only
Lawson, 2 Bing
the family for
rejection said
it would be a
namely, the con
family, affords
such evidence w
testimony could
of intimacy or confidence that subsisted between the *party* and the declarant"

"It may be noted," says *Prof Wigmore* "as to this reasoning, *first*, that the result is inconsistent with the general language used in the earlier judicial opinions, and is supportable only on the narrow test of *Lord Erskine* before mentioned, secondly, that the special reason given, namely, the inconvenience of an investigation into sources of knowledge, is anomalous in the law of Evidence, for no Court is allowed to decline to investigate the sources of a witness's qualifications so far as may be necessary, while in each case the Judge's discretion permits, and old would surely be no more found to be" *Wigmore* § 14

Special means of knowledge ... statement admissible

names of persons from whom they ... as to the
Devi Kariappa, 6 Mys. L J 375 A ... ledge and
existence of relationship, the person having special means of knowledge was called

267=123 Ind. Cas 907. Family bards have special means of knowledge regarding the facts of the relationship between the different members of the families of their *jajmans* Consequently statements made by them as regards the relationship between members of the family would be admissible in evidence under 32(5). *Anandi* v *Nand Lal*, 22 A L J 657=46 A 665 It is the business of a *mirasi*, who is a hereditary family bard, to acquaint himself
recounts in song
hearsay does not rel
Abdul Ghafer v 1
L. J. 583 (P C)
Court had special m
cannot be received in evidence and it cannot be accepted as evidence that he had knowledge Proof of special source of knowledge is a pre requisite to the admission of the document in evidence and until the document is received in evidence no presumption can be made from the statement contained in it *Bhima* v *Mt Sender*, 9 O L J 186=4 U P L R (O C) 79 Before a pedigree said to have been prepared by a deceased member of family can be admitted in evidence under section 32 (5) it must be proved that it was either prepared by the deceased or that the deceased had that personal knowledge and belief which must be presumed in any statement of the deceased person which is admissible in evidence *Mahomed* v. *Saiyid*, A I R 1931 Oudh 1d7=8 O W N 349

Qualifications of the declarant Upon the general principle of testimonial knowledge, the qualifications of the deceased declarant—his relationship, or whatever is relied upon as equipping him with information—must be shown in advance *Banbury Peerage Case*, 2 Selw N P 764, *see also Taylor* § 640, *Wills Ev* 213 214 In India the existence of special means of knowledge in the

e he does not come
It no where appears
that he had any other knowledge than as mukhtear acting for these ladies He is not shown to have been a member of the family, to have been intimately connected with it, or to have any special means of knowledge of the family concerns Therefore in their Lordship's opinion he does not come within the description of a person having special means of knowledge ' See also *Bijay Bahadur* v *Bhupendra*
declarant has sufficier
tion is *Wigmore* § 14
priest as to the relat
clause 5 of section 32
Lal v *Radha Bibee*, 4 (
ment Court is admissible in evidence under s 32, cl 5 of the Evidence Act,
was
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32 suit, in which she stated, "I have no issue or any near relative Mati unal is related to me as a daughter's son and Khanati Lal is my husband's younger brother These are my relatives on the husband's side" In admitting the evidence Lord Shaw observed 'In this situation their Lordships are of opinion that, in the most solemn form, this lady had declared facts which must have been within the scope of h ... of the facts be sound, there can in their ment appealed from is correct'
ntained in his deposition and in affidavits filed by him are admissible in evidence under section 21 (1) read with section 32 (5) of the Evidence Act, made by a person having special means of knowledge, whether personal or hearsay *Tanrathim* v *Maru Goppi*, 33 Ind Cas 969 Where the Court below had rejected the evidence of certain witnesses on the ground that it was hearsay only and had not conformed with section 32 of the Evidence Act and on the face of the evidence it was sometimes uncertain whether the witnesses were speaking ... knowledge or from information derived from other
it ... which the
nor in the latter case to question the manner in which the Courts ... the provisions of section 32 *Safiquunnissa* v *Shaban*, 26 A 581=9 C W N 105 P C, So where the witness is speaking from hearsay he must show that his knowledge is derived from the person whose statement is admissible under the section *Vide Jugatpal Singh* v *Rajeshwar Singh*, 25 A 43=7 C W N 99

Statements are admissible to prove the facts contained in the statement on any issue In England dec ... relevant only in cases in which the pedigree to whic ... it is only relevant to the issue is only admissible in England not where they are ... of in ... Thus in ... for goods sold ... to prove the plea deceased father in was held that the not admissible *Haines* v *Guthrie*, 13 Q B D 818, see also ... *bune*, 11 L J Q B 46 This rule thus interpreted, says that declarations otherwise satisfactory, can nevertheless be used in those cases only where the issue involves as material a question of pedigree, *i e* geneology,—and therefore inheritance cases *Wigmore* § 1503 This view seems to have its origin in the observation of *Lord Ellenborough, C J in R* v *Erith*, 8 East 539, where he observed 'This was a case in which the question was, whether the declaration of the father of a bastard child, as the place of his, the bastard's birth was competent of that fact? The only doubt which has been introduced into this case has arisen from improperly considering it as a question of pedigree The controversy was not as in a case of pedigree, from what parents the child has derived its birth but in what place an undisputed birth derived from known and acknowledged parents, has happened The point thus stated turns on a ... and therefore not falling within and is

Settl ... Just Pe ... *Tuchal*, ... to make ... these declarations were first ... England in inheritance cases directly a part of the issue, bu ... litigation ought to have no bearing on the admission of these ... tion A deceased father's entry in a family Bible is equally trustworthy ... trustworthy whether the issue subsequently arising happens to be framed upon a

promissory note, or in application **S. 3**
majority of American jurisdictions
are now admitted whatever the

general nature of
pedigree, or descent,
Inhabitants of Warr
of the authorities

pedigree, and when the incidents of

cases, whenever they become
Similarly in the colonies the ru
D. 818, was not followed In

section 32(5) of the Indian Evidence Act such evidence is admissible In *Dhanumal* v *Ram Chunder*, 1 C W N 270=24 C 265, a plaint in a former suit, verified by a deceased member of a family and as such having special knowledge, was held admissible under section 32(5) of the Evidence Act, to prove the order in which certain persons were born and their ages In delivering the judgment of the Court *Petharam C J* said It was contended on the part of the plaintiff on the authority of the English cases that as the question at issue in this case did not relate to the existence of any relationship by blood marriage
he statements were excluded by the
his point the law in India under
England, and that the effect of the

sons of Sumbho Nath were born and their ages, and when admitted to my mind, satisfactorily proves that the defendant was the son who was born on the 6th June, 1868 Similarly in *Ram Chandra* v *Jogeswar* 20 C 758, for the purpose of the decision of a question of limitation it was necessary to prove the date of the plaintiff's birth The plaintiff and one of his witnesses each spoke to statements made to him by relations of the plaintiff who were since deceased relating to the date of the plaintiff's birth The defendant objected to such

Bipin Behary Dey v *Sreedam Chunder*, 13 C 42 has been practically overruled by *Dhunnmal* v *Ram Chandra, supra*

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com
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Stephens, Kent Assizes .
it has been said "Heare
when he married, and what children he had, etc, of which it is not reasonable to presume I have better evidence So to prove my father, mother, cousin other relations, beyond the sea, dead; and the common reputation and belief of it in the family gives credit to such evidence" On the authority of *R* v *Frith* 8 East 539, the place of birth or death—something more than the fact of birth or death—has by some Courts been thought to be inadmissible But question was finally settled in England in *Shields* v *Boucher*, 1 De G & Sm where *Knight Bruce* said "If the place of birth in *Rex* v *Frith* had been genealogical fact, as it was not,—had been material, namely, for any genealogical purpose which it was not *Lord Ellenborough* and the Court of King's Bench differently" See also *Lord* & M 156 where he observed

ship of consanguinity or of affinity only,
are actual
pedigree,
the decla
have been previously connected with the family respecting which their declarations are tendered" Moreover since the proof of a particular relationship often depends on the proof of some specific fact, such as birth, marriage or death, the date or place of
place of residence
history these facts
of the rule when
Wills Ev 212, *Monkton* v *Att Gen* 2 Russ & Myl 147, 156; *Betty* v
Ir C L 17 A statement as to the age of a member of a family made by his

ceased person having special
onship within the meaning of section 32
Narasimha Chari, 25 M 183, 209
see also *Ram Chandra* v *Jogeswar Narain*, 20 C. 758; *Brijmbehari* v
13 C 42

Contemporaneousness of the Statement It is not necessary to show that the declarations were contemporaneous with the events to which they relate for as *Lord Brougham* has well observed such a restriction "would defeat the

Att Gen, 2 Russ & My. 157, 158, *Tay Ev* § 639

excluded 'In cases
living witnesses
of ge
only
to supp
dead
right of way, or
fact which would support

reputation must proceed on
like, from the necessity of the
particular facts is not exclu
neighbourhood, and family transactions among the relations of
Therefore, what is thus dropped in conversation upon such subjects may be

presumed to be true." *Per Lord Mansfield* in *Berkeley Peerage Case* 4 Camp. 401. **S. 3**

Cases under clause (5) Very liberal interpretation should be given to the words "when the statement relates to the existence of any relationship by blood

family about certain
iority of members of
ishna Lal v *Raj Kuar*,
104 Ind Cas 299=1 Luck C 97=A. I R 1927 Oudh. 278 A statement as to the existence of a relationship is admissible even though it was made in a

s clause *Chandresuar*, v

mark of the party,
appellant in his own

t
s
r
s 11, if not under s 32 (5) whether it is shown that the application was filed by a person who was admittedly the testator's nephew and claimed also to be his adopted son and therefore was in a position to know the date of his death and the a
Lachn
T. 891
relatic
532;

any

that his father was
'6 Before a pedigree
made by a person

relates to the existence of relationship by adoption *Danakoti* v *Balsundara*, 36 M 19=18 Ind Cas 989 A pedigree filed in a Settlement Court for the preparation of *Kheuat* cannot be put in evidence as a family pedigree under s.

S. 32 32 (6) It can be admitted only under s 32 (5) for which purpose it must be proved that the document represents statement as to the existence of a certain relationship by blood or marriage made by a person who had special means of knowledge in respect of the matters thus stated and made before the question now in dispute was raised *Mathura* v *Bhulan*, 15 O C 364, see also *S[illegible]* v *Tilok Chand*, 36 Ind Cas 66 A statement in a will made by the father describing his adopted son, aged [illegible] and so as the sole beneficiary is admissible to prove the age of the boy under s 32, cls 5 and 6 of the Evidence Act *Krishnamachariar* v *Veeravalli*, (1913) M W N 355 = 13 M L T 350 [illegible] L J 517 = 19 Ind Cas 152 The question for decision was whether the plaintiff was the legitimate daughter of one K and R The respondent contended that R was not the legally married wife of K, and in proof of it produced a compromise and a decree between R and another person by which R obtained only a small amount as maintenance He also relied upon a statement made by R on a certain occasion admitting that she was the concubine and not married wife of K It was held that the statement of R was admissible evidence under section 32 clauses (3) and (5) *Parbati* v *Maharaj Singh* [illegible] Cas 188 A statement made by a person before a public officer as to his age is [illegible] v *Kondu* [illegible] maternal [illegible] age *Deb* [illegible] Settlemen[illegible] that the [illegible] had a spe[illegible]

199 Hearsay evidence is not admissible under section 32 c[illegible] Evidence Act, to prove the case of fosterage, in as much as, even if it be assumed that connection by fosterage can amount to relationship in any sense of the term the relationship is not by blood, marriage or adoption *Prince M[illegible]* v *Nawab Qudsia* 21 Ind Cas 613 The term 'adoption' in clause (5) of section [illegible] of the Evide[illegible] ship betwee[illegible] meaning of t[illegible] other *chela* [illegible] ing of clause (5) of section 32 *Achyutananda* v *Jagannath* 21 C [illegible] Ind Cas 739 = 20 C W N 122 Statements contained in the plaint [illegible] [illegible] as to the existence of relat[illegible] a statement within the mean[illegible]

[illegible] A L J 349 = 39 A 426 Where the question is whether A born on a [illegible] death [illegible] date is of age an entry in a book containing the record of birth, death and marriages in the family kept by his father who is dead that he was born on a particular date, is admissible under this clause *Mohamed Syedol* v *Yeo[illegible]* *Garl* 21 C W N 257 = (191[illegible] 39 Ind Cas 401 (P C) A statement by [illegible] to X, as the sole wife of [illegible] person having special means of knowledge *Krishna Theva* [illegible] (1917) M W N 201 [illegible]

[illegible]

ment is admis[illegible]ib[illegible] *Mr Justice Mooker*[illegible] that the section [illegible] should be excluded, first because it relates not to the existence [illegible] non existence of a relationship, and, secondly, because the relationship [illegible]

a *Mohunt* and his *chela* is not a relationship by adoption On behalf of the defen- **S. 32**

13 C 42, *Satish Chandra* v. *Mohendra Lal*, 17 C. 849 and *Ram Krishna* v. *Manindra Mohun*, 20 C L J 302. It is not necessary for our present purpo e to determine whether the fluctuation of judicial opinion indicated in the two sets of decisions mentioned, is more apparent than real, and whether they may not be reconciled by a recognition of the principle that a statement as to the time of commencement of relationship is so indissolubly associated with the existence itself of the relationship, that it may be rightly regarded, without undue strech of language, as a statement which relates to the existence of that relationship *Oriental etc Co Ld* v *Narasimha* 25 M 183, and *Patambar Kuru* v *Raman*, 2

that question, it

tion, viz, first, is t

by adoption, and, secondly, is a statement that A has one *chela* B, and has no other *chela*, a statement relating to the existence of a relationship? We are of opinion that both these questions should be answered in the affirmative In the first place, there is no reason why the term 'adoption should be interpreted in a restricted sense, that the expression that A has adopted B as his *chela* is found in judicial decisinos of the highest authority In the second place, the expression 'relates to the existence' is obviously very comprehensive and need not be

The statement was treated as admissible in evidence but was held not to be conclusive'

evidence unde

ship by blood,

A document containing a statement of a deceased person as to the mode of succession obtaining in a particular family is also admissible in evidence *Patambar Kuru* v *Raman* 24 Ind Cas 519, see also *Sheo Lal* v *Gour Narain*, 7 Ind Cas 218

25 A. 236=5 Bom L R 410=30 I A. 91 See al o *Kedarnath* v *Muthumal*, 40 C 555 (P C) The legal presumption as to paternity raised by s. 112 of the Evidence Act is applicable only to the offspring of a married couple A person claiming as an illegitimate son must establish his

S. 32.

to be good respecting ...
declaration, the declarations of illegitimate members of the family ...
persons who, thoug ... to the family ar
intimately acquainte
after the death of

Ghureeb Hossain ...
the age of a person, the entry of ...
he statements of his deceased father
ection 35 Munna Lal v Kameshar
A I R 1929 Oudh 113 A settlement of pedigree is admissible in evidence either under s 32 cl (5) if it be shown that it amounts to the statements of deceased persons, who were members of the family and as such had special means of knowledge and further that these statements were made before there was any controversy as ...
said pedigree *Sarfaraz* v

furni
that
to w
held
Act, but, in the case of an entry in the register in question, there is no ... show by whom the statement entered was made, much less that the person making the statement had any special means of knowledge *Mr Collier* v *Mrs L Baran*, 2 N L R 34 In an application for letters of administration the rights of the applicants to be considered the next heirs of the deceased depended on proof that the relationship between their great-great grandfather an ... was that of full brother and ...
sist
of
in
or deed of exchange, dated the 17th January, ... The *Kursinama* as to the relationship were produced by the applicants ... *nama* was held admissible in evidence *Shazadi* v *Secretary of State for India* ... C 1059 P C

Cases under clause (6) Entries made by a parent or relation in Bibles, prayer books, missals, almanacs, or indeed in any other books or in any document or paper, stating the fact and date of the birth, marriage, or death of a child, or other relations are also received as the written declarations of the deceased persons who respectively made them, *Tay Ev* § 650 These statements may be made by the declarant's own writing, or by assenting to or adopt ... ally true whether the state ... epute *Wigmore* § 1495 ... said "An entry in a ... r pedigree hung up ... all good evidence" ...

...
formal one—as, a deed or will—does not make the ... *Murray* v *Milner*, L R 12 Ch D 845; *Doe* v. *Pembroke*, 11 East 504, ... 'Such statements ... deceased

them, or did anything that amounts to showing that they recog-

S. 3.

"A pedigree, whether in the shape of a geneological tree or map, or contained in a book, or moral or monumental inscription, if recognised by a deceased member of the same family, is admissible, however early the period from which it purports to have been deduced On what ground is this admitted? It may be that the simple act of recognition of the document, and consequent

bers of the family, is
his information may

tated to be relations, or of information received by him from some deceased member of what the latter knew, or heard from other members who lived before his time And if so, it may well be contended, that, if, the facts rebut that presumption, and show that no part of pedigree was derived from proper sources of information, then the whole of it ought to be rejected, and so also if there be some, but an uncertain and undefined part derived from improper sources But when the

to that extent, the statements in the
, and are good evidence of the relation

adopted son that statemer
the testator *Chandressuar*
book regarding the relationship of parties are admissible under this clause *Amrit Sana* v *Prabh Dial,* 89 Ind Cas 989.

wills or deeds are admis-
D 845, *Smith* v *Tebbit,* L
he principle that they are
the natural effusions of a party who must know the truth, and who speaks upon
, without any temptation
teloche v *Baker,* 13 Ves
e Case 4 Camp 418 But
become admissible must
614 A written
has been set aside
10 M 362 So
7) does not render
o not purport or
it states only past
under section 32,
v *Mult in Chand*
does not prove
371 But when
ma macharriar v
Government v
, *Subramanian*

of parentage
is been allowed
d members of
e, 11 East, 501
Doe v *Ormerod*
and signature

S. 32. 16 So recitals of descent, and description of parties in deeds or other family instruments, will be received, provided the deeds come from proper custody and are proved or may from age be presumed, to have been executed by some member of the family to which the statements refer *Marmayon Peerage* Pr Min 111; *Hastings Peerage* Pr Min 200; *Borthwick Peerage* Pr Min 6[illegible] *Hungate* v *Gascoigne*, 2 Coop 417; *De Roos Peerage*, 2 Coop 541, *Sales* v *Davies*, 1 Mason 268 cited in *Tay Ev* § 651 But the execution of the deed by a relation is an inadmissible requisite *Slaney* v. *Wade*, 1 Myl & Cr [illegible] *Fort* v *Clarke*, 1 Russ 604; *Tay Ev* § 651 Though a person cannot claim title under an unprobated will he can rely upon a statement contained the[illegible] indicating the relationship of the parties. *Hitnarain* v *Rambaran*, 7 Pat 7[illegible] Pat L T 484 = A I R 1928 Pat 159 A statement, in a will left by a deceased person, to the effect that he and his brothers were living, earning and holding property separately, is not admissible in evidence under any clause of sect 32 nor under any other section of that Act *Gokuldas* v *Chandibai*, 48 L R 225 = 10 Ind Cas 967.

Fam. [illegible]
mansion [illegible]
The word [illegible]
the stand [illegible]

ance tor to [illegible]
time it is [illegible]
and of the e[illegible]
part of [illegible]
living [illegible]
tially, [illegible]
motive for preparing and preserving a record of family traditions [illegible]

as a [illegible]
occr [illegible]
be [illegible]
up [illegible]
observed "Nor do we think that the first portion of the observation [illegible] Lordships is intended to lay down an exhaustive definition of 'family pedigree' as used in cl 6 s 32, Indian Evidence Act 1872 Those two words [illegible] indicate the highest and the best type of family pedigree The decision does not show that a pedigree not conforming to that standard cannot be [illegible]

genuineness *Jagdeo* v *Vellabha* [illegible] The mention [illegible]

and the sons are found to be in joint possession of the property [illegible] shares the presumption is that the common ancestors held the property [illegible] *Nur* v *Juan*, A. I R 1928 Lah 964 A family pedigree may be a pedigree kept by a member of the family or by another person on its behalf and it can be admitted in evidence, if it is written by a family bard for the purpose of keeping a record of the family even for its use and the use of the family Such a record can be admitted even though not signed by the person making it

665=A I R 1924 All 575, see also S. 3
Ind Cas 235=24 Bom L R 289

of a *Harduar purohit* is valuable on a question of a family pedigree *Tauga Singh* v *Allah Ditta*, 133 Ind Cas 874=A I R 1931 Lab 722
It is valid to presume after the dea

v *Khelat*, 21 Ind Cas 274 A pedigree was filed before the Settlement Court in

Gulraj, 16 Ind Cas 625 Although a
Evidence Act may be made with respect to

32 (5) of the Evidence Act, though the entries in it were not of great value *Ram Din* v *Kayestha Patshala* 25 Ind Cas. 823

up were not
any of the
descriptions in section 32 of the Indian Evidence Act *Sorjon* v *Sardar Singh*, 23 A 72=2 Bom L R 492=5 C W N 49=27 I A 183 P C Where the
a family governed by the custom of
re can be no motive in the prepara
of the first born as the first born

would b
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members of the family made *ante litem motam* before there was anything to

S. 32. throw doubt upon them, are evidence to prove pedigree And such statements by deceased members of the family may be proved not only by showing that they acted upon them or assented to them, or did anything that amounted to showing that they recognized them If any ... who presumably would ...
pedigree, that evidence ...
stances *Abdul Ghaffur* ... 58 I A. 188=12 Lah 336=60 M L
J 583 P C

Horoscope—evidentiary value of A horoscope may be tendered under clause 5 or clause 6 of section 32 or under ss 17 18 of the Evidence Act Under clause (6) of section ...

... writer is dead or ... moreover to come within this clause ... horoscope ... dence" ...
Lal, 17 C ...
this claus ...
' Then the ...
been admitted as coming within ... reference to the horoscope This horoscope has ... 6 of that section That clause makes entries made by persons, evidence on questions of relationship by blood, marriage, or adoption, where the deceased person had some special means of knowledge As to that it is enough to say that it is not shown that the person who had made this horoscope had any special means of knowledge, and that the question which we have to decide is not one either of relationship by blood ...
no special ...
tendered u...
to follow d... point As regards the meaning of the words 'on questions of relationship' the interpretation is also not sound *Vide supra*, also *A C H Evidence Act p 336 I Note* A horoscope is receivable in evidence under section 32, clause (5) of the Evidence Act and not under clause (2) of that section but the party making it must have had special means of knowledge *Ramanathan* v *Murugappa* 33 Ind Cas 269=1916 M W N ..., see also *GopalChuah Hors* v ...
Rattan ...

...
stated to ...
could be ...
refreshing ...
So a hor...
under sect...
it was writ...
140 A ...
Goundan, 1 ...

In *Amardyal Singh* v ... 511=58 Ind Cas 72, a ...
one *Ram Nandan Ram* who ...
his son to be in his fathe...
scope could be admitted in evidence to ...
admitting the horoscope *Miller C J* ...
relationship between any of the parties a...

ments as to age made by deceased persons in the circumstances contemplated in the section were admissible The horoscope however, is merely evidence and is not conclusive and in face of the other conflicting evidence in the case I should have been inclined to remand the case for further consideration on this point

the lito of the son s
admissible in evidence
a relationship *Anna*
malai v *Annamalai* 10 L W 687=52 Ind Cas 496 Horoscopes deeds of adoption or of initiation as chela are admissible if the person writing them or hearing them read soon after their preparation is examined *Shankergir* v *Chinnuji*, 71 Ind Cas 140=A I R 1923 Nag 1 Horoscopes containing date of birth and prepared by a person having special means of knowledge and who is dead is admissible to prove date of birth A I R 1927 Pat 271=8 P L J 730=102 Ind Cas 449

Principle of authentication The principle of authentication as applicable to proof of the execution or genuineness of a writing is in general applicable to a writing offered under the present exception *Slaney* v *Wade* 1 My & Cr 338 *Tracy Peerage* 10 C & F 154 No special considerations here need attention except as regards the necessity of proving the handwriting of entries in family Bibles or the like The fundamental idea of authentication

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to the family, and therefore may be presumed to possess that authenticity which is derived from the tacit and common assent of those interested in the facts which they record But such public exposure of the writing is not needed when it contains the signature of a specific member of the family and his signature is authenticated So a signed chart of a family was admitted *Monkton* v

inscription u on a tomb-
in the mansion are all
ause in all those cases the
e existing —the want of
e ring or the Bible with
presumption is it would
nly did not more or less
ie case of family Bible,

there is no necessity of proving the handwriting of the entries Proof of the handwriting or authorship of the entries is not required when the book is shown to have been the family Bible or Testament for then the entries as evidence derive their weight not more from the fact that they were made by any particular person than that being in that place a family registry they are to be taken as assented to by those in whose custody the book has been kept' *Alvey J* in *Jones* v *Jones* 45 Md 160, *Wigmore* § 1496 *Berkeley Peerage Case* 4 Camp 421 *per Lords Ellenborough* and *Redesdale JJ* *Hubbard* v *Lees* 35 L J Ex 169 *Goodright* v *Moss*, 2 Cowp 591 *Slaney* v *Wade*, 7 Sim 595, *Shrewsbury Peerage*, 7 H L 1

Value of statements under clauses (5) and (6) Statements of the kind referred to in section 32, clause (5) of the Evidence Act may be evidence, but

S. 32. they must be received with great caution, since they are always open to the objection that the parties making them are not subject to any cross examination, the caution is all the more needed especially when the parties making them could not have h ... ig which th y ... Part X 6 ... ad man h d ... Lea v Po

County C
testimony
regarded
Bargis, (
deceased
for the
subjects is weighed with great caution Moore's Facts on the Weight and ... of Evidence 1150, 1156, Matter of Williams, 128 Cal 553, Wood v Talb... 65 N J Eq 310 Similarly in Smith v Cooper, 16 Beav 101, Sir J Rom... M R said 'It is a trite but just remark, that if one link in a pedigree assumed any two persons may be proved to be related; and it is the ... observation in these cases, that the difficulty consists in properly weighing ... consid
the cl
cases,
is evidence of declarations made before any question arose as to the success... to this property but there is no trace that they were remembered or acted up...

do really by attentive and careful recollect or recall the memory of ...

witness should be convicted of perjury for speaking of what ... have been said in a conversation with a deceased person" Nort Ev 190.

CLAUSE VII.

Scope of the clause The "transaction" spoken of in section 13, clause (a) is one by which any right or custom was created, etc. It applies to private as well as public rights. Customs, also, may be private as well as public, as for

S. 3

or rights may be given under clause (4) and not under this clause In England

to private titles? How is it possible
concerns only these private titles" In
rights as well as customs can be prove
relate to any such transaction as is mentioned in section 13, clause (a) On principle there is nothing to object to the reception of such evidence Under this clause private boundaries, titles or possession can be proved "If such evidence may be offered to show customs and boundaries of a private manor, boundaries of a parish, tithe duties (*Stell* v *Prickett*, 2 Stark 466, per *Abott*
which a number
ht is in substan-
So in *Weeks* v

a multitude of per

in England this tendency of extend-
to private rights was checked by
Q B 809 (1850) and an arbitrary
d private property rights was laid
down. In that case he said "Reputation is not admissible in the case of such separate rights, each
that, because there
We think this positic
is to cause
number of
v *Bedford*
shire, 4 E & B 535, *Doe* v *Thomas*, 14 East, 323

But in America the result is otherwise The earliest English practice had clearly been to admit reputation as to private titles, and it is therefore natural
regularly admitted
Cas Ev 421 note,
of the principle is
be so evidenced is
conceded *Ibid*

Old maps and old surveys so far as they have been used and resorted to by the community in dealing with the land, may be taken as representing, after the test of use and criticism, the settled reputation of the community as to the correctness of the tenor of the map or the survey *R.* v *Milton* 1 C & K. 62, *Hammond* v *Brad Street*, 10 Ex 390, *Pipe* v *Fulcher*, 28 L J Q B 12, *Daniel* v *Wilkin*, 7 Ex 429, *Bullen* v *Michel*, 4 Dow 297, *Smith* v *Earl Brownlow*, L R 2 Eqr 252, *Fouke* v *Berrington*, (1914) 2 Ch 308, *Freeman* v *Reed*, 4

32. M & M 418; *Curzon* v. *Lomax*, 5 Esp 60; *Doe* v *Whitcomb*, 1 H L C 4[illegible], *Carnarton* v. *Vellebois*, 13 M & W 313; *Beaufort* v. *Smith*, 4 Ex 450, [illegible] § 1592

In *R* v *Milton*, 1 C & K. 58, upon the trial of an indictment against a parish for the non repair of a highway, where, in order to show that the road in question was not within the parish, a map was produced which had been made ... [illegible] surveyor, from information derived from an old ... [illegible] out to him the boundaries, *Eskin J* held that if ... [illegible] old man's death, the map would be ... [illegible] ... came from the chest of the parish ... [illegible] *Nort Ev 190*

Clause (7) of section 32 does not declare all reputation to be relevant, but only that which consists of statements contained in a deed, will or other document relating to any transactions [illegible] modified, recognised, asserted [illegible] existence The clause there[illegible] evidence of reputation in th[illegible] are admissible under this clause, judgment and decrees are not in the least important. *Field Ev* 6th Ed [illegible] 703 But where the question [illegible] or *Bhaoli* system of rent, and th[illegible] in a *hebanama* executed by a tenant's deceased grandfather, *held* that the *hebanama* was inadmissible in evidence under s 32 (7) read with section 13 (a) of the Evidence Act *Bansi* v *Mir Amir*, 11 C W N 703

[illegible] not enough to [illegible]

present plaintiffs and by [illegible] the suit *Held* that the deed [illegible] though they could themselve[illegible] admissible, the custom as against the defendants must be proved [illegible] *Hurronath* v *Nittanand*, 10 B L R 263

Ancient possession In England the rule has always been that p[illegible]

[illegible]

things and the finding them in such a place is a presumption they were in[illegible] honestly obtained, and reserved for use, and are free from suspicion of dishonesty [illegible]

[illegible]

Doe v *Pulman*, 3 Q B 622 In *Malcolmson* v. *O Dea*, 10 H L Cas [illegible] laid down that the true ground for admitting a lease is that it shows an ancient acts of ownership Thus, the production from proper custody of an ancient lease granted by A is evidence of an act of ownership over the *locus* [illegible] by A at that date, and is presumptive evidence that he was then owner in

lso *Blandy*- S. 3
› to prove a
licences on
Rogers v.
prove rights
to which they refer *Heath* v *Dane*, (1905) 2 Ch 678. Entries in old parish books are admissible as evidence to prove who were the owners or occupiers of the property at a prev ous time *Smith* v. *Andrews*, (1891) 2 Ch 678; *Powell* p 287 So it is clear that the existence of a document of ownership of land (a deed, lease, or license) may be evidence that the maker of the document had
occasionally said that the
incorrect These docu-
s thus explained by *Lord*
is 641, 653, 688; "Old
being evidence of facts of
at a distant
d a person
responsible

law permits ancient documents, either with or without evidence of ancient payment of rent, to be given as evidence from which the jury may properly draw an inference that there was such possession For in the ordinary course of things men do not make leases unless they act on them, and lessees do not
payment of rent adds

laid down the reason
always attended with
e acts of ownership

That rule is, that ancient documents coming out of proper custody, and purporting
as a lease or a license,
payment of rent under
f of possession This
at possession is proved
to have followed similar documents, or that there is some proof of actual enjoyment in accordance with the title to which the documents relate And certainly in the case of property allowing of continuous enjoyment, without proof of actual exercise of the right any number of mere pieces of paper or parchment purporting to be leases or licenses ought to be of no avail It may be a question whether the absence of proof of enjoyment consistent with such document goes to the admissibility or only to the weight of the evidence,
"

look at this document you find it contains a great deal It shows upon the face of it that *Jenkins* must have been in possession or else he would not have brought an action of trespass He speaks of trespass the word is used in the document itself. It is not an act of ownership, I agree, but it is a document

S. 32.

pos_e sion againt
id it is evidence of
This doctrine, not
y adverse po_ _ n
cept the docum
Lson v Wood
5 T. R 112; *Rogers* v. *Allen*, 1 Camp 309; *Doe* v. *Askew*, 10 East 520, *Co*
v *Coether*, M & M 398; *Doe* v *Pulman*, 3 Q B 622 *Wigmore* § 157

Other cases. A deed of mortgage containing an assertion of title as to

from in all the High Courts in
Tota, 25 Ind Cas 747 = (1914) M
Ind Cas 149 = 14 C L J 467

and with transactions affecti
of certain lands as *niskar br*
brahmatter title in the will
case, which was not *inter partes*, to prove
will was not admissible in evidence under section 32 (7) of the Evidence
read with section 13 (a) and that the recital in the judgment not *inter partes* was
not evidence *Saitudra* v *Krishna*, 36 Ind Cas 882; *Basi Nath* v *Jagat Kishore*
35 Ind Cas 298 = 23 C L J 583 = 20 C W. N. 643 Where the validity of a
leprosy is

this clause *Nagammal* v *Sankarappa*, 54 M 576 = A I R 1931 Mad
settlement deed under which a promissory note is transferred to the plaint
admissible as secondary evidence, may be employed to prove the prom
note under s 32 (7) read with section 13 (a) since a settlement deed constituted
a transaction in which a right was asserted *Subba Rayabe* v *Vengama*, A I R
1930 Mad 742 = 123 Ind Cas 107

CLAUSE VIII.

of this clause is that when a number
one common statement, which
ons made in their minds at the time of
by the witnesses and is evidence R
v *Ram Dutt*, 23 W R Cr 35 (38) These statements are admissible on the
general principle that they appear to be natural and sincere. Illustration (n)
exemplifies this clause This illustration is based on the case of *Du Bost* v
Bresford, 2 Ca picture, the
impression pro
on the defence,
other spectators not being themselves put into the witness box
of the defendant a brother
and the latter very handsome
receive the
"Beauty and
the
Some n
picture
the Beas.

S.

impression produced by the picture on their own minds, viz., that it was intended

evidence that
Cook v Ward,
M & P 99, Phip Ev 332 In Chase v Howell, 151 Mass 422 (Am) notice of the rottenness of a tree's root was in issue, and to show knowledge by the city

H M
militar
calling
statem
different places and afterwards put in second hand before the Court cannot be received as evidence under the clause Queen v Ram Dutt, 23 W R. 35 Cr "It has been held that if a statement is made by several persons and any of them is dead, each of the persons must be taken to have made the statement for himself or herself and therefore the statement of the deceased person will be admissible under this section Chandra Nilmadhab, 26 C 236' Field Ev 7th Ed 234

the by standers, on seeing a caricature called out 'there is X,' and evidence is given of their words, what is relied on is, not their statements, but the fact of recognition; the fact, that is that the caricature at once recalls the person X to the minds of those who see it." Mark Ev p 34.

S. 33. could not be admitted under the section. If they were not known or could not be found, it is not easy to see how the fact that there were many of them is material In the English cases, it does not seem to have been proved that the persons who made the observations could not be called' *Cun Ev Ilth Ed p 85*

33. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, wh[en] the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if h[is] presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the C[ourt] considers unreasonable:

Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated

Provided—

that the proceeding was between the same parties or t[heir] representatives in interest;

that the adverse party in the first proceeding had the r[ight] and opportunity to cross-examine;

that the questions in issue were substantially the same [in] the first as in the second proceeding.

Explanation—A criminal trial or inquiry shall be deem[ed] to be a proceeding between the prosecutor and the accused with[in] the meaning of this section

Principle The securities which have been devised by municipal law ... Court

... by Betham as *confrontation* *Betham's Rationale of Judicial Evid* ... *III, Ch XIX* This was established long ... "The other side ought not ...

... a test ... and a certa... however ...

In other words, this secondary advantage is a result accidentally ... is ... with the process of confrontation, whose original and fundamental object is ...

S.

It is no essential part of the notion of confrontation; it stands on no better footing than other evidence to which especial value is attached; and just as the

party.
attainec
People v
W
tion ar
fied anc
have b

remaining alive and actually examined in the cause" See also *R* v *Chrisopper*, 2 C & K 994, 1000 Its weight, however, is of course affected by the loss of the demeanour of the witness *Phip Ev 7th Ed* 423. *Mr Taylor* however considers it an exception to the rule excluding secondary evidence of documents, holding that the rule is wide enough to exclude secondary evidence of oral

48 (52), *Balgangadhar* v. *Shrinivas*, 39 B 441=19 C W N 729=42 I A 729 (P C)

The rule contained in this section is an administrative expedient for doing justice between litigants in a particular situation as a rational compromise between two well known canons of judicial administration A presiding judge will require that a party
within his power to do so
be required to cause a witness
admissible facts given on a

33. to the particular witness —It is not essential that the proponent also shows that he can prove the fact itself in no other way The evidence being in its nature secondary, i e, inferior in a probative point of view, less decisive and convincing than the face to face testimony of the witness himself, the party tendering the less probative proof must show to the reasonable satisfaction of the judge presiding at the trial that it is impossible for him to procure the attendance of the witness himself This may be for one of several reasons. The witness may be dead, insane, sick or absent from the jurisdiction ' *Chamberlayne's Ev* § lo l

in interest, if criminal must relate
person *Mc Kelvey's Ev* S 164 The chief reason for the exclusion of hearsay
evidence are the wan
cross-examine the wit
judicial proceeding, in
the power to cross-ex
ordinary test of truth
sible, af
parties.
v *Beacl*
not dea
insane,
have been kept away by th
264, *R* v *Ersuell*, 3 T R
all the objections which n
Wright v *Tatham*, 1 Ad &
E of Winchelsea, 3 C &
Court new powers, which require to be ... with great caution ...
no doubt that it is still necessary
every witness at the trial, unless it is p
produce him, or to be so difficult
unreasonable to insist on its production" *Per Macpherson J* in ...
Moujan, 20 W R 69 Cr, *R* v *Piyari* 4 C L R 511, *R* v *Mutha* ...
648 In England the law on the subject is thus stated "Agreed in th
case, where a person has been examined in chancery, that in a cause at law
between the same parties his deposition may be used in evidence if it can be
proved that the witn ... not able to

ers what the law ...
ied could not be read at law
that the witness could not
reus v *Palmer*, 1 Ves & B ...
ns taken in a former proceed
It specifies what evidence is
...

receivable This is, whatever is deliver
proceeding or (*b*) before any person
Oral evidence therefore is as receivable a
deposition *Nort Ev 194*

The deposition of a witness is not a... under section 33 of the ...
Evidence
The mere
of the defe
admitting the prior deposition *Brajaballav* v *Akhoy*, 30 C W N ... I L R ...
Cas. 115=A I R 1926 Cal 705, *Ghulam Haider* v *Emperor*, ...

S.

L J. 205 Deposition in a civil suit is

can only
an absent v
ould be extr
In the
vidence Act,

ight and opportunity to cross examine and the questions in issue were substan
ially the same in the first as in the second proceedings *Chakauri Singh* v
Suraj Kuar, 2 A L J 91 If that fact is a statement made by a person who is
not called or cannot be called, the statement cannot be admitted unless it

78 Ind Cas 178 The Sessions Judge before transferring the deposition of a

section a party's deposition in a previous suit can be used against him in a

S. 33. subsequent suit as his admission. *Soojan* v. *Achmat*, 21 W. R. 414, *Arr Moharaj*, 36 C L. J 186; *Exp Hall*, 19 Ch. D 583.

Relevancy. Even where primary proof is practically unavailable, the secondary actually offered is not necessarily admissible. It must, in addition, be relevant It is essential that the fact tendered in evidence as secondary proof be relevant, both objectively and subjectively, to the existence of some *res gestae* or constituent fact *Morgan* v. *Nicholl*, L R 2 C P 117 Objective relevancy, being in the matter of natural law, of the reality of things, is assumed and but little classified or, indeed, discussed Subjective relevancy is however more carefully secrutinized, in its two essential requisites of adequate knowledge and absence of controlling motive to misrepresent. When these administ ...

... ity and Relevancy are ... introduce secondary evi... ch was not relevant eviden... in the second proceeding ... *Small* v. *Naram*, (1849) 13 Q. B 840.

... Waiver A compl...

... nection is that of wa... swer received at a for... , they cannot be exclu... subsequent trial In the same way, wh... l observer, "expert" so called, on a for... it cannot be rejected as improper in to... ...nions, on a subsequent trial. *Chamberlayn...*

... presiding judge to l... further involved in th...

... Pernona ... ...former trial The effect...

... of his adversary ... It will be remembered that it is frequently ... loss to the cause of justice and the primary evidence is not produced and that ... within reasonable lim... the rights of the opponent should be confi...

... Objections ...

... ds acknowledge the ... his testimony might, upon ... e stand under oath, and ... ... v *Welsh*, 17 Mass. 160 (167) ... to prove that what he said was a falsehood" ... questions (*Small* v *Nairne*, 13 Q B 840); hearsay (*R* v *Cavle*, 71 J P Rep.

152); or statements of the contents of unproduced documents (*Stein Keller* v *Newton*, 9 C & P. 313; 319; *Tufton* v *Whitmore*, 12 A & E 370), *Phip Ev*, 7th Ed. 425. **S.**

In order to enable the ground for its ble the High Court to judge its propriety. *Mol* . I. R 1930 Cal 756=32 Cr L J. 233, It is necessary that under this section the is admissible

and fast rule for the application of this section Each case must depend upon its own facts and the matter is essentially one for the exercise of the discretion on the part of the presiding Judge *Jati Mali* v *Emperor*, 33 C W N 1215

Affidavit An affidavit of a person who died subsequently and who has not been subjected to cross-examination is not admissible under ss 32 and 33 of the Evidence Act *Doraisuami* v *Balasundaram*, 38 M L T (H C) 275=102 Ind Cas 243=A I R 1927 Mad 507=52 M L J. 477, see also *Mir Abdul* v. *Musst Bibi Sona*, 8 Ind Cas 897

jointly tried, n B and the ee witnesses not a party to ist, with his as not really witnesses is *Abdul Gaffor* I R 1929 117, *Ponnu am* v *Umar*, consent So admitted in ch witnesses are alive *Lakshmi devamma* v *Krishtiah*, 39 M L T 198=104 Ind Cas 518 Any irregularity in the admission of such evidence is cured by consent of the parties *Radha Kishen* v *Kidar Nath*, 22 A L J 761=L R 5A 536=46 A 815=80 Ind Cas 874=A I R 1924 All 845, *Pannusuami* v *Shegaram*, 41 M. 610 The provisions, of this section are intended for the benefit of a party to a suit and he may waive their benefit at any rate in a civil is involved *Jainab Bibi* v *Hyler* T 23=56 Ind Cas 957=1920 M *Gopal*, 24 B 591=2 Bom L R 924, J 1 But that is not the rule in criminal matters *Kottammal In re*, 69 Ind Cas. 636, see also *Reg* v *Bernard*, 4 Moo P C N S 460, *Queen* v *Bishnath* 12 W R Cr 8, *Deputy* v *Upendra*, 12 C W N 140; *Mokshed* v *Emperor*, A I R 1930 Cal. 756; *Ghullum* v *Crown*, A. I R 1929 Lah 512; *Annavi* v *E*, 39 M 449

107; *R* v *Bird*, 5 Cox 11, *Strutt* v *Bovingdon*, 5 Esp. 56 In *Lord Palmerston's*

33. *Case*, the evidence was rejected, because the witness could give the effect only and not the words. But it may be doubted whether such minute particularity is requisite, for the very words could seldom be remembered after a lapse of time Where a note has been made by a reporter or a short-hand writer he could of course use the n

short-hand writer might

A & T 275" *Nort Ev*

prove what a deceased

put at the head of a deposition, form no part of it and are no evidence to prove the facts stated *Magbulan*

N 241=6 Bom L R 238, *1*

357; *Chalor* v *Emperor*, A.

v *Abdul*, 50 Ind Cas 431.

sition, the identity of the pc

ballav v *Akshay*, 30 C W N 254

common case proved to the

of on But it s

sat treacherous,

of while a written record of what is said abides *Litera scripta manet*' Some forcible remarks on the superiority of written over oral testimony will be found in the case of *Bunwaree Lal* v *Maharajah Hejnarain*, 7 M. I A 156; *Nort Ev* 191.

Judicial Proceeding The evidence taken in the ejectment proceedings before the revenue authorities

Court to recover possession by pe

in the revenue Court *Saru Khai*

1928 Lah 43 Where certain

who had no jurisdiction to conduc

a proceeding is inadmissible on a retrial before a competent Court *buta*

v *Crown*, 27 P L R 447=7 Lah 396=97 Ind Cas 752=27 Cr L J 1103=A

3 M 48; see also *Empress* v

694 The evidence taken in the

conditions and for the purposes

33, previous evidence

ce, the person gave the

Nga Pu, 22 Ind Cas. 675=

completed The moving party may

have abandoned the proceedings *Chamberlayne's Ed* § 1652

Before any person authorised by law It is not necessary that the evidence should have been given in a judicial proceeding Any deposition taken by a Magistrate in his ministerial capacity could be receivable, if not excluded on any one of the grounds mentioned in the section So a deposition taken before a Coroner (*R* v *Rig*, 4 F. & F 1985 : *State* v *Campbell*, 1 Rich 124, *R* v *Ba*

64 J P. 608; but see *R* v *Cowle*, 71 J P. 152), a British consul of Zan

(*Empress* v *Dossaji*, 3 B 334), a Special Registrar (*Jeketo* v *Jaifanessa*, 18 C W N 605. *Jekah* v *Faifanessa*, 20 Ind Cas 661; *Lanka* v *Lanka*, 42 M 10C) an arbitrator (*R.* v. *Amanulla*, 12 B. L. R. App. 15), or a Comm

appointed under Civil Procedure Code to take down evidence (Civil Pro Code, Order XXVI), a revenue officer in a mutation proceeding (*Mamtaz* v. *Wazir*, 65 Ind Cas. 308), is admissible in a subsequent case So no
ted by a Court which
Keraga, 54 M. 561 In
n by the Commissioner
Nundo, 3 C W N. 239;
C W N 794) but in

compel or not in practice employing cross examination as a part of its procedure
nd the
er its
nation
Judge
As
ved is
one of the constitution of Courts and their officers *Wigmore* § 1376 "It is sufficient if the point was investigated in a judicial proceeding of any kind, wherein the party to be affected by such testimony had the right of cross-examination" *Chamberlayne's Ev* § 1652

law
law.
and
4-17
of Civil Procedure Code lay down the rules which must be observed in taking down depositions in civil cases When any deposition is taken in accordance with law, the Court shall presume that the document is genuine (*Vide* s 80 of the Evidence Act) See also *Dorghai* v *Emperor*, 52 C 499, *Emperor* v *Phaguna*, 89 Ind Cas 1043

When the witness is dead Evidence given by a witness in a previous
action
procee
Steph
decease
eviden

Wigmore § 1403, *Gilbert's Ev* 60, *Lord Morley's Case*, Kelying 55, *Fry* v. *Wood*

S. 33. 1 Atk 444, *R.* v *Castro* (Trichborne Case), charge of Chief Justice, II ... Such depositions cannot be admitted in the subsequent suit when the witnesses are living and their evidence is procurable *Hurish* v *Tara Chand* 2 B L R App 4; *Chakauri* v *Suraj*, 2 A L J 91 *Bhoobun Moyee* v *Ambica* 23 W R 343, *Mahomed* v *Latan*, 1
The evidence of witnesses, ...
given before a Magistrate, ...
fresh charges have been added *Emp* ...
...
...is well *Chamberlayne* § 1634

Absence Absence of a witness ...
permanent, and such as to prevent th...
upon him may be a sufficient justificatio...

...sail "starting to move has ... rule" *Chamberlayne's Ev* § 16... v *Wells*, 1 Taunt 461, ... *French*, 2 C & K 1008 The deposition by a person where he denied on oath that he had presented a certain petition in Court which purported to be from him is held to be inadmissible as evidence when such person might have been brought into Court, but was not *Bhoobun Moyee* v *Umbica*, 23 W R 343

Illness Illness, by causing inability to attend has the same effect as death *Lord Morley's Case* Kelyng 55 ... v *Wood*, 1 Atk 445 *R.* v *Savage* 5 C & P 143, *Ro*... *contra Doe* v *Evans*, 3 C & P ... *Beaufort* v ... The phrase usually employed as a test is "so ... the application of the principle should be left to the trial Court's discretion *Thornton* v *Britton*, 144 Pa 130 ... eed only be in probability such that, ...y, the trial cannot be postponed ...a question for the determination of ... K. B 581, *R* v *Stephenson*, L & ... able to travel ...

...mined testimony or deposition, and would probably be much less ... *Mathews J* in *Miller* v *Russel*, 7 Mart N S La 268" *Wigmore* § 1406 ... also *Fry* v *Wood*, 1 Atk 445, *R* v *Savage*, 5 C & P 143; *R* v *Harris*, 4 Cox C C 440, *R.* v *Harney*, 4 Cox C C 441, *R* v *Ullner* 4 Cox Cr 441, *R* v *Stephenson* 9 Cox Cr 156, *R.* v *Bull*, 12 Cox Cr 31, *R.* v *Wellon* 9 Cox Cr 1..., ... 296 ... *R* v *Farrell* 12 Cox Cr 606 ... *R* v *Thompson* 13 Cox Cr ...

... his previous deposition was not admitted *R* v *Thompson* 13 Cox ... *R.* v *Farrell* 12 Cox Cr 606 A temporary illness will not excuse attendance and examination of a witness *Empress* v *Piyarilal*, 4 C L R 504, *Empress* v *Ashgur*, 6 C 774 = 8 C L R 124, *Harrison* v *Blade*, 3 Camp 457 *R.* v ... 5 C & P 143, *R* v *Tait* 2 F & F 533, *R* v *Wilson*, 12 Cox 622

Cannot be found "Inability to find the witness is an equally sufficient reason for non production, by the better opinion (*Oate's Trial*, 10 How St Tr 1285, *Anon*, Godbolt 236; *Gilbert Evidence*, 60, *Buller N P* 239, *The ...*

S. 3

State, 33 Ark.
ecedents (*Lord*
Scaife, 8 Q B
is usually and
If the witness
or the purpose
by the party's
to recognizing
ween party and
been no collusion
force *Wigmore*
e dead to him"
on Godbolt, 326 This principle has also been accepted by *Jeffreys L. C. J.*
Oates Trial, 10 How. St Tr 1227, on the assurance of Oates to the effect,
I cannot any
cannot when

ent and unsuccessful search
.1, *Wiedemann* v *Walpole*,
But in England the above
R v *Scaife*, 17 Q. B 238;
v *Austen*, 7 Cox 55, *R.* v *Hogan*, 8 C & P 167; *Phip Ev 7th Ed.* 425.
it in India there is no difference between civil and criminal cases.

Insanity I ... *nswell*,
T R 707; *Mor* ... 37 A
Court
estimony or
ir & M 147
ind and the
Even tem-
& M 147

also renders
Gallaghar,
1 Pa 112, *Cent R Co* v *Murray*, 97 Ga 326, *Ewing* v *Dihl*, 76 Pa 373;
rayton v *Wells*, 1 N
ve the same eff
Pa 378; *contra*,
6, *Greenl. Ev*
tisfied of the fact
order that this
no dispensation
se the deposition or report the testimony as a record of past recollection
Vigmore § 1409; *State* v *N O Water Works Co* 107 La 1; *Jack* v. *Woods*,
a 378; *contra, Cook* v *Stout*, 47 Ill. 531; *Stearns Lumber Co* v *Howlett*,
E 217.

Loss of faculties necessary for testimony The same result follows
ie witness loses his voice (*R.* v *Cockburn*, 7 Cox Cr C 265), hearing
ockburn, supra), eye sight, so far as necessary for the examination of
Kinsman v *Crooke*, 2 Ld Raym 1166, *Houston* v *Blythe*, 60 Tex 506
iculty essential to the giving of testimony *Chamberlayne's Ev*
Vigmore § 1408. Where evidence was given before a committing

S. 33. but in the Sessions Court the witness proves shy and speechle , this sec does not apply to the case and the evidence cannot *ipso facto* be treated a evidence at the Sessions *Moti Ram* v. *Emperor*, 75 Ind Cas 152= 4 C. L. J 904.

Incapable of giving evidence The capacity to give evidence mentio in section 33 of the Evidence Act need not be a permanent one; someth sh of permanent incapacity might satisfy the words of the section "incapabl of giving evidence" *In the matter of the petition of Asgur Hossein*, 6 C 774 (L R 124, but see *In the matter of Pyari Lal* 1 C. L R 504, where it was h that the words "incapable of giving evidence" in section 33, Evidence A denotes an incapability of a permanent kind The Court has no discr

if it is proved to be either actually impossible to produce him, or ve difficult to do so, or if it is unreasonable to insist on his production *In th matter of Pyari Lal, supra*

Kept out of the way by the adverse party If the witness has been

case where three prisoners were indicted for felony, and a witness for the C one of them, the C nst the man who ha against the other tw

men *R.* v *Scaife*, 2 Den 281=17 Q. B 238=5 Cox 243 S C, *Earl* *Lathom*, 1 Arn M & O 403, see also *Lord Morley's Case*, 6 How St Tr *R.* v *Harrison*, 12 How St Tr 851; *Green* v *Gatewick*, B N P. *R.* v *Guttridge*, 9 C & P 473; *Taylor* § 478. The proposition that if witness be kept out of the way by the adversary, his former statem on oath will be admissible, rests partly, on the authority of several dec both in civil and criminal Courts, partly on statutory analogy but chiefly on the broad principle of justice which will not allow a party to take advantage of h own wrong *Taylor* § 478, *Greenl Ev* § 163(g); *U S* v *Reynolds*, 1 L 322 Where it appeared that the witness who was related to the accused bsconding and the Se as part of the evidence in th 3 *Abbas Mandal* v *Emper*

131 Ind Cas 855=35 C W N 143=A. I R 1931 Cal. 473

Proof of unavailability ... The ... ponent of the former test mo or the deposition is of course ... ing thereto in consequence o. former testimony is offered, v *Tract* ... *C* ... 194 I ... cer

J in *Dunn* v *Dunn*, 11 ...
process of the Court, his previous deposition is inadmissible. *Blagrave* v. *Blagrave*, 1 Deg & Sim 252, 259 Under this section, the ev of an absent witness taken in the Magistrate's Court cannot be received in the Sessions Court without proof of the circumstances which make it admiss Such circumstances should be proved like any other fact by the evidence of witnesses and a mere report that a witness is dead or absent is not

ueen Empress v. *Nag Po*, L B R (1872—1892), 134 *Khem Singh* v *Emperor* **S.**

dia and an argument based on the here *Alyan* v *King-Emperor*, 31 C 766=A I R. 1927 Cal 679, *R* v *oakes*, (1917) 1 K B 581, but see *R* v *Cohen*, 34 L J. 623 A previous eposition can be admitted in evidence only under the provisions of s 3 of the Evidence Act, but before it can be placed on record of a criminal d been made on at in spite of , or that he was

icapable of giving evidence, r his presence could not hich, under the circumstance *Ghulam* v *Emperor*, A I R 1929 Lah 542; *Annavi* v *Emperor*, 39 M 449= *e* v *Emperor*, A I R 1929 Mad 32=46 M. 117; n 437=A I R 1925 Lah 418, *Emperor* v. Cris 161=15 Cr L J 713, *Falconer* v *Hanson* *pole*, 1891 Times, June, 15, *Bishan Das* v. *Ram* 06 P R 1915.

Official duty etc Inability on the part of a witness to attend a trial owing to requirements of official duty, will usually be deemed sufficient adminis- ry evidence of his former testimony n of the compel- ing the attendance of the official wi , *Wigmore* § 1407. But in India such evidence will not be admissible when he can be examined on commission

Presence cannot be obtained without an amount of delay or expense etc It is only in extreme cases of expense or delay that the personal attendance of a wit prisoner

, in the absence of special able *Per Phear J* in *Queen* ness is no ground allowed 4 What delay or expense is instances of each case Of the circumstances of the case, one of the chief which the Judge has and ought to

exists, or for which witnesses are produced at the trial *Per White J* in *In the matter of Pyari Lall* 4 C L R 504 (509—510) But where the absence of the witness is due to temporary causes, his previous deposition cannot be admitted *Ibid* The mere

actually impossible to produce him, or to be so difficult to do so, or if it is unreasonable to insist on his production *In the matter of Pyari Lall*, 4 C. L. R.

S. 33. 534; see also *Asiatic Steam Navigation* v. *Bengal Coal Co* 35 C 751; *Nga Ba* v *Emperor*, 104 Ind. Cas 637=A. I. R 1927 Rang 248; *R.* v *Hogg* 6 C & P 176; *Beaufort* v. *Crawshay*, L. R 1 C P. 699. *Empress* v *Rama Reddi*, 3 M ... So where a witness is procurable his subsequent deposition is not admissible *Bhoobon* v *Ambica*, 23 W. R 343; *Emperor* v. *Nandu*, 2 A L J 509 The whole notion of taking depositions is that they are a provision in advance for obtaining testimony from one who will not be available at the *time of the trial*, i. e., in the traditional phrase, they are taken *de bene esse*, conditionally. If the witness is in fact available at the time of the trial, the principle of confrontation requires that he should be examined *viva voce* on the stand This principle is constantly indicted. *Greenl Ev* § 163(i) In certain States of the United States of America, such deposition is admitted where the personal attendance of witnesses would involve them in great pecuniary loss and involve a sacrifice of their personal interest without any person ... *& A R Co* v *Bussen*, 95 Ga. 584. The notion that any citizen ... his duty to the community ...

Proviso—Para (1) At common law testimony given by a witness in a civil or criminal proceeding is admissible in a subsequent, or in a later stage of the same trial, in proof of the facts stated, provided that the proceedings ... *Phip. Ev 4th Ed p 406* ... against a person not a party ... That cannot be done for this reason because such person has it not in his power to cross-examine" *Goodright* v *Moss*, Cowper, 592 So "examinations upon oath, except in excepted cases, are of no avail unless they are made in a cause or proceeding depending between the parties to be affected by them and where each has an opportunity of cross-examining the witness" *Per Lord Kenyon L C J in R.* v *Erisuell*, 3 T R 707 The law on this subject is thus summarised by *Chief Baron Gilbert* "When you give in evidence any matter sworn at a former trial, it must be between the same parties, because otherwise you dispossess your adversary of the liberty to cross examine." *Gilbert Ev* 68. So a deposition cannot be given in evidence against any person that was not a party to the suit; and the reason is because he had not liberty to cross examine the witness, and it is against ... proofs in a cause to which he ...

would have been more accurate if it had been ... interest" Here the effect is the same as that of *res judicata* and estoppel. In fact they are ... *Ev 196* ... ves in interest. ... 101 Ind Cas ... privies ... L T 510=101 Ind Cas ... =A. I ... *Nicholl*, 2 L R C P ... *Willes J* ... parties, is really meant persons ... claiming ... trial between different parties having different rights and with whom the plaintiff had no privity, and as he had no opportunity to examine or cross-examine the witness it would be contrary to the ... or in any way affect his interests by the ... *Per Hinman C J in Lary* v *Brainerd*, 30 Cox ... rties being the same is thus laid down by *Gilchrist J* ... "If the testimony be given under oa... adverse litigant was a party and ... calle... want... parti... *the* ... 343 ... made by an accu... ing against the accused is admissible in evidence in a ...

igh the prosecutor in the second case is the S.
Queen Empress v Bhabhutgar, Rat Un
To satisfy the requirements of this section the
unst the same parties or their representatives in
nterest, at the time when the suits are proceeding and the evidence is given. *Sita Nath* v. *Mohesh Chunder*, 12 C 627 ; *Queen* v *Ishri*, 8 A. 672=A W. N. 1886, 257.

Where the parties of the present suits were not parties or representatives of the parties of the previous suit, in such a case, a deposition made in the former suit is not admissible in evidence in the present suit *Mrinmoyee* v. *Bhooban Moyce*, 15 B. L R 1=23 W. R 42; *Queen Empress* v. *Ishri*, 8 A. 672 A W.
. Bom L R 599 (601).
a former suit when

The parties may be
it may be defendant in
atham, 1 A & E 3

ng to the competency of
discredit or
if Mr W
now if B had
further well
nent, though
nt opponent
has. *Ibid*

The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or

may not have an opportunity to cross examine the witness, yet the person in

lity could not be used by the defendant therein, "as a man who cannot be prejudiced by a deposition or proceeding in a suit shall never receive any advantage from it." *Gibb Ev.* 55; *Brown* v *Johnson*, 13 Gratt. 641; *Burr Jones* § 683.

& El 783, *Krishna Rao* v *Raja of Pittapur*, 102 Ind Cas 713=A I R Mad 733 The wording of this proviso is perhaps a little defective *Instead*

the suit in which the depositions were taken; and they cannot be ... party unless they can be read against him" So evidence *taken on the first trial* is admissible in a second trial if although the two trials be not between the same parties the second trial is between persons who generally *represent* the former parties or are their privies in estate *Taylor on Evidence, 11th Ed* § 467 The vague expression "representatives in interest" has not *been* defined in the Evidence Act
include privies
for the purpo

tayne's Ev § 1670
for all purposes synonymous with the expression ... in s 11 in C P Code *Rama Krishna* v *Tirunarayana*, A I R 193 198=62 M L J 116.

Infant The accused

redemption
a representative in interest of the mortgagor *Mashwe* v *Alg* ... 26 Ind Cas 111=8 Bur L T 104 A Hindu widow in possession of the estate of her husband completely represents the estate and consequently a reversioner can be said to be the representative of the party (i e the widow) within the meaning
Kumari v *Nitya Kali*, 12 C L J
Mookerjee J said "*Prima facie*, therefore
proceedings are between the same parties
or their representatives in interest But it has been argued that *Monmohini* ... Hindu widow in possession of the estate of her husband, completely represented the estate, and consequently the position is the same as if she was a party to
contested
9 M I
may in th
Moyee v
pressed the view
of evidence

S.

ı both the proceedings Morgan v. Nichol, L R 2 C P 117, see also *Fool Kissory* v. *Nobin*, 23 C 441, *Patinharkuru* v *Raman*, 24 Ind Cas 519 "The equirement of identity" says *Prof. Wigmore*" of parties is after all only an ncident or corollary of the requirement as to the identity of issue It ought, hen, to be sufficient to inquire whether the former testimony was given upon such

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t

hough a different person, had the same property interest that the present

this
hose
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former evidence *Mutatis Mutandis*, the rule is the same where a party whose omission from the record fails to alter the issue or the opposing party's right of cross-examination has been dropped in the second case *Chamberlayne's Ev* § 1671

t no
of
oss-
still
been satisfied *Moore* v *Triplet*, Va, 23 S E 69 So the general principle is that in all cases where the party has without his own fault or concurrence

Greenl. Ev 163(f) The doctrine requiring a testing of testimonial statements by cross examination has always be

or be shaken by cross examinati
declining, he has had all the be
examination of th it
Moule, 1 Drew 472,
law is that no evi
examination of both
examine and has
if he had cross-exan
an opportunity of
Vaughan, 1 M. & S. 6, *Empress* v *Jhubo*, 8 C. 739.

S. 33. "A deposition is considered a partial representation of fact, as to all p[illegible]
who
Per
Dr
taken in former suit depends upon the fact that the adverse party, or those [illegible] privity with him, had the opportunity, to cross-examine the witness [illegible] that the deposition was taken without authority, or without the sanction of [illegible] oath or without such chance of cross-examination it should not be [illegible]

proceeding provided that the adverse party in the first proceeding had the [illegible] and opportunity to cross examine That the accused had the opportunity [illegible] cross-examining this witness, is I think quite clear He was asked to do so [illegible] he refused to do so But I think it is also clear that at the stage at which the case had arrived he had no right to cross-examine Now as far as I can see [illegible] accused in a warrant case has no right to cross-examine the prosecution witness until after the charge is framed ... No doubt s 256 (Cr Pro Code) d[illegible] prohibit cross-examination at a previous stage but that is not the same as saying that the accused has any right to cross-examine. I am of opinion that until [illegible] 56 is reached the accused has no right [illegible] the present case the accused had no r[illegible]

under s. 33" But in *Mangal* [illegible] was examined by prosecution [illegible] the charge it was discovered [illegible] unable to answer the [illegible] It was that he [illegible]

must also be right to do so *Dal Bahadur* v. *Bijai Bahadur*, A [illegible] C F 9—31 C W N 369 In th[illegible] which requires that the adverse party [illegible]

is dead and the opposite party had an opportunity of cross-exam[illegible] J 584[illegible] though he did not avail himself of it *Tafiz* v. *Emperor*, 50 C L J [illegible]

but was not cross-examined by the defence, his deposition is [illegible] under s. 30 in the Session's trial, even when the Sub-Inspector dies [illegible] the Session's trial. *Tafiz* v. *Emperor*, 50 C L J. 584=A I R. [illegible] 228. A deposition taken in an *ex parte* proceeding cannot be used under this section in a subsequent contested proceeding between the same parties even

where other conditions of the section are satisfied *Raj Mungal* v *Mathura*, 13 A. L J 881.

, if not admitted, must be proved, before
3 The deposition of a witness obtained
and forming part of the
the Evidence Act, provided
Empress v *Ram Chandra*,
19 B 749, see also *Queen Empress* v *Basvanta*, 25 B 168=2 Bom L R 761

In an enquiry under Chapter XVIII *of the Criminal Procedure Code, a* witness was examined by the prosecution but he was not cross examined by the

accused had the opportunity to cross examine a witness examined by the prosecution, where the accused did not cross examine any of the prosecution witnesses, and was not asked by the enquiring Magistrate to exercise his right of cross-examination *Ibrahim* v *King Emperor*, 17 C W N 230=18 Ind Cas 406=14 Cr L J 70, see also 2 Weir 755 Deposition of a witness can be taken in the absence of an accused who has absconded When such a deposition is to be used in a subsequent case, it is necessary to establish that when that deposition was taken, the accused had absconded, and after due pursuit could not be arrested *Queen* v *Etwaree*, 21 W R Cr 12, *Queen Empress* v *Sahib Singh*, A W N 1896, 182, see also *Ghurbin* v *Q E*, 10 C 1097

Failure of cross-examination There may have been an adequate opportunity of cross-examination, so far as depends upon the nature of the tribunal or

stances preventing adequate cross examination *Wigmore* § 1390

S. 33.

who
Per
Dr
take
privi.
that
oath, or without such chance of cross-examination, it should not be re
although if due notice was given, it is not necessary that any cross-exam
should have been actually made. *Fitzgerald* v. *Fitzgerald*, 3 Swab & T
also *Lawrence* v. *Maule*, 4 Dr 172; *Macomlie* v. *Anton* 6 M & G 27

33, Evidence Act, the statements
3, provides that in certain circum
proceeding is relevant in a subsequent
proceeding provided that the adverse party in the first proceeding had the
and opportunity to cross examine That the accused had the opportun
cross-examining this witness, is I think quite clear He was asked to do s
he refused to do so But I think it is also clear that at the stage at which
case had arrived he had no right to cross-examine Now as far as I can se
cross examine the prosecution witn
No doubt s 256 (Cr Pro Code) does
stage but that is not the same as
that the accused has any right to cross-examine. I am of opinion that un
stage of the case provided for in s 256 is reached the accused has no right
cross examine That being so in the present case the accused had no righ
Mr Milne is not admissible in evi
A I R 1929 Lahore 540

dur v. *Bijai Bahadur*, A
requires that the adverse par

adverse party had both the right and
So a deposition of a witness is admissible under this section when
is dead and the opposite party had an opportunity of cross-examining
though he did not avail himself of it. *Tafiz* v. *Emperor*, 50 C L J 584
Ind Cas 743 = A I R
Q E v *Ram*, 19 B 749

524 = A I R Cr Pro
208 of the Cr Pro
but was not cross-examined by the defence, his deposition is not adm
under s 30 in the Session's trial, even when the Sub-Inspector dies
the Session's trial. *Tafiz* v *Emperor*, 50 C L J 584 = A I R 1930
228 A deposition taken in an *ex parte* proceeding cannot be used under this
section in a subsequent contested proceeding between the same parties

opponent is also entitled to cross examine the interpreter so as to test the correctness of the translation, and to call other witnesses to verify the interpretation. *Wigmore* § 1393

Whether the deposition of a witness who cannot be cross-examined on account of some organic defect, such as defects of speech, hearing or the like, should be admitted in evidence, it is for the trial Judge to decide. *Quinn* v. *Halbert*, 55 Vt 228 The same principle also applies when the accused is deaf or dumb or blind *Felts* v *Murphy*, 201 U. S. 123; *Wigmore* § 1393

Sundry insufficiencies of cross examination Where a party is absent from the Court at the time of the cross examination, but his counsel is present, he can [illegible] a witness Still in sc [illegible] 'fo. 429, 133 But such [illegible] a witness taken in his absence is read over to him and liberty is given to him to cross examine the witness *R.* v *Smith*, R & R 339; *R* v *Forbes*, Holt, 599 In *R* v *Hake*, 1 Cox. Cr 226, *Earle J* said · 'The reading of it in the prisoner's presence is equivalent to the taking of it in his presence The object is to afford to the [illegible]

Ibid Failure to take advantage of a known opportunity for cross examination [illegible] nishes no ground for modifying the [illegible] ion that the party in question had no [illegible] assistance such an opportunity for [illegible] ces, be a very barren privilege Nor is [illegible] was embarrassed by the absence of his lawyer and was not afforded an extended time in which to exercise the option to cross examine personally The existence of such infirmative consideration is not deemed inconsistent with the reception of the evidence upon a subsequent trial Where the party to be affected by the secondary evidence has announced an intention to take no further part in pending proceedings, subsequent tender of opportunity to cross examine is regarded as having been expressly waived

[illegible]

cross examine Where a witness leaves the country after the charge and he [illegible] xpense, his deposition before [illegible] this section *Nga Ba On* v [illegible] Bur L J 114=A I R 1927 Rang 248

Section 33 whether controlled by s. 350 The general provisions of section 33 of the Indian Evidence Act are not in any way affected by section 350 of the Code of Criminal Procedure *Lelal* v *Crown*, 101 Ind Cas 183=28 P. L R 199=28 Cr. L J. 451=A I R 1927 Lah 332=8 Lah 570

[illegible] without an opportunity of examining and cross-examining or the *very point* on which their evidence is adduced in the subsequent proceeding Though separate proceedings may involve issues, of which some only are common to both, the evidence of those common issues given in the former proceedings may, on the conditions mentioned in s 33 arising, be given in the subsequent proceedings. *Ram Reddi* v. *Seshu Reddi*, 3 M 48=2 Weir 756=2 Weir 433. Unless the issues were then the same as they are when the former deposition is offered, the

S. 33. cross-examination would not have been directed to the same material point of investigation, and therefore could not have been an adequate test for exp[illegible] inaccuracies, and falsehoods *Wigmore* § 1386 It is absolutely necessary that the former statement was sufficiently tested by cross examination upon the point now in issue. It is sufficient if the issues were the same or substantially the [illegible] 8 C L R 273, *Wig*[illegible]

[illegible]

Doe v *Foster*, 1 A & E 791; *R.* v. [illegible] 6 Cox Cr 52; *R.* v *Beeston*, 6 Cox Cr 4[illegible] *Castro*, Trichborne Case; *Brown* v. *Whi*[illegible] 2 Cr App. 257, *Wigm*[illegible] same rule holds in criminal cases thus a deposition on [illegible] grievous bodily harm, [illegible] facts *Phip Ev 7th Ed* 124 citing, *R* v *Smith*, Rus [illegible] 6 Cox 52, *R* v 4 F & F 63, *R* v. *Beeston*, 24 L J M C 5, *R.* v. *Dilmore*, 6 Cox 52, *R* v *Williams*, 12 Cox 101

In *R.* v *Beeston*, 6 Cox Cr 425, deposition of a witness on a charge of [illegible] to do bodily harm, was admitted on a trial for [illegible]

he would not [illegible] same case, and [illegible] has had full oppor[illegible] said. "The question [illegible] circumstances that the [illegible] situation" says *Prof* [illegible] in the application of the rule, and not a narrow and pedanti[illegible] the whole the judici[illegible] to receive testimony already adequately [illegible] or much improvement *Wigmore* § 1387 [illegible] issue are substantially the same, it is always a useful test to see whether the same evidence will prove the affirmative of the issue in both *Field Ev 6th Ed* 149, *Wordroffe Ev* [illegible] Ed 356, *R* v *Rochia Mohata*, 7 C 42=8 C L R. 273, *Doe* v *Foster*, 1 A & E 791

Depositions of deceased persons are not admissible under s 33 of the Evidence Act unless the subject-matter of the dispute in the two suits is the same and also the subsequent suit is between the same parties or their representatives in interest [illegible] 34 Ind Cas. 875 [illegible] suit under s 9, Act [illegible] at a former case [illegible] since dead, is admissible [illegible] 23 C 441

[illegible] the purpose of excluding [illegible] case that

Markby Ev p 33. [illegible] and on behalf of F [illegible] own behalf for assau[illegible] these charges F [illegible] of the same house under section [illegible] institution of the civil suit [illegible] was sue[illegible]

Foolkissory v. *Nobin Chandra*, 23 C. 441.

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

34. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not lone be sufficient evidence to charge any person with liability.

Entries in books of count when relent.

S. :

Illustrations.

A sues B for R
be indebted to hin
ent, without other

Principle. "The reasons justifying the admission of this class of statements ntested as they are by cross-examination have not been as clearly defined by e Judges as in other Hearsay exce
iore § 1522. It has already been stat
an exception to the Hearsay rule,
ircumstantial guarantee of trust-
On the face of it, in this class of
In such a case the situation is
ne where, even though a desire to state falsely may casually have subsisted,

elated motives whic
probable trustworthin
habit and system o

al inaccuracies and to counteract
ince the entries record a regular
course of business transactions, and error or mistatement is almost certain to be detected and the result disputed by those dealing with the entrant; mis statements cannot safely be made, if at all, except by a systematic and comprehensive plan of falsification. As a rule, this fact (if no motive of honesty obtained) would

8 Ind. Cas 81 = 13 C. L. J. 139.

"It is recognized that to use a system of regular accounts to sustain a

S. 34. In or[illegible]

[illegible] ar as a party's own [illegible] kind of evidence [illegible] certain class of transactions he was thus totally without [illegible] witness for him evidence obtainable from others, certain past statements of his must be admitted by very necessity. Thus the principle of necessity and the principle of circumstantial guarantee were both recognized [illegible] footing of [illegible]

[illegible] the rule was established before the [illegible] can therefore be understood only by keeping [illegible] Courts in establishing it was precisely [illegible] more § 15[illegible] admissibility [illegible]

in the affairs [illegible] cases the book [illegible] it being practi[illegible]

[illegible] § 314[illegible] available of a completed transaction. *Ch*[illegible]

[illegible] guards for correctness. [illegible] ordinary motives for untruth and adding certain [illegible] *Per Tindal C. J.* in *Poole v. Dicas* 1 Bing. N. C. 6[illegible]

[illegible] abuse of this evidence in [illegible] were living or dead." But there was more [illegible] and still suing for the claim; moreover, the whole proceeding was also [illegible] paraged as involving the making of evidence for one's self, for "the rule is [illegible] a man cannot make evidence for himself." In 1609, Stat. Jac. I. C. [illegible] after, reciting these considerations, forbade this use of shop books [illegible] action for any money due for wares hereafter to be delivered or for [illegible]

hereafter to be done," except (1) within one year after the delivery of the wares or the doing of the work, (2) where a bill of debt existed (3) between merchant and merchant, merchant and
man," for matters within the
I C 4 § 22 and 16 Car I
that a man cannot make evid
complete, by refusing to recognize these books at all, after the expiration of the year. In the lower Courts, where the jurisdiction was limited to small
ued (*Vide Thayer, Cases on Evidence,*
the historical material), and a recent
(to an extent somewhat indefinite) in
the upper Courts (Rule of Court, 1883, Ord 33, R 3; Ord 30, R 7 as amended by Rules of July, 1902) But before the end of the century of the above Statute,

where there was such evidence (entries) by a servant known in transacting the
ner, such entry,
from time to
re that servant,
the servant or
agent usually employed in such business, was intrusted to make such entries by his master, (and) that it was the course of trade,—on proof that he was dead and that it was his hand-writing, such entry has been read (which was *Sir Biby Lake's Case*) And that was going a great way, for there it might be objected that such
et by reason of the
has gone so far."
rty But already
Williams, Comb
gory, Peake Add
nd, 3 B & Ad 890, the matter was placed
e of the exception was understood as
since deceased, in the ordinary course of
lly unconnected with the parties, or the
clerk of a party, or a party himself *Greenl Ev* § *120b*

law *Cun Ev 11th Ed 99; Field Ev 6th Ed* p 151

the books of merchants and tradesmen regularly kept and written from day to day, without any blank, when the tradesman has the reputation of probity constitutes a semi proof and with his supplementary oath are received as full proof to establish his demand. *Greenl Ev § 119 cited in Taylor* § 712 The same doctrine is familiar in the law of Sc
others, kept with a certain reaso
Court, may be received in evidence,
in supplement of such imperfect proof. It seems however ...
or other
ali unde,
probatio,
273—277,
evidence of a debt being due to him by entries, whether by himself or ... in his own books, provided the books have been regularly kept in the course of business *Cun Ev 10th Ed 175*

therein" So, even by that Act a man was not allowed to make ... himself by what he chooses to write in his own books behind the back of the parties. But where there was other independent evidence of the truth of the transaction to which the accounts referred they were admissible as corroborative evidence, provided the books were first shown to the satisfaction of the Court to have been regularly kept in the course of business *Nort Ev* 193, see also *Dwarka Doss* v *Jankee Doss,* 6 M. I. A 88 But such books could not be used as independent evidence *Rai Sri Krishen* v *Rai Hurri Kishen,* 5 M I A ... *Dwarka Doss* v *Darka Doss,* 2 Agr 308; *Ramkristo* v *Hurrydos,* Marsh 219; *Jagun Kooer* v *Raghoonundun,* 10 W R C R 148; *Allyat* v *Jugut Chunder* ... W R C R 242, *Seth* v *Seth,* 13 W. R (P. C) 36; *Sorabjee* v *Kunnaye* ... W. R 29 P C, *Gopal Mundal* v *Nabbo Kishen,* 5 W R Act X Rule ... Account books are legal evidence to corroborate oral testimony *Rajnarain* v *Olivia,* 5 W R Act X Rule 30, *Ram* v *Hurry,* Marsh 219=1 Hay ... Ind Jur N S ...

fraud, it must be considered binding upon him *Gopee* v ... N S 358

Books of accounts as evidnce—American rule "The 'shop book' rule is that by which shop books and tradesmen's books of account, regularly and fairly kept as books o ... oath are admitted as *prima facie* evidence ... The rule is ... by the ... regard to the admission ... contained is a very old one ...

going into the history of the admissio
noted that the origin of the shop-book
administered in this country was it seems,
but from the law of Holland. .. It has long been the settled ...

that entries made in the regular course of business in shop-books by the clerk or agent of a person are, with proper restrictions, admissible in evidence after the ... ting ... It has long been the

... lab ...

... In many of the states statutes have

been en...
account n...
parties to...
entries to...
may be in...
them, sinc...

...ates that books of accounts regularly

... selves to charge any ... rated they are still ... missible They are ... ooks of accounts are ... rson with liability

It would be more correct to say that though admissible they do not establish the facts required to be proved, i e, that a person owned a certain sum of money,

present sectio...
instances ...
an entry relevant under section 34 and one relevant under section 32, cl (2) is that in the former case the person who made the entry may be available as a witness while in the latter case he is not. I find it very difficult to appreciate on

Sridhar, 28 B 294 and has been accepted as correct in *Daji ...* v *...* *Narayan*, 10 Bom L R 811, *Dukha Mandal* v *W N Grant*, 16 C L J 24 and *Akhouli* v *Tarak Nath Ghosh*, 17 C W N 774=16 C L J 328, and it is perhaps too late to contest it If this other view is adopted it should be held

S. 34. *Sen* v. *Bijoy Chand, supra*, see also *Jainab Biswas* v *Siva Kumari Debi*, 46 C L J 253 = 101 Ind Cas 733 = A I R 1927 Cal 855, *Manickchand* v *Paralaji*, 9 Mys L J 337 It is essential in every case where reliance is placed upon books of acc
course of business;
the entries themsel
removed by the admission of the opposite party. *Bibi Imambandi* v *Haji Motasuddi*, 15 C. L J 621 = 13 Ind Cas 678 Under the Indian Evidence Act entries in books of account regularly kept in the course of business are admissible in evidence, not only for refreshing the memory of the witness, but also as corroborative evidence of the story which he tells Books of account which profess to record facts relating only to the particular transaction in question are less reliable than a book where in the same is recorded in common with other transactions in the or
nathan, 29 C 331 P C = 6
It is not necessary in a
written and that they were kept in regular course of business. If a gomasta and a member of a firm were examined and depose that the accounts were *regularly kept, the accounts may be held to have been proved* in the absence of evidence to the contrary *Biccha Lal* v *Jai Pershad*, 45 P R 1899 A party who calls for an account book is bound by all the entries contained therein *Shib Pershad* v *Promotho*, 10 W R 193; *Raneswari* v *Bal Kishun*, 9 A 713 P C

Account books the Privy Council in *Jaswant* v *Sheo Nara* 3 are instructive as to the variety in account-book al value, but merely a man's private record, p ordance with his pleasure and convenience "Other accounts may be so kept, and may so tally with external circumstances, as to carry conviction that they are true" "And," their Lordships continue, "the Evidence Act, section 34, therefore, enacts that entries in books of relevant evidence,
The admis
to the general rule laid down in section 34 of the Act"

"The wor
paper bound
by tearing a p
in the sense
portfolio, or clip, or strung together on a piece of twine which is intended But so untied at will, would not in the ordinary English, be called a book narrow a signification would not do in India, where accounts are often kept on sheets of paper laced or threaded together in a manner which allows removal of any sheet at any time by the untying of a knot Of this class are the bahis of practically every Ma
in the English Copyright
'every volume, part or div
of music, map chart, or
for the conve
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enacting sect
even the Ma
not made in
intended not to be taken apart at any time for any purpose

however to say what is not a book for the purpose of section 34, ... hesitation in holding that unbound sheets of paper, in whatever quantity, though filled up with one continuous account, are not a book of account within the purview of section 34 ... book of

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ing substantive evidence on which reliance may be placed A private diary may be most regularly kept and contain . made, of the utmost value It may be used a witness or refreshing his memory and and others of the Evidence Act; for such user does not make the document itself evidence. (*Cf. Ramji* v. *Rangayya*, 1 M. H C R 168) It may also come in under section 32 (2) if the requirements of that section are satisfied But no entry in such a diary can be filed as documentary evidence of the facts stated in it in favour of the person making the entry if he is a party to the suit. It would be excluded by section 21 of the Act, and section 34 provides no exception in favour of it The reason for such differentiation between a private diary and a private account is manifest An account, regularly kept necessarily results in a continuity which makes fraudulent addition extremely difficult and dangerous , it is a chain of forged links into which the subsequent interpolation of a link of forgery without discovery is almost impracticable The man who wishes to defraud his neighbour accounts, or, having kept them, suppresses then hood with truth in regularly kept account popular, because of the mathematical connection running through them But these safe-guards of truth are entirely absent in the most regularly kept of private diaries, and subsequent interpolations, to meet an unexpected demand and facilitate fraud, are generally possible without difficulty and danger of discovery It is clear that the Legislature, which guides itself by human experience, had such considerations before it when it enacted, by section 34, an exception to section 21, in favour of books of account I am therefore of

discovery are not admissible under section 34" *Per Stanyon A J C.* in *Mukund Ramv. Dayaram*, 23 Ind. Cas. 893 (894, 895)=10 N. L. R. 44.

urse of business ave been kept e and not as in- words 'regularly kept,' and in ows" and not "proves' It is 34 of Ac I of 1872 is not Act II of 1855, and this seems ection 34, indicate that the regularly kept in the course of business—in the first place, making them relevant whenever they refer to a matter into which the Court has to enquire, and nextly, providing that when such entries are sought to be used as statements for a particular purpose—namely, to charge any person with liability, they shall not alone be sufficient evidence for the purpose. Section 32, clause (2) makes relevant a statement consisting of an entry made by a person who is not a witness before this Court, in books not necessarily books of account but—kept in the ordinary course of business. A

Per Mookejee J ...
the old Act I' ...
regularly kept ...
"proved to have been' have been dropped. In the later Act I of 1872 the w...
in the law. The legislature has dispen... This amounts to material altera...
that the book ...

... itself and as appears ... such a regular and usual account book as
the party against whom it is offered, and not be a memorandum for other purpose...
Burr Jones § 570 The entries in the books of account should relate to the
business or occupation of the person whose books they are and not to transac...
tions of such person having no relation to his regular busine s or occupation...
But the admissibility of the book in respect to proper items will not be l...
because of the fact that the book contains some entries not connected with the
regular business of the party The charges ...
particular, and should itemize the ...
frequently ...

... most elementary ...
407 "Finally, when ... *Ganesh*, 95 Ind. Cas. ... in evidence, but would of cou...

tenance and general accuracy ... entries therein But, where the fact of regular main...
formally proved" *Mukundam* v *Dayaram*, 10 N. L R 44=23 Ind Cas. ...
They may be kept in the form of a ledger, if this is general mode in which the party
keeps his books, provided the entries are original entries The entries may be
made in pencil, or in the form of a time-book ... not only of
the labour of the plaint ...

Cash books in which ... the issuance of the checks are not admis...
evidenced by them are admissible in evidence were made at the time of the transactions
prescribe the form in which books are to be kept, nor the degree of definiteness
to be observed in making entries The statutes do not generally
general application. They have been so framed as to have a very
tho e of a tradesman or a banker are admissible in evidence if within the statutory
condition, the purposes of which are to secure authenticity and credibility in
respect to the evidence, rather than to prescribe the form of it. Whatever may

be its form, it is only evidence *prima facie* of what is shown by it. Supplementary proof may often be required to make such evidence relevant to particular case. *Burr Jones* § 570

S.

plaintiff that there were dealings between him and defendant, *held*, that the dealings were not proved under s. 34, Evidence Act, in the absence of evidence of specific sums having been paid. *Buta* v *Trilok*, 100 Ind Cas 862=A I R. 1927 Lah. 903; *Narayan* v *Vithoba*, 100 Ind Cas 863=A. I. R. 1927 Nag 177.

not prove anything. account kept in the with liability The

Firm of Jodha v *Dilta*, 84 Ind. Cas. 909=6 Lah L. J 504=A. I R. 1925 Lah. 242 This section does not limit in any way at all the nature of the material tements in a book of account. vouchers, receipts or other *Kallu Mal* v *Bhawani*, L. R. 6 A 375=88 Ind. Cas. 383=A I. R 1925 All. 742; see also *Yesuvadiyan* v. *Subba*, 52 Ind. Cas. 704; *Abdul* v *Puran*, 82 P. R. 1914=277 P. L. R. 1914; *Ramaswami* v *Ramanathan*, (1914) M. W. N. 240=22 Ind. Cas. 627 Where a claim based on entries in account books is entirely denied, plaintiff must prove the various items of his account by independent evidence, as the entries cannot in themselves charge any person with liability. *Ganeshi* v. *The Firm of Mangal Ram Atma Ram*, 76 Ind. Cas. 157 In a suit for recovery of water cess, *bahi* entries showing that in previous years the defendant has been paying cess at the rate demanded, are admissible in evidence. *Prabhu Dayal* v *Ram Chander*,

n slips of paper , the books cannot be rejected on the ground that the entries were not made in them regularly from day to day *Mangali Prasad* v *Mandir Das*, 11 Ind. Cas. 95. Where the plaintiffs can easily produce independent and trustworthy evidence in support of entries in their account books, it would be unfair to defendants and wrong in principle to accept as sufficient proof the entries, uncorroborated by any evidence one of the plaintiffs to the effect *Ganga Ram* v *Kala Ram*, 53 try in the *patmarsh* alone is not erty which is denied. *Keshavan* v. ook, not otherwise suspicious, is supported by *prima facie* reliable . R. 1909 Entries to be admitted ier testimony must be made in the . to prove that the entries were taken from books which were regularly and correctly kept. *Queen Empress* v. *Sayad Sarfuddin*, Rat. Un Cr. C. 344=Cr Rg 37 of 1887. Though certain account books are proved not to have been regularly kept in the course of business, yet if they are proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose, they are relevant as admissions against the firm. *Reg* v. *Hanmant*, 1 B 6, 10. If books are kept in pursuance of some continuous and uniform practice in the current routine of the business of the particular person to whom they belong, they are 'books of

that the books were kept up in the regular course of business It is a matter of intrinsic evidence as to whether the books in question were books of account and regularly kept in the regular course of business *Emperor* v *Narbada*, A. I R. 1930 All 38 The book should be such a regular and usual account book as explains itself and as appears on its face to create liability in an account with the party against whom it is offered, and not be a memorandum for other purpose *Burr. Jones* § 570 The entries in the books of account should relate to the business or occupation of the person whose books they are and not to transactions of such person having no relation to his regular business or occupation. But the admissibility of the book in respect to proper items will not be lost because of the fact that the book contains some entries not connected with the regular business of the party The charges in the book must be specific and particular, and should itemize the transactions recorded Such entries have frequently been rejected when they consisted of charges in gross for continued very ces *Burr. Jones* § 571

have no weight *Kesheo Rao* v *Ganesh* 95 Ind Cas 198=A I R 19.. must 407 "Fir
see that th
supposed,
usually called the *mahajani* system Their evidential value ... depend upon their formality and the checks against fraud secured by method of
d with admissibility A ...
, will be admissible As regards
...ween the cash books and ledgers
of a large bank, and the day-book of a house-keeper. The difference lies in the weight to be given to the entries therein But where the fact of regular ... must be

stubs of checks, several days after the issuance of the checks are not ...
Cash-books in which the entries were made at the time of the transactions evidenced by them are admissible in evidence The statutes do not generally ...

respect to the evidence, rather than to prescribe the form of it "

S.

absence of recital in a
who is not a party
the case of *Ram Persh*
restricted in the sam L J
621=13 Ind Cas 678; *Ali Nasar Khan* v *Manik Chand*, 25 A 90=22 A W N
207; *Pragdas* v *Daualtaram*, 11 B 257; *Debendra* v. *Arun*, 1925 Cal 65;
Tarakumar v *Arun*, 74 Ind Cas 383; *Kasam* v *Haji*, 76 Ind Cas 327; *Ganga Ram* v *Lachmi ram*, 19 C. W. N. 611=28 Ind Cas 705; *Imambandi* v. *Haji Mutsaddi*, 28 C L J 409=45 C. 878

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other
causes they have a suspicious and fraudulent appearance, and are not explained they should be rejected The book may be admitted as to entries which are proved to be original, althought other entries in the same book are not original, unless the two classes of entries cannot be distinguished Irregularities in account-books sufficient to justify their exclusion must be gross and palpable Books of account must, however appear to embrace all of the items of account between the parties which are proper subjects of entry The account book must

the power of
of the book
and veracity
give evidence of facts or circum-
ok is not fairly and honestly kept as a
r routine of business, subject, it is
said, to the limitation that the investigation should be confined to a time at or near the period covered by the account in suit *Chamberlayne's Ev* § 3148

Jama wasil baki papers Where certain entries are admissible under section 32, the position is that there is no statutory obligation to look for anything else in order to found the liability It does not follow that such entries should necessarily, in any event, be regarded as conclusive of the truth of the statements therein made When such entries in the landlord's papers are sought to be used against the tenant, their evidentiary value has got to be carefully

evidence to show when and by whom these entries in collection papers were

s. 34. made Held that the collection papers were inadmissible in evidence *Mowr* v *Tarak Nath*, 16 C L J 3?8 *Jama wasil baki* papers have no weight except as corroborative evidence *Surnomoyi* v *Johur Mahomed*, 10 C L R 31? *Belaet Khan* v *Rashbehary* 22 W R 519, *Gopal Mandal* v *Nabakristo* 3 W R (Act X) 83 *Kherromonee* v *Bejoy*, 7 W R 533; *Umed Ali* v *Habibullah* 47 C 266; *Yeshuvadiyan* v *Subba Naicker*, 52 Ind Cas 701; *Dwarka Das* v *Sant Baksh* 18 A 92 *Mahomed Mahmud* v *Safar Ali* 11 C 407 (409), *Fan...* v *Agnikumar*, 71 Ind Cas 300, *Jonab* v *Siva Kumar* ... Cas 733=A I R 1927 Cal 855; ... J 68 The fact that ... Evidence ... if the co... ...established *Bhaba Sundari* v *Tara Nas* ... entry in a *Siaha* which is a copy of the accounts ... be admissible in evidence if regularly kept but the law specifically states that of itself it shall not be considered to be sufficient evidence to charge any person with liability *Bhagwat* v *Prasad* 15 R D 401

Account books, entries how to be proved Where certain account books were produced in the original Court by the plaintiff, and all that was proved was that they were in the handwriting of his father, and the books were not examined in detail in the original Court, and the particular entries upon which the plaintiff relied were not selected and exhibited it was held that the entries ought to have been pointed out and proved and evidence should also have been given in detail as to the character of the books themselves *Hingumaya* v *Heramba Chandra*, 8 Ind Cas 81=13 C L J 139 In that case the Court in delivering the judgment said "It is essential, in every case where reliance is placed upon books of account, to establish that they have been regularly kept in the course of business It is perfectly true that as laid down by their Lordships of the Judicial Committee in the case of *Deputy Commissioner* v *Ram Parshad* 27 C 118=26 I A 254=4 C W N 417, they need not be written up from moment to moment or from day to day But it is obvious that if they have been written up casually once a week or a fortnight, though they may be admitted in evidence, obviously they do not possess the same claim to confidence that attaches to books entered from day to day or from hour to hour as transactions take place (*Muncher Shaw* v *New Dhurumsay*, 4 B 576) The proper procedure to follow therefore, is, as laid down by ... Committee in *Dwarka Dass* v ... has kept the accounts or ... prove that the books have ... that they are generally accurate But this is not all th... necessary, section 34 makes the entries relevant if they are entries in a book of account regularly kept ... is therefore not sufficient merely ... themselves have to be proved ... moved by the admission of the ... books were produced ... the plaintiff ... *sonno Chucker...* ... Court. The p... the plaintiff relies were not even selected and ex... this Court ... at all. Obviously the ... considerable laxity ... to have been pointe... detail as to the charact... the books closely ... has been applied ... use ...

... must, therefore ... evidence to show ... of his pred... assured that the ... and expenses ... th... were destroyed

by him soon after the *furd*, embodying the expenses, and *maskabar*, monthly accounts, were prepared. It was found that these latter accounts were kept regularly in the ordinary course of business. The *maskabari* and *rola* books,
furds
under
Mohan
rt gave
a decree for the plaintiff on the evidence of his account books and of his book-

going into the witnessbox was not entitled to succeed. Hira Bhagat v. Gobind Ram, 63 P. R. 1897.

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ertain disputed items interpersed in the account should not be disallowed
l no specific evidence
hy such fictitious items
Hanuanta v. Akbar,
0 P. R. 1910=147 P. L. R. 1910=117 P. W. R. 1910. It is not a condition precedent to accepting entries in account books as relevant under section 34, Indian Evidence Act that it should be proved how the accounts came to be written, and
necessary is
o be establi
who were examined as witness for the defence, was considered sufficient corroborative evidence of the accounts to charge the defendants with liability. *Bichha Lal v. Jai Pershad*, P. L. R. 1900, 5. It is unnecessary to prove, by independent evidence, the correctness of every single item of an account extend-

for the decision of the
ittee likewise observed
l account books, but
each book contained that amount of difference which was appropriate to its character. The committee also used the *better test of genuineness than the*
correspondence
other evidence,
firmed the deci
I A 6 P C

Plaintiffs sued to recover money due as balance of a running account and

The various items entered
plaintiff, the High Court
er this section, sufficient
he evidence, however, one
of the plaintiffs having given evidence with reference to the account books, stating the amounts advanced to and repaid by the defendant, and no question
speaking from his own
lence of a witness for the
was sufficient to uphold
carla Das v. Sant Baksh,

S. 34. There is frequently confusion in the subordinate Courts as to how an account book should be proved and used under section 34 aforesaid. It is common practice to call a witness and examine him, as to the particular item sought to be proved ...

...mouth of a witness who merely reads it and cannot supplement it with the personal knowledge Use of an entry to refresh memory is one thing its proof as substantive evidence under section 34 is another, but this distinction is constantly lost to sight by Judges and practitioners A clerk called as a witness may depose :—I remember ... last year Having ... my master's cash book ... not a case of evider... section 34 of the Evidence Act But suppose the account book had been produced and the entry tendered in evidence Then the deposition of the clerk might have been in these terms —'I know the defendant ...

'I ... ye ... mo ... ca ... wa ... bo ... we ... da ... adi ... wi ...

int ...

Adequate knowledge The declarant must have adequate knowledge as to the fact as ... w of his knowledge the truth of the transaction ... acts in pursuance of a report to him by an ... ployment there is presumption of the truth of the ... 3071. In a suit on accounts the plaintiff produced his ... send goods to the pla... used to be entered ... an account. *Held* that the matter was left in doubt whether the witness was speaking from personal knowledge or without personal knowledge and that the defendant not having chosen to cross-examine the witness the plaintiff should be given the benefit of doubt and the evidence taken to be tendered on personal knowledge *Mt Har Dei* v *Kishen*, 1931 A L J. 946 = 133 Ind Cas 900 = A I R 1932 All 60

But such statements shall not alone be sufficient evidence Section 34 ... is regularly kept in the ... to charge any person ... 5 Section 34 of the ... a decree by mere ... proving the existence of certain entries in books of account, even though ...

... entries. No particular form or kind of evidence in addition to the ... is required Any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the entries furnished in books of account, if true *Yesuvadiyan* v. *Subba Naicker* 22 Ind Cas 704; see also *Rama Swami* v *Ramanathan*, 22 Ind Cas. 627, ... v *Kala*, 22 Ind. Cas 403 = 17 P L R. 1914; *Beni* v. *Bisan*, 89 Ind. Cas ...

Kalu v. *Bhairam*, 88 Ind Cas 383 = A I. R. 1925 All. 742, *Abdul* v *Firm* Ditta, 81 Ind Cas 909, *Gopeswar* v *Bijoy*, 28 B 291, *Dhuka* v *Grant*, 16 C L J. P C, *Ganashi* v *Firm*, 76 Ind Cas. 157; *Khumi Mal* v. *Dwarka Das*, 1930 A L J. ...orative proof must be given by evidence ... it seems to have been deemed necessary that this corroborative evidence should be furnished if the rule itself is to apply. Confirmation of a particular item may be sufficient In other words it was necessary for the proponent to call third persons such as those who had dealt with the plaintiffs and found their books to be correct. Where evidence of this ... produce the best ... good faith with ... In this connec... The book to be verified by the testimony of the witness must be the same in which the account in question is entered *Chamberlayne's Ev.* § 3096. But such entries are evidence against the person making them *Ningama* v. *Bharmappa*, 23 B. 63; *Mathilda* v *Gaebele*, 96 Ind Cas. 429 = A I R. 1926 Mad. 955; *Jodha Mal* v. *Ditta*, 81 Ind Cas 909 = A I R 1925 Lah 212

... accident *Seth Maganmal* v *Darbarilal*, 24 N L R. 10 = 30 Bom. L R. 296 = 107 Ind Cas. 113 = 47 C. L J 222 = A I R. 1928 P. C 39.

Relevancy of entry in public record, made in performance of duty.

35. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

General Principle An exception which in practice is by far the commonest in its employment is the exception admitting statements made by officials in persuance of official duty The principle of Necessity, which in one form or another ... the death, insanity, ... arant, but ...

... attendance of the officer is corporally impossible to obtain, there is ... a high degree of expediency that the public business be not deranged ... ing on the strict enforcement of the Hearsay rule *Wigmore* § ... *Ev.* § 162 (m).

S. 35.

The second essential for an exceptions to the Hearsay rule is that circumstantial guarantee of trustworthiness be found, to take the place of confrontation and cross-examination so far as may be Two reasons are by the Courts as ... [illegible] ... tion in this respect. The first ... public officers do ... justifying the exception ... § 162 (m) In ... "The law reposes ... public officers that it presumes they will discharge their several trusts with accuracy and fidel... charge of their public duty may ... true, under such a degree of ... case may appear to require" Sir ... "It depends upon the public duty of the person who keeps the register to make such entries in it, after ... *Kennedy*, 5 App Cas 623, ... F 468, *Parke B* said ...

... ly, the ... the document ... duty exists ... will ... ibly the duty ... whose violation a penalty is expressedly expressed. Possibly the officer may not be one from whom in advance an ... oath of office is required No stress seems to be laid judicially on either of these considerations, nor need they be emphasized It is the influence of the official duty, broadly considered, which is taken as the sufficient guarantee of trustworthiness, justifying the acceptance of the hearsay statement. *Wigmore* § 1632

... another person before use in Court is small, so ... making of this particular official statement is hardly amenable to the ... above supposed Finally, so far as the other element is concerned—the ... correction of errors by public inspection—its efficacy must be of the ... moment, for it is not supposed that the public, or specifically interested members of it, do in fact (whatever their rights may be) ever demand inspection of the vast majority of official records that are made, and there can be hardly any chance of checking or revision from that source. It would seem that the second reason, put forward so definitely by *Lord Blackburn*, is to be ... as merely a casual advantage, and not an essential limitation, of the class of documents to be included within the exception." *Wigmore* § 1632.

case as the present, statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorized agents of the public in the course of official ...
public interest or required to be r...
Taylor Ev 10th Ed § 1591 "In man...
a lapse of years, it would be imp...
contained in such documents were in...
an exception is made to the rule ... *Lord Carson* in *Ghulam Rasul* v *Secretary of State*, 30 C W N 101 (101) = 86 Ind Cas 651 = 52 I. A. 201 = 23 A. L J 639 For further discussion *vide* next topic.

S.

v. *Rajpat Singh* 5 C 744 751, 753 = L R 7 I A 63; see also *Mallikarjuna* v. *Secretary of State*, 35 M 21) So the register is admissible irrespective of whether the official who actually wrote the entries had any personal knowledge or whether the register was a copy of a previous register which had become untidy *William Graham* v *Phanindra Nath Mitra*, 19 C W. N 1038; *contra* *Ambalavana* v *Sree Minakshy*, 28 M L J 217 = 26 Ind Cas 841 = (1915) M W. N. 76 Now let us examine whether the principle is violated on the ground of want of personal knowledge on the part of the entrant. The argument for excluding the use of entries except for facts necessarily within the entrant's personal knowledge is thus stated by *Denman L C J* in *Doe* v *Wallaston*, 1 Moo & R. 389. "The clergy man must be present . and this fact of the time (of the marriage) is ... gistery of baptism, the time of ... from ... ink it ... here stated necessarily within the ... But *Pattison J.* thus reasoned for ... there was no personal knowledge on the part of the entrant "Must we not take it to be the act of the incumbent, who, however he got his information, *had satisfied himself* of the fact before he sanctioned the entry?" *Doe* v *France*, 15 Q B 758 In the same case *Wightman J* s...
having taken ...
English Com...

... 1073, ... *ray*, 8 ... 389; ... (988); ... *Wigmore* § 1646

"It ...
tion of a ...
personal ...
receivable ...
practical ...
that the same principle is applied to persons whose hearsay statements are receivable under the exceptions to the Hearsay rule; and the application of the ...

here as elsewhere, but the principle itself need not be and is not judicially employed to the extent of unpractical strictness; and it has its qualifications and exceptions, based on good sense and practical convenience" *Wigmore* § 1635. So it is at first sight unsatisfactory to accept an entry as evidence of a fact not occurring within the personal knowledge of the entrant At the same time there

S. 35.

The second essential for an exceptions to the Hearsay rule is that ... circumstantial guarantee of trustworthiness be found, to take the place of ... confrontation and cross examination so far as may be. Two reasons are ... by the Courts as justifying the present exception in this respect. The fi... that public officers do th... ness justifying the except... al Ev. § 162 (m) In P...

trusts
charge ...

... n *Doe* v *France*, 15 Q B ... who keeps the register to ... such entries in it, after satisfying himself of their truth' See also *Lyell* v *Kennedy*, 5 App Cas 623, 641 In *Irish Society* v *Bishop of Derry*, 12 Cl & F 168, *Parke B* said "The bishops in making the return discharged a public duty, and faith is given that they would perform their duty correctly, the return is therefore admissible on the same principle on which other public documents are received" The fundamental circumstance is that an official duty ex... make an accurate statement, and that this special and weighty duty will usually suffice as a motive to incite the officers to its fulfilment Possibly the ... may not be one for whose violation a penalty is expressedly expr... Possibly the officer may not be one from whom in advance an ex... oath of office is required No stress seems to be laid judicially on either of ... considerations, nor need they be emphasized It is the influence of the ... cial duty, broadly considered, which is taken as the sufficient guarant... trustworthiness, justifying the acceptance of the hearsay statement *Wig* § 1632 ... of

of official documents, there are every where numerous official docu... ... of person having a spe... ... offi...

and comparison by another person before use in Court is small ... making of this particular official statement is hardly amenable to the ... ... is concerned—the actua...

vast majority of official records that are made, and there ... chance of checking or revision from that source It would seem ... second reason, put forward so definitely by *Lord Blackburn*, is to be regarded as merely a casual advantage, and not an essential limitation, of the class of ... "In su... documents to be included within the exception." *Wigmore* § 1632

city be not confirmed by the usual tests of truth, namely the swearing and the S.
titled to this
by law to
put
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en
be difficult to prove them by means of sworn witnesses" *Per Wayne J* in *Gaines* v *Relf* 12 How 472, 570, *Wigmore* § 1631 So "official registers, or books kept by persons in public office, in which they are required to write down particular transactions, or to enrol or record particular contracts or instruments, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth —the obligation of an oath and the power of cross examining the persons on whose authority their truth and authenticity may depend This has been said to be because they are required by law to be kept, because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office or in the discharge of an official duty ' *Per Fowler J* in *Ferguson* v *Clifford*, 37 N H.
al books, etc,
books, and
keep *Nort.*
g
vo sufficient
guarantee of reliability to render them admissible if offered in evidence *Mckelvey's Ev* § 206 The exceptional privilege given to public records by this section cannot be extended to entries which a public officer is not expected to, and is not permitted to make *Ali Nasar* v *Manikchand*, 25 A. 90 (F. B) = 1902 A W N 207; *Madhabrao* v *Deonak*, 21 B 695. There must be

might not be admissible *Bhaiya Dugaj* v *Beni Mahto*, 22 C W N 139 = 23 M L T 382 = 20 Bom L R 712 = 28 C L J 1 = 47 Ind Cas 1 (P. C) But registers kept under private auth
private individuals are inadmissibl
(1913) 1 Ch 392, *Whittuck*, v
R 303, *Doe* v *Gatacre*, 8 C & P 5
it is not the duty of the officer to
14 App Cas. 137, *Farrell* v *Maguire*, 3 Ir L R 187 A register can be received to prove incidental particulars concerning the main transaction where they
(1926) 1 Ch 284
own to be prepared
any other person
he country, nor has
the act or record
e absence of proper
I R 1930 All.

English Law Another exception to the hearsay rule consists of statements contained in public or official documents which are admissible as evidence of
294 Statements
Royal proclama-

United Ins Co 7 *Johns* 38;
mentary Journal (upon all matters properly before either House, *Jones* v.

S. 35. *Randall*, 1 Cowp 17; *Root* v
matters, *Oates Case*, 10 How, St T
not conclusive evidence of the f
Dacklin, supra, *Att-Ge*
Official registe
is required by ... or reference, and (2) the
entry has bee ... er. *Ibid* p 298. So in
England, a ch ... in of the Establ bed
Church, is admi ... by the evidence of the
identity of the ch ... baptism; but not the time of its
... to make enquiry about the time of
... *Draycot* v *Talbot*, 3 Bro P C
... *May* v *May*, 2 Stra 1073; *Wihen* v *Law*, 3 Stark, *R* 63, *Doe* v
Barnes, 1 M & Rob 389; *Stark Ev*
9 Eq 373, *R.* v *Weaver* L R 2 C
the church of England, from the t

Hubback on Succession, 470; 474 ... in 1644 and 1653 provided for the registration of births, deaths and marriages *Scobell's Ordinances*, 76 236, *Dudly's Case*, 2 Sid 71 But these Ordinances were annulled upon the restoration of Charles II And registers kept under ecclesiastical authority continued to be admitted in evidence by the Courts although not required to be kept, nor declared to be evidence by any Statute. This is probably the meaning of *Lord Holt's dictum* that such registers are evidence from "the nature of the thing", and of the additional words attributed to him by one reporter of least au ... " *Stainer* v *Burgesses of Droitwich*, 1 Salk 28 ... 290 Abo
the time of the decision of that ca
which were repeale

... Will IV (
Statutes ...

... *yer*, 13 L J N S Ch 398 ... evidence of the baptism of the ambassador's son ... entries in a register are admitted ...

of their own or of England. *Evans v. Ball*, 38 L T. 111 ; *Taylor* § 1593; *Php Ev 7th Ed.* p 329.

S.

... e entry must have been contemporaneous ... the sanction of being under oath, but the official character of the transaction appears to afford a *prima facie* guarantee for its truthfulness—stronger, perhaps, than that which obtains in respect of books kept in the ordinary course of business *Nort Ev* 200 But the entries should be made promptly, or at least without such long delay as to impair their credibility. *Php Ev 7th Ed* 330, *Doe v Bray* 8 B & C 813

... of the Indian Evidence Act, the following documents are public documents —(1) documents forming the acts or r... , (ii) of official bodies and ... licial and executive, whether o... Majesty's dominions, or of a ... private documents ... 5 App. ... whole w... that it ... in a corporation book concerning a corporate matter, or something in which all ... ld be public within that sense But it must be ... made by a public officer I understand a ... a document that is made for the purpose of the ... able to refer to it It is meant to be where there is a judicial or ... be the ... ay be ... ; but I ... for the purpose of being ... have access to it afterwards ... any cases entries in the ... entries of that kind, ... are admissible, and they were "public" then, because the common law of England making it an express duty to keep the ... e kept by a public ... I think as far ... o its accuracy, and ... at, in every case ... , it has been made ... , as a register to be ... m public" says *Prof.* ... signify open to all', 'capable of being known or obs... persons in general,

... Ind Cas 125=A I R 1926 ... n cases, be a public record within ... it does not follow that every ... public servant to a superior officer and made in pursuance of orders given by the latter, is admissible evidence to prove such fact *Mallikarjuna* v. *Secretary of State*, 35 M. 21=14 Ind Cas 401.

S. 35. **Other official book, register or record** It is important to observe that whenever it is the duty of a public official, either at common law, or by S... to record certain facts in any book which is ... referred to ever after ...

...ot as a ... rove not only the ... recorded in the ...

... kept by any law ... the station writer, the register not being one directed ... where it neither purports ... The statement of ... *Mohammad* v *Emperor* ... Cr Pro ... and the ... prove tha ... is not a r... the docu... in que... provisions of that secti... N 65 The certificate of ... v *Queen Empress*, 28 C. 348=5 C W ... under this section, for it is neither a book ... is no evidence of the age of the m... any officer in accordance with law ... nor a register, not a record kept ... *Teiskhana* papers prepa... not papers of the de... *Samar Dasadh* v *Jaggu* ... of this section can be ... kept ouside British Ind... *Teiskhana* Register (so called from the number of columns in the statement ... register) prepared by a person who is called a *patwari* and submitted to the C... lector, in accordance with the rules framed by the Board of Revenue under s ... of Reg XII of 1817, is not an official publ... ... v *Sundaram Pillai*, 23 M 499 ... *Makhan*, 18 C 531 ...

... evidence, is admissible in consequence that part may not be admit... *Durga* v *Deo Bahadur*, 22 C W N 439=23 M L T 382=28 C L J 1=... Ind Cas 1 (P C) ... admissible in evidence under this section ...

preted ... as inc... in this section must be take... 28 Bom L R 1225=50 B 716=A I ... of a foreign state. ... servant' has not been defined in this Act. ... 21 of the Indian Penal Code and s 2 (17) of the Code of Civil Proc... of 1908) As regards who are public servants vide 12 B H C R 1 ... 7 B L R 448=16 W R ...

... *Gangaram* v *Fakirgouda*, 51 C L J 592

Register or record A ... in that ... recorded ... it is kep... that it is ... arises (perman... its own), ... the staten... ...saction ... separate ex... ance of ... circumstances that ... the official precincts and the ...

ore not fitted for entry in a single office volume The return differs from the S. artificate in that it is preserved in official custody A further distinction, within s that the former deals with r, while the latter records nt has occurred out of his

s 1637. It must always be a
correspondence which do, and those which do not, fall within the scope of s 35 But where there is a statutory duty laid upon public officers to investigate and report facts, a report of the facts elicited by their investigation is an official record within the meaning of this section *Ramakrishna* v *Tirunarayana*, A. I. R 1932 Mad. 198.

it essential that a register should be n str *7th Ev p 330*, see also *Graham* v *Phan* *Winfield*, 18 Ves 143; *May* v *May*, 2 Str P 552

Nature of the Duty—General Principles Whether a given statement was made under an official duty will depend chiefly upon the nature of the office, the subject of the statement, and the form of its making (1) It is clear that no

they did not occur (7) A statement otherwise admissible is not generally to be excluded where there existed for the declarant a special interest or motive to misrepresent (8) The person having the duty and the person making the statement must on principle be identical *Wigmore* § 1633

B 756

Any other person in performance of a duty, etc An entry in a *Chaukidar's* register of births and deaths was relied upon as proof of the date of the

S. 35. birth of a person The entry was admittedly not made by the *Chaukidar* & there was no evidence that it was made by any other public servant or that it was the duty of any public servant to make it *Held*, that the register was not admissible under s 35 of the Evidence Act *Ganpat* v. *Gauri Sankar*, 190 C 68.

Errors of interest
affect the weight of
App Cas 437, *Falcon* .
They do not also affect
(1907) 2 Ch 592 So also, the fact that the entry is in the interest of the ... or body keeping the register, affects weight only, not admissibility *Irish Soc* ... *Derry*, 12 Cl. & F. 641; *Phip. Ev 7th Ed.* 330, *Sturla* v. *Freccia*, L R. 5 App Cas 623, 628

Wajib ul arz An entry in the *wajib-ul-arz* is admissible in proof of the custom under s 35 and its validity does not depend upon the question wh...
the *wajib-ul-arz*
Hasan v *Abdul*
village admini
the statements
rights and cust
of such rights
and purport to give the history of the devolution in certain families ... When ...
the narrators stand in no better position than any other tradition
are incidents not with ...

safe to accep
4 O W N
have been
is shown by the party alleging it. *Manya* v. *Sitaram*, 23 N L R ... Ind Cas 438 = A I R 1927 Nag 147, *Wasiq Ali* v. *Athar Ali*, 110 Ind Cas ... I R 1928 Oudh 409, *Sartaz Koer* v *Mahadeo Bux*, 29 O C 153 = 92 Ind Cas 657 = A I R 1926 Oudh 332, ... *Singh* v *Rustam Singh* 3 O W ...

or *Riwaj i am* should be supported by instances *Baij Nath* v ...
W N 872 ... An entry in a *wajib-ul-arz* ...

Singh v *Babu Lal*, 21 A L J 822 = L R 4 A 557, *Sher Munawar* ... *Muhammad*, 78 Ind Cas ... What

existed or that
had been made
207 *Wajib-ul*
of 1863 when property ...
much more reliable than oral evidence given after the event ...
Ashgar Ali, 57 I A 29 = 52 C. L J 183 = A I R 1930 P. C 30 = 59 ...
J 156 (P. C.)
... in the village records

...s laid down for his 216 = 13 C. W. N. *Musammat Lali* v ... = 10 C. W. N. 730; 63; *Isri* v *Ganga*, *Maharaja*, 2 A L. ...*arurudhicaja*, 15 A ..., 16 A 10, *Garura-* ... W. N 33 = 23 A 37; *Ali Nasir* v. *Manick Chand*, 25 A. 90.

Riwaj i am. An entry in a ... *facie proof of the custom* *Lalh* ... 924 = A I R 1927 Lah 241, *Ghu*... *Riwaj i-am* being a public reco... of his duties, is admissible in evidence to prove the facts therein entered and the ...

Lah. 99 = 1923 Lah 401

...it fact ... *rana* ... 6 Ind ... *siwam* ...

... a judgment, therefore, an ... to a relevant ... the judgment ... In support ...*urno Chunder*, 15 M 378 and ... For the respondents it is contended that the relevancy of judgments is governed by sections 40 to 43 of the Evidence Act and that a judgment not *inter partes* is not evidence ...

issue or relevant fact, even though the judgment may be between persons who ...

...ds" Then after dissenting from the *Parbutty Dassi* v *Purno Chunder Singh* ... *Mahpal Singh*, 5 C 744 = 6 C L R 593, ...ectness of this decision (i e *Parbutty* ...oubted in *Sundar Das* v *Fatimul ul nissa* ...

Appavu, 12 M 9 ... a judgment not *inter* ... a fact in issue or ...

S. 35.

ition between the parties." Ind. Cas 298='0 C W N Ind Cas 583=43 C 707=
20 C W N 802=11 A L. J 121=18 Bom L R 490=21 C L J. 116, see also *Asa Singh* v *Uansa Ram*, 621 Ind Cas 509=A I R 1930 Lah 237 On a consideration of the authorities and the provisions of the Evidence Act it is clear

L. R 763

relevant under s 35, Indian Evidence Act. *Gehimul* v. *Kurmumal*, 10 S L R 38=25 Ind Cas 551

book death to be accepted as conclusive of the dates of the death recorded *Rangappa* v *Ranga Swami* A I R 1925 M W N 232=88 Ind. Cas 249=A. I. R. 19 Mad 1005 The register of deaths maintained under para 367 of the Police

Reddi v *Kotaiyya*, 33 M L J
III of 1899, the Registers of Births and
e Board of Revenue since the year 1865 do
come under this section *Ibid* Entry in death register may be rejected when used to prove or disprove death on a particular day, if register is prepared in casual way. *Kali* v *Sashi*, A I R. 1930 Cal Death Registers are evidence of the
of

ved
tribunal *Phip Ev* 7th Ed. 332.

of a partition which affected the public revenue is admissible in
l purpose only. *Abdul Hamid* v
Khasra is not a record
herein in the name of a tenant in
35 of the Evidence Act, but
ory of the plot in question before
bua, A I R. 1923 P. 163.

weight cannot be attached to a partition paper in the absence of detailed inform- S.

35 of the Evidence Act *Soshi Bhoosan* v *Girish Chunder*, 20 C. 940; see also *Ramsarup* v. *Ramnaram*, A. I R 1929 Pat. 32. A *batuara chitta* is not admissible in evidence under s. 35 of the Evidence Act. *Isuar Chandra* v. *Taranath*, 1 Ind. Cas. 307. Entries in *batuara khasra* papers are admissible in evidence, but it is for the Court to decide in each particular case whether the

made in a proceeding under Reg. XIX of 1831 between predecessors of the parties to a suit are good and admissible evidence, quite apart from anything contained in section 35 of the Evidence Act. *Khetra Nath* v. *Mahomed*, 23 C. W. N. 48 = 45 Ind. Cas. 921.

Entry in a certified copy. Under this section an entry made on a certified copy indicating the date on which it was completed is certainly relevant But when an enquiry as to correctness of such an entry has been started or its

report *Nizam Din* v *Mahomed Iqbal*, 108 Ind. Cas 619 = A. I R 1928 Lah. 643.

Ghori v. *Ajudhia*, 14 R. D 444

Satish Chandra Mukho- ficate of guardianship was be a record kept by a

Court of a District

S. 35.

erein So in the province of
strict Judge to a guardian
made by a public servant in
in such record is there for
meer Hasan v Ejaz Husain
A I R 1929 Oudh 135; see Mehdi Ali v. Walayat Hasain, 5 Luck. 605 7 O W N 25 = 121 Ind Cas 277 = A I R 1930 Oudh 97

duty
to titl
ship c
of his official duty and the same was recorded It was held that the statement was admissible in evidence on the question of relationship under this section
Lal Harihar Pratap v Bishesu
Ind Cas 422 = A I. R 1928 (
by the surveyor who recorded
Ba Htue 5 Bur L J 116 = 98 Ind Cas 166 = A I R 1926 Rang 204;

entries in a prescription register maintained by a Government
in a Government although the particular
compounder or c
witness. D Cruz
Oudh 310 Altl
final or sole test published at the

Bidya Prasad v Surkhur, 134 Ind Cas 638 = A I. R 1931 Pat 263.
of Chari ssistant Collector is admissible Gan A report in police diary is admissib witness. Abheraj v Ga
Singh, A I R. 1932 Oudh 137

Where the subdivisional officer directed an enquiry by a Kanungo of the circle into the matter of the complaint by virtue of s 202 (1) of Cr Pro Code was admissible

the actual state
for that purpose
being an offici
comes under section 35 of the Evidence Act, and is admissible without formal proof Mohan Singh v Emperor, L R 6 A 49 Cr = 85 Ind Cas 647 = 26 Cr L J 551 = A I R 1925 All 413 The contents of the report may be used as a corroborative piece of evidence to show that the implication of the accused in the offence is not an after thought. It cannot certainly be used as a substantive piece of evidence Mohan Singh v Emperor, supra

An *Inam Register* embodies the conclusions of the *Inam* Commissioner on **S. 35**

3 Ind Cas 616 = 48 M L J .

Protap Chandra Deo v *Jagadish Chandra*, A. I R 1925 Cal 116. Entries in the *Siyaha* are made by the *Patwari* in the ordinary course of business and are

4 M. L J 182 = 72 Ind Cas 214. Extracts from Revenue Registers Nos 1 and

Surendra Nath, (1919) Pat 465 = 53 Ind Cas 20

A recital in a public record as to a statement made by a public servant with reference to a particular statement of the grant by the Government may be admitted, under section 35 of the Evidence Act as proving that the public servant made the statement that he is to have made, if the fact that he made such a statement is a relevant fact. *Sankaracharya* v *Manali Saravana Mudaliar*, 51 Ind C 876

Revenue Records are not evidence of title for they are kept for fiscal purposes and it is not part of the duty of the Revenue Officer to record title But

under the Land Acquisition Act *Secretary* v *Satish*, 58 C 828 = 35 C W 173 P C

Though survey entries in survey records may not be sufficient evidence to prove that certain land is *poramboke* they are good evidence where the only question is as to the extent of *poramboke* land *Kalayal* v *Secretary of State*, 2 L W 413 = 29 Ind Cas 154

Officer that the name of this or that person was entered as the occupant of certain lands could be admissible if relevant, but it would not be admissible

S. 36.

36. Statements of facts in issue or relevant facts made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts

Relevancy of statements in maps, charts and plans.

Principle This section ... charts generally offered f... authority of Government

are in favour of any inaccuracy being challenged and open to the criticism of all, the prob... (7th Ed) The person or persons who prepared the map in question, ... unavailable, both the principle of Necessity and the principle of the Guar... of Trustworthiness are satisfied Hence ...

ment surveyor ... rized to do; an

... to make return of his ... official surveys, and his returns are the... admissible *Wigmore* § 1665

Scope of the section ... charts offered for public sale ... country, etc, and as regards ... the section refers not ... fields *Whiteh... Stat* ... also boundaries of villages estates and (in *Khasra* ...

... *Castro*, alias *Orton*, L R 9 Q B 350, 12 Cox C C 454, ... B D 406, 14 Cox C C 436, 6 App Cas 229, 14 Cox C C 546 Under ... rule excluding declarations ... are admissible in Engla... Car & P 481, *Bridg*... L R 5 Ch D 709

a map is prepared, must be an authority given by statute *Gahjoo La...* *Jagat Pal*, 11 C W N 230=9 C L J. 415 But there must be judicial ... quasi judicial duty to enquire by a public officer *Sturla* v *Freccia*, 5 App ... 623, *Irish Society* v *Derry*, 12 C & F 64.

Survey ...

... Nevertheless, the principle was sufficiently recognized at common law ... *Evans* v *Taylor*, 7 A & A 617; *Wigmore* § 1665 These maps were also ... because they were findings by ...

it raises a reasonable presumption of title. Revenue Survey maps are not conclusive and may be shown to be wrong *Ramnandan* v *Jaigobind*, 2 Pat. 839. *Thak* and survey maps are not conclusive as to whether lands which formed part of the bed of the river were included in the permanent settlement of 1793. It is not permissible for a Court to act on the assumption that in 1793 a state of things existed different from what appeared from any evidence before the Court. *Secretary of State for India* v *Upendra Narain*, 71 Ind. Cas. 819 = A. I. R. 1923 Cal. 217 = 36 C. L J. 336. Maps and surveys made for revenue purposes are official documents prepared by competent person with due publicity and after notice to ... ...issible as ... They are ... h weight. ...

As a rule *exparte* statements in survey maps should be created on the same basis as books ... corroboration of ... distant times, ... available their value assumes greater proportions, and if they indicate a state of ... hey may be ... rd and fast ... this nature ... 28 Pat. 281 ... not direct ... the survey was made. In each case the Court has got to decide whether the evidence of possession is sufficient to raise a reasonable presumption of title. A survey map is an official document prepared by competent persons interested and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were made" *Debendra* v. *Surendra*, 31 C. W. N 419 = 102 Ind Cas 370 = 45 C. L J. 474 = A. I R. 1927 Cal. 347; see also *Musst Bibi* v. *Deo Nandan*, 5 Pat. L J. 681 = 2 Pat L. T. 81 = 59 Ind. Cas 298

Where the parties consent to be bound to regard the boundary lines as laid by the su... correctnes... *Kistwari*... between th... but evide... *Abdul*, 3 P... favour of the accuracy of *thak* and survey maps and it is for the party who ...

Ind Cas 182 There is no gener... on the *thak* or survey map must be presumed to have been in existence at the time of the permanent settlement The question is essentially one of fact and must be determined on the facts and circumstances of each case *Profulla Nath* ...

...ntrary ... made. ... maps ... but it ... at the time of the permanent settlement. *Ananda Hari* v *Secretary of State*, 3 C L J. 316, *Mirza Shamsher* v *Kunj Behari*, 7 C L J 414 Unless it can be proved that the person against whom a *thak* or survey map is attempted to be used

S. 36. expressly consented to the delineation or admitted the correctness of such maps they have no binding effect *Kristomoni* v *Secretary of State*, 3 C W N 53 ... *thak* map is admissible as evidence ...

... But a ... sufficient to prove ... v *Gobind*, 9 C ... *Watson & Co*, 27 ... sought to be set ... an Amin's report ... v *Bisseshur*, 5 W. R 34 If there has been a Government survey, the survey map must be taken as evidence. *Radha Choudhrain* v *Gudharee*, 20 W. R ... 25 W. R 153; *Guddadhur* v *Tar* ...

v. *Fakrunissa*, 15 Ind Cas. 159.

Thakbust map. ... sketches, in ... magnetic be ... made from c ... *Bhusan Bane* ... thak authori ... to title or pos ... can legitimately be drawn from thak map *Debendra La* v. *Secretary of State* 31 C ...

... and is in possession ... the *zemindari* papers ... value of such a map is ...

... was jungle ... discoverable from a mere inspection ... nor their agents have by their signatures, admitted the correctness of the ... *Joytara* v *Mohomed* ...

... picked up and verified the thak marks indicated ... in the *thakbust* map, prepared the revenue map by accurate observations made by, expert surveyors with scientific instruments *Keshabjee* v *Sashi bhusan* 90 Ind Cas. 1027 = A I R. 1926 P 385 As the object of a *thakbust* survey and map is to ascertain and delineate the boundaries of the estates borne on the Revenue roll of the District, the entry in a thak map that certain lands formed part of an estate become a relevant fact under this section and such entries are evidence on which a Court may act. *Abdul Hamid* v *Kiran Chandra*, 71 W N 849

Entries in a . . . . . . 1 Court of fact to hold that disputed . . . . . . it the time of the Permanent Settlem . . . it the boundary . . . . . . *Ramnandan* v. . . . . y that the state . . . survey maps existed at the time of the . . . . *State* v. *Wazed*, 31 C L J. 111 A . . . . . fmin in connection with the measurement . . . . is a rough register, statements entered in . . . affected thereby had notic . . .

23 C. 552.

In case of dispute between Thak and . . . revenue survey map which was carefully and officers and the *thakbust* map do not agree, . . . pillars, put down on the ground . . . xistence; and they correspond with . . . the field book and the materials . . . ish sufficient data The revenue . . . e signature of the revenue surveyor on the thak map does not mean that if the thak map is reduced to the same scale as the revenue survey map, then the two boundaries will necessarily agree but merely that the surveyor has satisfied himself that the boundary accepted and intended by the demarcation staff has been correctly picked up on the ground, . . . an v *Ramjas*, 3 Pat 85 . . . Cas 1027= A I R . . . jah *Mahendra Ranjan*, 4 . . . rule that a . . .

. . . the *thak* and the survey . . . clearly agrees with the . . . There is no general or . . . llow either the one or the other, the Court may, if it considers the *thak* map more reliable, follow that in preference to the survey map *Abid Hossein* v *Doucourry Pal*, 6 C. W. N 629

. . . held that a Topographical survey map of 1869 in which the boundary line between the two *perganahs* was given, was admissible in evidence under section 36 of the Evidence Act When *pergannah* boundaries are found entered in such . . .

S. 36 valuable eviden
conclusive and
contrary, they
made. In cases o
to possession is
boundary line on
absence of better evidence, the lower Appellate Court erred in law in not accepting a Topographical survey map as evidence of possession at the time the map was made. *Gajhoo Damor* v. *Kotwar Jagatpal*, 11 C. W. N 230=9 C. L. J. 415.

45 M. L J 444=50 C. 446=50 I. A 121=(1923) M. W. N 511 The map ... rd is the settlement map and the entr... in a different notation and therefore the ... map, nor is it an independent piece of evidence *Laharam* v *Gurmukh Rao*, 99 Ind. Cas. 628=A I R 1927 N. 204 Maps prepared under the Calcutta Survey Act have great evidentiary value as regards question of title *Debendra* v. *Surendra*, 31 C W N 419=102 Ind Cas. 370=45 C. L. J. 474=A I R 1927 Cal 345 A site plan prepared for ... of

Warden of the Cinque Part was excluded and this decision was ... appeal in *Mercer* v *Denn*, (1905) 2 Ch. 538, 555 A map prepared by a Commissioner entrusted with local inspection is only evidence in the case in which he was entrusted with such inspection. *Dinabandhu* v *Aslarun*, 12 C L R 50

Under sections 36 and 83 a map prepared by a Deputy Collector particularly for the settlement of land forming the settled bed of a river is not admissible ... *Kanto Prosad* v *Jagat Chandra*, 23 C 335 A map prepared for one purpose ... *eonath Mozumdar* v *Durga Tarini* 11 C. ... maps and plans were prepared by the ... not for a private purpose, such maps and plans are relevant facts under section 36 of the Evidence Act *Rahimatulla* v *Secretary of State*, 112 P ... =18 Ind Cas. ...
Though a Rennell Survey ...
is valuable evidence on
not conclusive of its non e
N. 1113; see also *Secretary of State* v ... *Haradas Acharya* v *The Secretary of State*, 26 C L J, 590 A map pr... a *kanungo*, is not relevant under this section. *Tarini Sarkar* v *Fakram ...*

maps and *chittas* are g...
Maps and plans prepared
under this section. *Rahim*
Cas 799.

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor General of India in Council, or of "any other legislative authority in British India constituted for the time being under the Indian Councils Act, 1861, the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909,"* or in a notification of the Government appearing in the Gazette of India, or in the Gazette of any Local Government, or in any printed paper purporting to be the London Gazette or the Government Gazette of any colony or possession of the Queen, is a relevant fact.†

Relevancy of statement as to fact of public nature contained in certain Acts or notifications.

S.

Legislative recitals—Principle The general grounds of reception are (1)

sometimes advanced (*vide R* v. *Sutton*, 4 M & S 532, 549)—cannot otherwise suffice to give it any weight as evidence in controversy) But, next, it is clear

he authority to inform itself

was in fact the distinction

of a statement in the recit

* Substituted by Act X of 1914, Sch 1

† The last paragraph added by s 2 of the Indian Evidence Act, 1899 (5 of 1899), was repealed by the Schedule II of Act X of 1914

S. 37. *Phillips* in *R* v *Suton*, 4 M & S 532, 539 These considerations indicate it as the wiser course to reject ordinarily such recitals as evidence Should it be made to appear that the recitals offered
unknown basis but are n
means of information h
for their admission as official statements made with due authority and up
adequ
of th
532 (
and
and v
seem
forth by the learned Judge is not sufficient to meet the objection raised by Wigmore, neither
by *Prof Wigmor*
laws to operate on
accrued or vested u
ought in such a
intended that is an apology for the passage of the act and the reason why Legislature so acted Such a preamble is evidence that the facts were represented to the Legislature, and not that they are really so' *Elmo dr* v *Carmichal*, 3 Litt 472, 480 So the better opinion seems to be that the Legislature has no jurisdiction to determine facts touching the rights of individuals.' *Parmalee* v *Thompson*, 7 Hill N Y 77 (80)

Recital co
of a statute is t
made by autho
spiritual and
truth ' *Cole v*
sible *Leister*
But in England recital in a Private Act was not admitted *Gardner* v Le Merchant's Rep 276 *Bret* v *Beales* 1 M & M 416 421 But this distinction is apparently not only without principle to support it but is also ill adapted to in [illegible]

of those outrages to support the averments to that effect in an information libel on the Government in relation to them *R.* v *Sutton*, 4 M & S 53 so a recital of a state of war, in the preamble of a public Statute is good evidence

Khn, 17 How St Tr 63
ence of the action of that House upon
vp 17 *Root* v *King* 7 Cowen 613
E S 191 This section makes no di

is as much relevant as the same
England recitals in Private
between the persons in whose behalf they are enacted 21 Beav 619 *Beaufort* v *Smith* 4 Ex 450, *Cowell* v *Chambers*, 21 Beav against the stran *Colchestera* 36 L J C P 20 They are not however evidence against
to the act *Elmondroff* v

admissible to prove the qu
and speeches of members, these publications not having the authority of
mentary Journals (*McCarthy* v *Kennedy* Times March 4, 1905, per D of 1855
cited in *Phip Ev 7th Ed* p 325) Section 9 of the repealed Act II of 1855

S. 3

follows: "Any r...
ndia in Council, ...
reinafter to be pa...
l such Courts an...
cited" This has been incorporated in this section.

... though ... nclusive ... rely as ... ot as determinations of controverted ... be made evidentially conclusive ... 1352; see also *Harrat* v. *Wise*, 9 B C. 712; *R.* v *Greene*, 6 A. & E 518; *R* v *Franklin*, 17 How St Tr 636; *Att. Gen* v. *Bradlaugh*, 14 Q B D 667 So a legislative declaration of fact that are material only as the ground for enacting a rule of law—for instance, that the use is public one may not be held conclusive by the Courts; but a declaration by a Legislature concerning public conditions that by necessity and ... *ock* v *Heigh*, 256 U ... se, the recital may ... *Wigmore* § 1352

...

rinciple admissible The executive cannot be supposed to need express authority

...

Canada).

Government Gazette The Government Gazette is admissible and sufficient evidence of such acts of the executive or of the Government, as are usually ... inations and the ... , 8 Price 89 For, ... the publisher to ...

... nature proof of the publication under due authority *Goodeve Ev* 307 The Government *Gazette* is also evidence of various Acts of state at common law *R.* v. *Holt*, 5 T R 436, *A G* v *Theal stone*, 8 Price, 89, *Taylor* § 1662; *Phip.*

S. 38 *Ev. 4th Ed.* 711. The appointment of an officer may be proved by the government *Gazette*. *R.* v. *Gardner*, 2 . .
2 Mod. & R. 363, where the . .
division of a parish. The Gov
of sale, and a printed paper
in the *Gazette*, and issued from t
were admitted in evidence to
Jatindra v *Brajo*, W. R. (8864) 5..
conclusive even where such knowledge is presumed from the publication of a fact in the Government *Gazette* *Harret* v. *Wise*, 9 B. & C. 712.

Gazette of India Previous to 1863, the Government of India had no exclusive organ of its own; its notifications, orders, etc, being published in any of the Local Gazettes of the Local Governments as was necessary. In that
as the Gazette of the Government
1863 was passed to give to publication
ablication in any other Gazette in which
publication was prescribed by the law then in force. Vide s. 1 of Act XXXI of 1863; *Field's Ev* 7th Ed 152

document constantly used and referred to, are to be assumed genuine
principles, however, are in fact usually involved, first, the admissibility of a
proved to be printed by official authority, as hearsay evidence of the contents
of the original and secondly the presumption of genuineness of a particular
two que
nction of
nction of
t, to prove
ng to be
The Judge
ent,
proof of its being bought of the Gazette printer, or where it came form. Wigmore
§ 2151 Section 81 of the Indian Evidence Act enacts: "The Court shall
presume

known or observed by all and in which persons in general have
well as which is done by an officer of the Government, executive, legislative
or judicial.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

Relevancy of statements as to any law contained in law books.

S. 3

Principle. There is no reason why an officer may not be authorized to give printed copies as well as to give written copies; nor has there been any doubt that such authorized copies are admissible Yet it cannot be said that such an

had their source, not so much in a doubt of any of these principles, as in the

the copy rather than the authority to furnish it that the dificulties have arisen. *Wigmore* § 1681 "Not that the printed Statutes are perfect and authentic copies of records themselves, but every person is supposed to know the law, and therefore the printed Statutes are allowed to be evidence because they are the prints of what is supposed to be lodged in every man's mind already *Buller J Trials at Nisi Prias,* 225 The reason of their reception is thus stated by *Duncan J.* . . uthentic
publication danger
of mistake a Statute
King's
for by
t affords to all parties, and
en the States The rule, too,
nger of abuse, and error or
rry, 28 N H
provides that
be printed

law authorized reports of foreign countries would be admissible to show the
ports of the domestic Government as well
ld not be admissible. Taking every thing
seems, to extend the meaning of the section
of India, Great Britain and other foreign
countries.

Mich 196

. 38. by an expert witness (Title 45 ... copy? It is usually said that ... case a copy must be used But the ...
that the state of
Statute, but o

l ... copy of it. This argument has much force but rarely prevailed, except that
Statute already proven by copy
Cowp 161, 174; *Picton's Trial* ...
178, *Alivan v. Furnival*, 1 C M. & R 291; *Millore v. Heinrich*, 4 Camp 1...
Baron de Bode's Case, 8 Q. B 250; *Cocks v Purday*, 2 C & K 270, *Nelson* ... *Bradfort*, 8 Beav. 539, *Sussex Peerage Case*, 11 Cl & F 115; *Bremer v Freem.* ... 10 Moore P C. 362, *Greenl Ev* § 488. The particular question is whether ... evidence of a foreign "written law" should be presented in the shape of a c... or merely by recollection testimony of one qualified to know it *Wigmore* § 12... In *Baron de Bode's Case*, 8 Q B 250, *Patterson J* said: 'I quite agree that witness conversant with the law of a foreign country may be asked what in ... opinion the law of that country is But I cannot help thinking that as so... as it appears that he ...

I ... why the rule should not be the same in the case of a foreign writ... law I think the rule would be just the same if the question related to ... French Code as existing at this moment. If a witness were asked what the l... now is with respect to a bill of exchange in France, and were immediately cro... examined as to whether that law was not in writing, and answered that it wa... I think a copy of the law must be produced.' So also *Justice Story* sta... "Generally speaking authenticated copies of the written laws, or other publ... instruments of a foreign Governm...
not to be presumed th
authenticated, which
justice in foreign coun
foreign Government
on Conflict of Laws § 640.

According to this section evidence of foreign statute law can be given ... the authorised copy of the Statute of the foreign government But section ... of the Act says that it can be proved as well by the opinions of persons special... skilled in such law Now the
proving a foreign statute, or
different circumstances The
"But the answer to this is clear
purely and simply directed to the contents of a specific Statute, the proof ... be by copy of its terms But in the usual case this is not the question. The inquiry is as to the state of law at the present time or at a given time past ... inquiry ...

... ter accuracy, would ... se other material elements" ... JJ in *Baron de Bode's Case* ... *Sussex Peerage Case*, 11 Cl. & F. 115; *Cocks v. Purday*, 2 C. & K. 270, *vide* notes under s 45 But in some cases a copy was required. ... *Harford v Morris*, 2 Hagg Cons 430, *Boenllinck v Schneider*, 3 Esp ... *Cl*... v *Levy*, 3 Camp. 166; *Miller v. Heinrich*, 1 Camp 155; *Alves v Hodgson*, 7 T R ...

S. :

The books are produced, but the witness, describes them as authoritative Proof. of the law itself, in a case of foreign law, could not be taken from the book of the law, but from witness who described the law If the witness says. 'I know the law and this book truly states the law,' then you have the authority of the witness

Majesty's Dominions to ascertain the law of that part. *Phip Ev 4th Ed. 359*; *Lord* v *Colvin*, 1 D & S 24; *Login* v *Princess* of *Coorg*, 30 Beav, 632=1 Jour. O. S 109. So also by Stat 24 & 25 Vict Ch 11, a similar case may be stated for the opinion of a Court in any foreign state with which His Majesty may have entered into a convention for ascertainment of such law *Phip Ev.* 4th Ed 359 An unauthorized translation of the Code Napoleon is not a work to which reference can be made under this section *Christian* v. *Delanncy*, 26 C 931= 3 C W. N. 611 Under this section the Ceylon Insolvency Ordinances might be looked at to decide the question of the defendant's liability *Devanayagam* v. *Muthu Kumar Swamy*, 14 Ind Cas 560

admits authorized as well as unauthorized Law Reports when the latter is recog-
or shall
ded by
report

always been done and ought to be done A judgment is none the less an authority because it has not been reported, otherwise the question of whether or not a judgment could or could not be regarded, would depend upon the mere whim of the Reporter I therefore respectfully dissent from the view on this point expressed in the case reported in 4 C W N 732" *Brett* and *Banerjee JJ.* concurred with him; see also *Trustees, P. D.* v. *Venkata Chalam*, 92 Ind. Cas.

S. 39. 710 An unauthorised report of a High Court case is entitled to respect. L J 153=A I. R 1925 Nag 414 Unauthorized reports are on the s footing as an unreported case 24 O. C. 319.

HOW MUCH OF A STATEMENT IS TO BE PROVEI

39. When any statement of which evidence is given form part of a longer statement, or of a conversation or part of an isolated document, or i contained in a document which forms par of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made

What evidence is to be given when statement, forms part of a conversation, document book or series of letters or papers

Principle ... ing of an uttera ... word in another p ... clause is modified by a prior or subsequent clause; one sentence qualifies another; and one paragraph may form only a part of the whole exposition We must compare the whole, not because we desire the remainder for its own sake, but because without it we cannot be sure that we have the true sense and ... f parts is thus as ... he in tru ting ... emainder was." ... a portion only

... ent or subsequent words or ... the thing produced, and give ... Buller, J, Trials in N. P. ... 298 ...

... or criminal ... statement ... taken together; for thus alone can the whole of what the person making the statem ...

How St Tr 257 ... ce against him can ... In *Algernon Sidney's* ... arguing passages piecemeal said "My l ... you will make all the penmen of sc. ... *David* of saying' there is no G ... ngelists of saying, ... was a ... t they were drunk." ... *L C J* ... part of it that explains the sens ... e trifled with a little. It is ... you must not take that alone, ... is heart, There is no God' Now here ... call for it" This rule ... you can say there is any part that is in the admission of an opponent and to conversations in general, including in impeachment. Where a series of letters in a correspondence, or of entries in an account-book are involved, it is sometimes difficult to draw the line between

those which are in effect part of the same statement and those which are not S
(*Call* v. *Howard*, 3 Stark. 6; *Sturge* v. *Buchanan*, 10 A & E 59; *Roe* v *Day*, 7 C & P. 705) But it seems that so far as the letter or oral statement put in as an admission was written or made in reply, or contains within it a reference to a

under section 33 *Prince* v *Samo*, 7 A & E 627

Abbot C J in *the Queen's Case*, 2 B & B 297, observed. "The conversations of a party to the suit, relative to the subject matter of the suit, are in themselves evidence against him in the suit, and if a counsel chooses to ask a witness as to anything which might have been said by an adverse party, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation—not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relates to the subject-matter of the suit because it would not be just to take part of a conversation as evidence against a party without giving to the party what he said on the same heory at least, be defended E 627 *Denman L C J* "We cannot assent to it. We will merely observe that it was not introduced as an answer to any question proposed by the House of Lords, and may therefore be strictly regarded as extra judicial, that it was not necessary as a reason for the answer to the question that was proposed, that it was not in terms adopted by *Lord Eldon* or any of the other Judges who concurred, that it was expressly denied by *Lords Redesdale* and *Wynford*, and that it does not rest on any previous authority" The Indian Legislature has wisely left to the discretion

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is concerned, they are still governed by the provisions of section 27 which must be construed as favourably to the accused as possible for it is a section which makes an , namely sections 25 A I R 1929 Lah ting in a confession in respect of which the bar created by ss 24, 25 and 26 Evidence Act, has not been removed by s 27 *Sakhan* v *Emperor* A I R 1929 Lah 341 Because a document is admissible

first, whether the party

other parts, of the conversation, document, whose statement it is, may afterwards, by remainder, or other parts, or other statements

Tr. N S. 785) or a lost writing *Hardy's Trial*, 24 How St. Tr 681 As to a

in Bankruptcy Such judgments
her parties or strangers Such
bind only parties ... as between persons not so affect... Judgments in personam are all
Co Lit 271
donor or do
ancestor and
... ...chers; (3) *In law* (or representation) as testator and executor, intestate or administrator, tenant and lord ...
successive incumbents The s
parties, viz, that a party cl
manner as the original party
of their legal effect, as distin
(*Cockle Cas* 14)

The distinction between judgments in *rem* and judgments in *personam* was thus laid down by *Blackburn J* in *Castrique* v. *Imrie*, L R 4 H L pp 4?–
429 'Some points are clear Where a tribunal, no matter whether in En...
or a foreign country has to ...

judgment
country
rights of tl
exercise of that jurisdiction ... on the disposition of the thing, and does in the
of any particular party in it, be sold or transferred, the case is very
different Whatever it settles as to the right or title, or whatever disposition it
makes of the property by sale reven...
valid in

... has also been defined as a judgment by a Court having
special jurisdiction over the subject-matter (*M Dannel* v *Alcorn*, [1894] 1 Ir R
274, 278); such judgments operate ... (*Needham* v
Bremner ...

... of two reasons—first on account of the solemn ...
publicity attending such judgments; secondly, on account of the princip...

S.

Interest reipublicae ut sit finis litium (It concerns the state that there should be an end to all law suits) Hence the maxim, *transit in rem judicatum* The

gment and also

principle is that

solemn character, must be presumed to be faithfully recorded), but that it
between the
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Alijan,
ist 361;

relevancy of
74) F B But
the judgment

parties, except where the judgment is clearly *res judicata* A judgment other than a judgment referred to in ss 40 to 42 may be admissible to prove that a right was asserted or denied under s 13 of the Evidence Act or to explain or introduce facts in issues or to explain the history of the case *Purnima* v *Nand*, 12 Pat L. T 582=A I R 1932 Pat 105 The law of evidence does not make a

one suit
t *Tulsi*
applies
should
not do so because that matter has been decided before *Lakshman* v. *Ramdas*, A I R 1929 Cal 374 (F B)

Judgment, meaning of The word judgment in sections 40—44 means any final judgment, order or decree of any Court *Step, Dig Ev* art 32

Scope of the section This section deals with judgment *in personam* and
is v *Bapu Kaihor*, 10 B 439,
anji v *Dipa*, 3 B p 3), it is plain

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ge,
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also

S. 40. 2 of Act VIII of 1859 was to be construed as including a material issue, and we think that, similarly, the terms 'taking cognizance of a suit' may be construed as including a material issue in the suit between the same parties; in other words, that section 40 was intended to include cases in which the general law relating to *res judicata inter partes* as then understood applied" This section provides that the existence of a judgment, decree, or order is a relevant fact, if by law it has the effect of preventing any Court from taking cognizance of a suit or of holding a trial *Per Mitter J* in *Gujju Lal* v. *Fatch Lal*, 6 C 171 (176) In the same case *Garth C J* at p 190 said "It is true that s 40, might

Khoti Act, conclusive and final evidence of the liability thereby ... and the Civil Court cannot look behind the entry And, under the circumstances mentioned above, the evidence of a decision otherwise relevant under s 40 of the ... a date of the survey entry ... that the

have been shown to the surv... the record is the entry *Ram* ... *Balbin*, 21 B 235, *Gopal* v *Dasarathi* 21 B 244; *Gopal* v *Mogesnuar*, ... *Antaji* v *Madhab*, 21 B 480 Where a subsisting judgment, order or decree, relevant under this section is set up by one party as a bar to the claim of the ... Court

judicata or otherwise under some other rule ... This section ... because do with question of evidence beyond the adm... a plea of *res judicata* is not a plea as ... barring the ... parties ... refers ...

to a point in issue *Udamauthal* v *Parameswara*, 85 Ind Cas ... 460 = A I R 1925 Mad 1019

Principle The doctrine of estoppel is a fundamental doctrine of all Courts that there must be an end of litigation *Re May*, (1885) 28 Ch D 516 (C A) Judgments being public transaction of a solemn nature are presumed to be faithfully recorded Every judgment is therefore, conclusive evidence for or against all persons of its own existence, date and legal effect as distinguished from the accuracy of the decision rendered *Phip Ev* 7th Ed. 392.

Foreign Judgment A party who has submitted to the jurisdiction of a foreign Court is bound by its judgment, when such judgment is within jurisdiction and does not offend the principles of natural justice. Irregularities which do not affect the jurisdiction of the Court do not vitiate such judgment

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(a) where it has not been pronounc ... b)
where it has not been given on the merits of the case; (c) where it appears on
incorrect view of international
India in cases in which such law
...ich the judgment was obtained
are opposed to natural justice, (e) where it has been obtained by fraud; (f)
where it sustains a claim founded on a breach of any law in force in British
India."

So a foreign judgment operates as *res judicata* except in the six cases specified in section 13 of the Civil Procedure Code of 1908 *Bababhai* v *Narharbhai*, 13 B 224 "Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained It is in this way that the judgments of foreign and colonial Courts are supported and enforced" *Per Parke B* in *Williams* v *Jones*, 13 M & W. 633, *Russel* v *Smith*, 9 M & W 819, *Goddard* v *Gray*, L R 6 Q B 139

So where the subject matter is a *res* so situated as to be within the lawful control of the state under the authority of which a Court sits and that authority has conferred on the Court jurisdiction to decide as to the disposition of the thing and the Court has acted within that jurisdiction, that decision is conclusive,

they are final and unalterable by the Court pronouncing them *Duchess of Kingstons' Case*, 2 Sm L C 731, *Ricardo* v *Garcias*, 12 Cl. & F 368; *Nouvion* v. *Freeman*, 15 App Cas 1

Previous Judgment to bar a second suit A judgment which is not a judgment *in rem*, is not admissible in evidence against those who are neither parties to it nor derive title through such parties, as proof of the facts determined therein. *Kesho Prosad* v *Kashinath*, A I R 1926 Pat 577=97 Ind Cas 282 Under *section 40, the existence of a decree is a relevant fact when the question* is whether in
or to hold th

would also conclude the trial of the question as to what the rate of rent at the date of that suit was if the decree showed that that question was heard and finally decided in that suit *Ibid* 'It is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision If the decision was wrong it ought to have been appealed against" *Per Lord Macnaghten* in *Badar Bee* v *Habib Merican*, (1909) A C at p 623, see also *Huntley* v *Gaskell*, (1905) 2 Ch 656; *Mangma* v *Wright*, (1909) 2 K B, 958, *Humphries* v *Humphries*, (1910) 1 K B 796

Res judicata by general principles of law Where a matter has been

S. 40. 2 of Act VIII of 1859 was to be construed as including a material issue, and we think that, similarly, the terms 'taking cognizance of a suit' may be construed as including a material issue in the suit between the same parties; in other words, that section 40 was intended to include cases in which the general law relating to *res judicata inter partes* as then understood applied" This section provides that the existence of a judgment, decree, or order is a relevant fact if by law it has the effect of preventing any Court from taking cognizance of a suit or of holding a trial *Per Mitter J* in *Gujju Lal* v. *Fatch Lal*, 6 C 11 (176) In the same case *Garth C J* at p 190 said "It is true that s 40, m... have be ... VIII of ... *Dayee* v ... was in ... whether civil or criminal, from taking cognizance of a suit or trying any particular issue The words 'holding a trial' are amply large enough to admit of this construction, and it is not because in some other Act the words 'holding a trial', may have been construed to refer to criminal trials only, and we ought to confine their meaning in the same way in s 40 of the Evidence Act" See also the judgment of *Mitter J* in page 176 A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, ... *Expaite Official Receiver*, (1896) 1 Q B. ... st and second actions are different, the ... irectly (not collaterally or incidentally) in ... a second action between the same parties. *Prietman* v *Thomas*, 9 P. D 210 C A; *Halsbury* Vol XIII p 33 An entry in a record prepared under s 108 of the Bombay Revenue Code, by the Survey ... the Bombay ...

Khots have never received tha... conclusive effect of the entry ... have been shown to the surv... the record is the entry *Ram* ... *Balbin*, 21 B 235, *Gopal* v ... *Antaji* v *Madhab*, 21 B 480 Where a subsisting judgment, order or ... relevant under this section is set up by one party as a bar to the claim of the other, the latter can show that the judgment, order etc, was delivered by a Court without jurisdiction or was obtained by fraud or collusion, and it is not necessary ... *Bansi Lal* v *Dey* ... admissible judgments ... own as plea of *res* ... ection has nothing to ... judgments because a plea of *res judicata* is not a plea as a matter of evidence, but only a pl... barring the actio... as a ... atte... of ... from the rules of evid... also *Sita* ... contain ... to a poir ... 460 = A I R 1925 Mad 1019

Principle The doctrine of estoppel is a fundamental doctrine of all Courts that there must be an end of litigation. *Re May*, (1885) 28 Ch D 516 (C A). Judgments being public transaction of a solemn nature are presumed to be ... therefore, conclusive evidence for or ... , date and legal *effect* as distinguished ... *Phip Ev* 7th Ed. 392.

Foreign Judgment A party who has submitted to the jurisdiction of a foreign Court is bound by its judgment, when such judgment is within jurisdiction and does not offend the principles of natural justice. Irregularities which do not affect the jurisdiction of the Court do not vitiate such judgment

only when it is so pleaded, or there is an opportunity of so pleading it Otherwise it is only a relevant fact from which the Court may draw a conclusion in favour of the person who tenders it as evidence. *Vooght* v. *Winch*, 2 B & Ald 662.

But "the plea of *res judicata* as a bar to an action belongs to the province of adjective law, *a l litis ordinationem* ; but difference of opinion prevails among jurists as to whether the rule belongs to the domain of procedure or constitutes a rule of the law of evidence as furnishing a ground of estoppel In England, and I may say also in America, the rule is usually dealt with as belonging to the law of ...

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suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court

Explanation I The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto

Explanation II For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court

Explanation III The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other

have been made

med to have been a

is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused

Explanation VI Where persons litigate *bonafide* in respect of a public

cause

a suit in respect of such

cause

A judgment *in per*

record and their privies

S. 40. cannot canvass the same question again in another action, although, perhaps

there must be an end of litigation, otherwise there would be no security for any person"

Stay o
the matter
instituted su
or any of
in the same
relief claim
continued by the Governor-General in Council and having like jurisdiction, o
before

a suit in a foreign Court does not preclude
the C · a suit founded on the same cause of
action Vide section 10 of the Civil Procedure Code of 1908; see also *Moyl* v *Kasouji* 1 C L R 282, *Balkissen* v *Kishan Lal*, 11 A 148, *Ramalinga* v *Raghunath*, 20 M 418, *Venkappa* v *Manjurath*, 16 M L J 526; *Bissessur* v

Din Shaw v *Galstaun* 29 Bom L R 382=102 Ind Cas 229=A I R Bom 245; see also *Kuberan* v *Kornan Nair*, 88 Ind Cas 421=48 M L J
=A

suit shall include the
whole
of act
bring the suit w
sue in respect of,
not afterwards sue in respect of the portion so omitted or relinquished action
person entitle
may sue for
the Court, t
so omitted
for its performance and successive claims arising under the same
shall be deemed respectively to constitute but one cause of action *Order II, rule 2, Civil Procedure Code*

Previous Acquittals or Convictions Section 403 of the Criminal Procedure Code 1898 follows —A person who

against him might have been made under section 236, or for which he
been convicted under section 237

A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged

Explanation The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused, or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section

Judgments how proved If a party offering a record does so in support of a plea of *res judicata*, or to show that he has acquired or his adversary has lost some title or right either by the judgment alone or by it and proceedings taken for its enforcement, the whole record so far as it concerns the formal stages, must be either produced or exemplified, and if exemplified, the exemplification must show on its face that the record is complete and is regular nor can the record be patched with parol *Wharton on Evidence* § 824 Before any document, whether an original or a copy can be received in evidence of a judicial proceeding, it must, in general appear that the record or entry of such proceeding has been finally completed *Taylor Ev* 10th Ed § 1570

Judgments not relevant under ss 40 to 43 R was charged with the offence of defamation and convicted The complainant then sued R in damages

41 A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant

Relevancy of certain judgments in probate, etc, jurisdiction

Such judgment, order or decree is conclusive proof—

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation ,

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, *[order or decree] declares it to have accrued to that person ,

that any legal character which it takes away from any such person ceased at the time from which such judgment, *[order or decree] declared that it had ceased or should cease ,

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, *[order or decree] declares that it had been or should be his property.

* These words in s 41 wherever they occur were inserted by the Indian Evidence Act Amendment Act (18 of 1872) s 3

... continual doubt; and as regards *things*, that every one who can be affected by the decision may protect his interests by becoming a party to the proceedings. In addition to which it is to be remembered that a decision *in rem* not merely declares the status of the person or thing, but *ipso facto* renders it such as it is declared, thus a decree of divorce not only annuls the marriage, but renders the wife *feme sole*, and adjudication in bankruptcy not only declares, but constitutes, the debtor a bankrupt, a sentence in prize Court not merely declares the vessel prize, but it vests in the captor. Phipson Ev 7th Ed 397; cited with approval in ... *Venkataramananayya*, A I. R 1931 Mad ...

tion pronou...

... the status. So a ... person, but for the purpose of adjudicating upon ... of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from the particular interest in it of a party to the litigation (*Castrique* v *Imrie*, L R 4 H L 414, 428). Apart from the application of the term to persons it must affect the *res* in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer. *Halsbury*, Vol XIII, p 327.

Scope of the section Th... makes ...

... *Gangadas*, A I. R 1928 Sind. 121 = 22 S L R ...

S.

the purposes for which the judgment of a competent Court operates as conclusive against the world, and so far as such purpose relates to the status or what is referred to as legal character of a person, it specifies three purposes only: it

is conclusive against all the world as to that status, whereas in a judgment in

B. 455=65 L. J. Q. B. 616=75 L. T. 95.

is thus supposed to be a party. *Nort. Ev.* 214; *Cunningham Ev.* 187. The four

S. 41. classes of judgments, etc. which alone are to be conclusive, affect, it will be observed, the *status* of a person

... the status is that of a thing—that the title to it accrued at the time when the judgment declares it did or should where the vesting is in *futuro*. *Ev.* 215. *Radhakessin* v. *Mt. Gangabai*, 22 S. L. R. 105 = 1928 Sind. Judgments declaratory of

... therefore a ... conclusive against ... 1928 A. 385.

... *Official Receiver* v. *Lakshmi* ... 54 M. 727 = A. I. R. 1931 Mad. 474.

Probate Jurisdiction. The Courts in India exercise the Probate jurisdiction under Act XXXIX of 1925.

... m probate is granted ... ers as such may be ... I think that it was ... intended to include the case of an executor. The fact that the section has been frequently applied to cases of persons after the Hindu Wills Act came into force shows this. The only legal character when the Probate Court declares a person to be entitled to is that of executor. It confers the character of administrator. It does not declare it. So the section would be meaningless unless 'legal character' included the office of an executor. I do not think that the circumstance that in the particular case the powers of the executor may be limited, makes any difference in the construction of the section."

... s only granted after satisfactory evidence has ... quate capacity on the part of the testator ... (*Jones* v. *Goodrich* ...

in any Co... v. *Duke of* ... v. *Concha* ... *Griffiths* v. ... *Harris*, 1...

to probate must be taken to have been conclusively determined and therefore probate is conclusive proof of the due execution of the Will which is the foundation of the title of the executor. *Chandreshuar* v. *Bisheshuar*, A. I. R. 1927 P

R. [illegible] also *Ralabundu* v. *Yanamandia*, 79 [illegible] 4 C 360; *Mayho* v. *Williams*, 2 N. [illegible] *anjanabai* v. *Ram Das*, 4 C. W. N. clxxvi; *China Sami* v. *Hariharabarda*, 16 M 380; *Jagan Nath* v. *Rangit*, 25 C. 354; *Mt. Phekni* v. *Mt. Manki*, 9 Pat. 698 = 128 Ind. Cas. 128 = A. I. R. 1930 Pat. 618.

Court in such matters is conclusive. See also *Field Ev* 335

in a Common-law Court, either
he executed the Will (*Marrio*
not then in England (*Whitaker*
L. R 29 Ch. D. 657), provi
the title of the executor, in whic
1433. But where the points were directly in issue and actually decided by the

S. 41. Court between the same parties, or persons claiming under them, the judgment *in rem* will be conclusive evidence of the matters decided in it. *Spencer* v *Williams*, 2 L R P. & D 230=40 L J P & M. 45 For instance, if, in a suit for administration, the sole question be, which of the two parties is next of
Probate Division, declaring 'that as f...
...dant has proved himself next of kin,' ...
m as such, will be conclusive evidence of
the relationship of the parties in a subsequent action between them for distribution, instituted in another Court *Barrs* v *Jackson*, 1 Phill. 582; *Bouchier* v *Taylor*, 4 Bro P C 708, *Doglioni* v *Crispen*, 35 L. J P. & M 129, *Thomas* v *Kettriche* 1 Ves Sen
execution of the Will,
Harmusji v *Bai Dahi*
Ganesh v *Ramchandra*,
question was considered in *Ramani Debi* v *Kumud Bandhu*, ...
"The Judgement in a probate
...s has been repeatedly held an
...ct to the law of limitation (*lar*...
Ishan Chandra Roa, 6 C 707) A probate proceeding, therefore, while it enjoys
the advantage ... to a special re...
that a decision
it is clear fro
nandan v *Sheo*

by their very
cause of action
21 B 563 In
conclusively sh
testator, and does not ...
proceeding; in other words, the judgment of a Court by which ...
refused, does not necessarily operate as a judgment *in rem* in the same way as a
judgment by ... No doubt, such a judgment if it
declares that ... has not been duly executed by the
testator with ... it has not been duly attested may
... legal character of a
...racter and the
Will, but every
refusal to grant probate does not conclusively show that the Will propounded is not the genuine Will of the testator The decision may be based upon entirely different grounds, which do not touch the question of the genuineness of the Will Such a judgment cannot operate conclusively unless it embodies a final decision against the genuineness of the Will The learned Judges of the Bombay High Court while they lay down the proposition carefully guarded themselves, however, against any expression of opinion upon the question whether, if an issue had been raised upon the question of forgery of the Will and had been decided, the decision might not be conclusive." The true rule is thus formulated in the case of *Schultz* v *Schultz*, 10 Gratt, 358. When a Will has been propounded by a party interested and fairly rejected on the merits, it would defeat the policy of the law and be productive of many mischiefs, if it could be again propounded by the same party or by others who might be interested and the contest thus renewed from time to time. The sentence, therefore, against the Will must be regarded as a sentence against all claiming under it, it stands upon a footing analogous to the subject ... adjudications upon ... which they
... If there
or against
... cannot be
ment of the matter ...
the same or in any other Court by
in privity with them, in other w...
a refusal to admit a Will to probate is conclusive of the facts necessary to support the decision *Freeman on Judgments*, Vol I, *section 319*(f). O...

for probate by another person, for example, a legatee who claims an interest under the Will; if so, it would be futile to hold that an executor who has made default, cannot propound the Will again. *Ramani* v *Kumud*, 14 C. W N 924 The finding as to the execution of the Will of the Probate Court binds at any

as is contemplated in section 41 of the Evidence Act in as much as such judg

Ramoje, 5 Mys L J 107, see also *Monmohini* v *Banga*, 31 C 357=8 C W N 197.

The expression 'legal character" in section 41, Evidence Act, when it has

Matrimonial jurisdiction This section enacts that a final decree of a competent Court in the exercise of matrimonial jurisdiction which confers upon or takes away from any person any legal character not as against any specified

S. 41. (IV of 1869), does not make the proviso in section 17 applicable to the confirmation by the High Court of a decree of nullity of marriage made by a District Judge, and such a decree may therefore b
six months from the pronouncing thereof
to be applicable to a decree of nullity,
the same before the six months' period has expired, cannot on that ground be treated as made by a C : ithin the meaning of sections 41 and 44 of the : is therefore, under s 41, conclusive proof *Edward Caston* v *L H Caston*, 22 A 270 (F B) In a case decided before the passing of the
nedans
in the case
er wil the
a ide, and
but it would

be no evidence against
that the two ladies were s
Charan, 7 W R 38=I
whether the decision can
judgment by a Court h

L R 4 H L 428) or maritime lien (*MinnaCraig* v *Charbreed, etc* ..., 1 Q B 460) A decree for enforcement of maritime lien by a Court of Admiralty is a judgment in condemnation of property as forfeited, and also is a judgment *in rem* *Geyer* v *Aguilor*, 7 T R 696, *Maingay* v *Gahan*, Ridge, L & S 1, 79

is barred by the previous decision which is a judgment *in rem* ... section *Narayan* v *Hardutta Rai*, 16 N L R 201 The decision of the Insolvency Court amounts to conclusive proof as to the title in respect of the specific things claimed by the applicant, not merely as against him, but absolutely, within the meaning of this section *Pitaram* v *Jhujhar* 33 Ind Cas 798, see also *Mussamat* v *Mathura*, 40 Ind Cas 102, *Bhairo* v *P C Das*

even if it could be held that the decision was not a judgment *in* ... judgment *inter partes* and binds the creditor *Ram Narain* v *Durga Das* Ind Cas 568=55 P R 1912=242 P W. R 1912

An order of an Insolvency Court refusing to adjudicate a person insolvent on the ground that he was not a member of a firm which had been declared insolvent is not a final order which conferred upon or took away from him any legal character within the meaning of this section and hence it is not a judgment *in rem* Being a partner in a firm is not a legal character. *Off. Assignee* v

Madras v. *Off Assignee of Rangoon*, 46 M. L. J 580=1924 Mad. 662=34 M L T. (H. C) 90=83 Ind Cas. 171, see also *Radha Kishen* v. *Mt. Gangabai*, A. I. R. 1928 Sind 121=22 S L. R 105 An order adjudicating a person an insolvent and vesting his property in the Official Receiver no doubt operates as a judgment *in rem* but the grounds on which the order is based has no such effect *Radha Kishen* v, *Mt Gangabai*, A I. R. 1928 Sind 121=22 S L. R 105

S.

Legal Character.
The legal character assig
legal status of the person

"We : 'A man's
"legal attaches
to hir ... ve mark or dress, as it were with which the law clothes him apart from the attributes which may be said to belong to normal humanity in general *Rama Krishna* v *Narayana*, 39 M. 80=26 Ind Cas 883.

ng must have been declared not as
A decree declaring that A is entitled
t only made against a specified person,
so it is not conclusive proof of title to a debt *Venkataramanayya Pantulu*, 54 M 601=A I. R 1931 Mad 441=61 M L J. 229 (S B) Similarly a right to recover a debt or a chose in action cannot be deemed to be a "specific thing". *Ibid.*

f an issue as to the age of a
of the guardian for person,
proceeding, is not one of
the judgments *in* conclusive
against the world R 1910
On an application ministration
her father,
sly been made under the Guardians
idow for a declaration that she was the
infant son of the alleged testator,
by the present petitioners who claimed
to be testamentary guardians of the property appointed by the Will now
propounded, and that the le
question of genuineness of t le
proceedings under the Pro
haraborda, 16 M 380 A ju of
adoption is not admissible le
matters decided therein *Guru Mahadev* v *Jagatraj*, 71 Ind Cas 929, *Kanhya Lall* v *Radha Churn*, 7 W R 338, *Yarakalamma* v *Ana Kala Naramma*, 2 M H. C. R 276

uted
the
d in
edly
were
decree

S. 42. of the ... pro ... the ... the ... ical ... rties ... a sentence of ... of ... evidence on a questio ... estate ...

... marriage . . But in these cases the parties ... whom the evid...

... Judges, when taken apart ... But it has been contended that this opinion of the ... entitled to much weight, apart from the reasons on which it is founded, is not ... decision of ... it being merely ...

... section does not ... was not in issue ... on the matter appearing in the Administration ... *Mah Muthu* v *Servai*, 4 Rang. 251 = 97 Ind. Cas. 1051 = A. 1926 Rang 202; see also *Oates* v. *King Emperor*, 38 C. L J. 163.

Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41

42. Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a pulic nature relevant to the inquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Illustration.

... is relevant, but it is not conclusive proof that the right ... exists.

... not as res judicata ... parties ... Per ...

s section judgments S.
whether between the
see also *Collector* v.

such as the existence of custom in succession in particular communities. Such

regarded as a species of reputation,—will also be received and this too, whether the parties in the second suit be those who litigated the first or be utter strangers.
when admitted, will so far vary, that
ey will be bound by the previous
suit be strangers to the parties in the
nclusive. *Reed* v. *Jakson*,
Even before the enactment
this country. *Doorga* v. *Narendra*, 6 W. R. 232; *Madhab* v. *Toorne*, 7 W. R 210, *Totaram* v. *Mohan*, 2 Agra 120; *Venkata* v. *Subba*, 2 M. H. C. 1.

Origin of the Rule *It has often been said that verdicts of juries,* and judgments, decrees, and orders of Courts of competent jurisdiction, are evidence of reputation, and possibly when juries were summoned *de vicineto*, and were consequently assumed to be acquainted with the subject in controversy this may
s were admitted,
said "Reputa-
is case; *a fortiori*
lays there is no
exception to the
Hearsay Rule *Wigmore* § *1593* Because "that was when the jury was summoned *de vic*
Per Alderson B
early part of the
verdict was a c
Pre Treat Ev 90 .
nor a Judge's c

S. 42. pronounced in a cause litigated is also admissible, not as tending to 'e

to be forced into evide to the Hearsay Rule Il Case 147, which was dec the Reputation Exceptio explained in notes und "Such evidence, admiss is not in itself in any proper sense evidence of reputation It really stan upon a higher and larger principle, specially in cases, like the present, of prescription; it comes within the category of *res gestae* and of declarations accompanying acts . The effect of this evidence. is extremely strong to estab In the same c as evid and bet being fil referenc actions, the pat decree stronger Court b observed 'Here the persons acting as Judges had no knowledge of the except what they derived in the course of that proceeding" But see *Duke of Newcastle* v *Braxtowe*, 4 B & Ad 279, where *Parke J* said, 'Though they (Justices) are not proved to be residents in the country or hundred they must from the nature and character of their offices alone, be presumed to have sufficient acquaintance with the subject to which their declarations relate" The Similarly in *Evans* v *Rees*, 10 A & E 155, *Denman L C J* said his own opinion of an arbitrator as to a boundry is formed not upon the

933), and it seems to receive some support from a recent case in which held that old depositions are not admissible under this head of evidence if they contain testimony only as to particular facts *Mercer* v *Denne*, (1904) 2 Ch 534; (1905) 2 Ch 538, *Wills Ev* 234.

Cases in which judgments were held admissible where they relate to public matters In the verdict in an action

A judgment in favour of a Lord of a manor on a *quo warranto* for a franchise is evidence of the right even against copy holders of inheritance *Carnarvon, Earl of* v for pre-emption based on custom, evidence which it was alleged The most satisfactory based on the custom *Akbar Khan*, 1 A 44 *Mundil*, 27 C 379 (391), *Kalian Das* v *Bhagirathi* 6 A Judicial dec *Sheonarayan*, 1 A. 373; *Sheoboran* v *Bhairo*, 7 A 880 Judicial dec recognising the existence of a disputed custom amongst the Jains of one place are very relevant evidence of the existence of the same custom among the Jains of another place, unless it is shown that the customs are different and oral evidence of the same kind is equally admissible There is nothing to

setting up of a High ...ge of the 43 of the ...ustees of a ...es money ...gments in have been decreed in favour of the trustees of the temple were relevant under s 42 of the Act as relating to matters of a public nature *Ramasami* v *Appavu*, 12 M. 9

to show that ... shrine *Sri Ganesh* v. *Keshavrao*, 15 ... ...cretary of State, 16 C 173 (183) Where ... daughter's son is sanctioned by cutom amongst *Dehastha Smarth* Brahmins, decisions in suits in which

who made it. *Banwarilal* v *Sheochand*, 85 Ind Cas 795=A I R 1923 Lah 384 When a question of status is in issue, judgment and orders between the ...e case, rent suits, suits for ...are of high evidentiary value *Jumilal* v *Mt Hulki*, A I R ...ugh a judgment not *inter partes* ..., as a fact in issue, or as a ...recitals in the judgment cannot *Kashinath* v *Jagat Kishore*, 20 C W. N. 643=23 C L J 583=35 Ind Cas 298; see also *Ram Ranjan* v *Ram Narain*, 23 C 533 (P C); *Bhutto* v *Kesho Prosad*, 1 C W N 265=24

of a public nature' within the meaning of section 42, and the judgment of the

S. 43. Faridkot Court is not therefore relevant as relating to a matter of public nature *Ibid.*

43. Judgments, orders or decrees, other than those mentioned in sections, 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act

Judgments, etc, other than those mentioned in sections 40 to 42, when relevant

Illustrations.

h of them

A obtains a decree against C for damages on the ground that C ... make out his justification The fact is irrelevant as between B and C

a l fet ma

A afte...
tion As b...
(*d*) A ...
murders A in consequence

The existence of the judgment is relevant, as showing motive for a crime

* (*e*) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue

* (*f*) A is tried for the murder of B The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue

Principle It is well settled that a judgment *in personam* is not admissible in a suit between strangers or a party and a stranger except in a question of ... settled, the reason ... tendered against ... (*R.* v *Fo*... *Morcan*, 11 Q B D 1028), sometimes as hearsay (*Step Art* ..., *Whart* s ...), though it has been objected to this view that even if the judge were called as witness ... or to prove his judgment ...

could not make defenc... legitimate ground for r... satisfactory reason for ... that the objection of *res i*... solemn acts of strangers if relevant to the issue *Phip Ev* ... where the instance of judgments, orders or decrees is a fact *in issue* or a relevant fact under some other provisions of the Act, the judgments, orders or decrees ... *i e* the

... however, there is a highly important limitation. A judgment ...

*This *Illustrations* was added to s 43 by the Indian Evidence Act (1st) Amendment Act, 1891 (3 of 1891) s. 5

S.

sible for *proving the truth* of what it asserts may be valuable as evidence for some other purpose Its very existence may be a fact in issue, and then of course, evidence of it may be given; or it may be a fact relevant within some

'ence

So

. Imis-

0, 41

or 42. So the cases referred to in this section are such, as the section itself

taking this view I am doing any violence to the language of s 43 of the Evidence Act, which, if I understood it aright, declares that judgments, orders and decrees other than those mentioned in ss. 40, 41 and 42 are of themselves irrelevant, that is in the sense that they can have any such effect or operation as

which the partibility of the estate was asserted and recognised The reason upon

and cannot be so

than the transaction

Gobinda v *Shamlal*

C W N 521 P C

but if they are not

inter partes unless there existence of such judgment is a fact in issue or is relevant under some other provisions of the Act The existence of the judgment may be relevant but not the decision of the Judge or the opinion expressed by him It is immaterial if the defendant on both cases is the same and the decision of the Privy Council in 22 C 533 is no authority for the general proposition that a judgment against a party can always be used against him in a subsequent suit by another person *Benodelal* v *Secretary of State,* 34 C W 1113=A I R 1931 Cal 239 So recitals of judgments not *inter partes* of relevant fact are not admissible in evidence *Asa Ram* v *Mausha,* A I R 1930 Lab 237

Existence of judgment etc is a fact is issue If the object of the judg

even though his name appear on the back of the bill, or of his malice, or of

S. 43.

l v. *Macnamara*, 9 East 361; *Incledon* v *Bur* *hila*, 14 W. R 339; *Keramat* v *Gholam* notwithstanding the verdict is still at liberty to r § 1667: but see

vill apply to other cases, wh , or the like *Powell* v 158, *Griffin* v *Brown*, 2 Pick 304 In defence was that the plaintiff had received atisfaction of his damages, it was held that the plaintiff, on traversing this plea, might put in evidence a judgment recovered from him by the assignee of the principal for the amount so received eed as conclusive proof that the money had

Watson v *Little*, 5 H

29 L J Ex 270

Irrelevant under some other provisions of this Act. Ordinarily a s judgment not *inter partes* is *m Lal*, A I R 1929 *Lah* regards the value of the entries *Nageshar* v *Hanuman*

L R 10 (Rev)

In a sui binding on by the same part of the land in suit was not binding on the ground of the land ancestral, can only be treated as admissible for the purpose of showing that on former occasion the right of the alienee to alienate part of the property in suit was called in question on the ground that the property was ancestral The finding of the Court in the previous suit that the property was ancestral is not relevant *Partap* v *Mothu*, 8 Lah L J. 492 = 96 Ind Cas. 938 = 27 P L R 544

the f *Harih* Wher not re with s

transa previous decisions in Land Acquisition cases are relevant in a subsequent where the market value of the land in the same neighbourhood is in *Madan Mohan* v *Secretary of State*, 78 Ind Cas 557.

S.

5 Pat. L. W. 97=43 Ind. Cas. 393.

One N, who was a usufructuary
her right to recover profits in that sh
defendant for a number of years. R
dant's name continued to be recorded as a
the defendant and R

present suit for a declaration that the
, the lease in his favour having come to
The defendant pleaded an arrangement

the unexp
mortgage
pleaded b
admissible
Mahomed
Rec
Satindra v.

possession was claimed or disputed, and also as evidence to show that there
was such a j
determine w
trial should c

n an action for
his land by the
was accidental

of the executants
of a bond on which a suit had been brought, directed the prosecution of the
plaintiffs in t
for the offence
Raj Kumari
Sarma v. *Kash*

Kalipada, 28 C. W N 587. But
. p. 618, *Ghosh J* said · "I am not
prepared to say that the decision in the civil suit would not be admissible in

, and what the land in
. *Nath* v. *Mahomed Wafiz*
P. C)=6 C. W. N. 387.

S. 44. Judgments, etc are admissible, meaning of The general principle is that the mere existence of a judgment, its date and legal consequences, are conclusively proved, as against all the world, by the production of the record, but that ...en though, as between the ...must have been proved. The ...non th...

sively ...
the par...
used ... such third person ... though the judgments cannot be ... W N 402 Judgments and decrees recognizing rights between parties to a suit or between persons whom they represent are not conclusive but are admissible in evidence under s 13, ...
different from those in the former suit ...
Neamut Ali v *Gooroo Das*, 23 W R ...
Gopi v *Kherod*, A I R 1925 Cal 194. ...
in evidence in order to prove that there w...
certain way, does not make all the recitals i...
in the subsequent action *Abdul Latif* v ...
Cas 667, see also *Tripurana* v *Rokkam*, 42 M L J 324 (F B)=45 M ...
Krishnanath v *Jagat Kisho*... 3 C L J 583; *Sarod* v ...
Kanta ... arties contains a recital of the ... refers to a point in ...
... 900 Statement ... *...adurn*, A. I R 1925 Mad. 996=85 Ind Cas 996=... the respective claims which the parties put ... *Chhadek* v. *Syd Ali*, 85 Ind Cas 979 (981) ... available, and the substance of the pleading is narrated in the judgments, the judgments furnish evidence of the allegations made by the parties on that occasion *Kailash* v *Bijoy*, 72 Ind Cas 680, see also *Parbatty* v *Purno*, 9 C 586; *Bhaya* v *Pande*, 3 C L J ... *Byathamma* v *Avallu*, 15 M 19, *Thama* v *Kondar* 15 M 378, *Krishna*... v *Rajagopala*, 18 M 73, *Malcomson* v *O'Dae*, 10 H L C 593, *Lyell* v *Kennedy* (1889) 14 A C. 437 *Neil* v *Devonshire*, 8 A. C 135

Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved

44 Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

Principle ...

between parties who were really not in contest with each other." This rule has been embodied in the Indian Evidence Act. *Barkunissa* v. *Fazl Huq*, 26 A. 262 (283). So under this section the defendant is entitled to show that the decree is obtained by fraud. *Ibid*, see also *Hara Krishna* v. *Ramesh*, 62 Ind. Cas. 962 = 6 P. L. J. 373.

ties to a suit tenders or has n 40, 41 or 42, it is open to the

lays down that any party to a suit or *judgment, order or decree which is relevant under s. 40, 41 or 42*, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. *Prayag Kumari* v. *Siva Prosad*, 93 Ind. Cas. 385 = A. I. R. 1926 Cal. 1 = 42 C. L. J. 280. This section was construed by *Maclean C. J.* and *Banerjee J.* in the case of *Rajib Pondey* v. *Lakhan Sendh*, 27 C. 11 = 3 C. W. N. 660 and it was held that a party to a suit can show that a decree

Bose, 30 C.
d is sought

a judgment, order or decree as barring a second suit or trial; section 41

S. 44. case of fraud or collusion will have to be specifically alleged and substantiated by the party setting it up. *Baikantha* v. *Mohendra*, 1 C. L. J 65. To set aside a decree on the ground of fraud, it is not sufficient to prove constructive fraud, but an actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in i[illegible]
by that contrivance. *Bishe*[illegible]
R. 1926 Lah. 177. Where a [illegible]
fraud or collusion, such fraud or collusion as is contemplated by [illegible] the Evidence Act, must be raised in the defence. *Ambika* v. *Kala Chandra*, 10 C. W. N. 422 (424). Where a party seeks, under section 44 of the Evidence Act, to avoid a judgment on the ground that it was delivered by a Court not [illegible]

[illegible]
111 Ind. Cas 762 = A. I. R. 1928 Pat. 675.

Not competent. The words "not competent" in this section refer to a Court acting without jurisdiction. *Kethamma* v. *Kelappan*, 12 M. 229 (2[illegible]). "Jurisdiction may be defined to be the power of a Court to hear and determine [illegible]

[illegible] "jurisdiction", which has [illegible] stated to be "the power to hear and determine issues of law and fact, [illegible]

[illegible] v. *Behary* [illegible] . 193. This jurisdiction [illegible] circumstances. Thus, [illegible] to place, value, and [illegible] may be exercised within [illegible]

[illegible]

pronounced by a Court without jurisdiction is void. [illegible] void and a nullity it is not only the duty of the Court which passed it to [illegible] *Mohan* v. [illegible]

[illegible]

Lal, 17 A. 478; *Haji Musa* v. *Purmanc*[illegible]
Vaithinathu, 38 M. 682; *Roop Narain* v. [illegible]
Narendra v. *Gopal*, 17 C. L. J. 634. One must [illegible] fundamentally [illegible]

[illegible]

pronounced, for the power to decide necessarily carries [illegible]

decide wrongly as well as rightly. *Ib* W. N. S. 723=31 C. L. J. 482. In *Mallarjun* (347)= 5 C. W. N. 10, *Lord Hobhouse* said: wrong

Moomraj, 45 C. L. J. 24.

The plea of *res judicata* can be satisfactorily met by showing that the *judgment, in which the issues pleaded were decided*, was delivered by a Court

To sustain an objection that the Madras Insolvent Court's order is a nullity conferring no title to the debtor's estate on the Official Assignee, it is obviously not sufficient to prove that the order was wrong. To hold otherwise would virtually erect into a Court of appeal from the Insolvent Court, not only this Court, but every Court in which the (and would be inconsistent with section 41 Act What, then, is the test of wheth

unless there is a

S. 44. Mere delay in raising it cannot itself be fatal objection when a fresh execution sought. *Sheo Tahal* v *Binack Shukul*, 1931 A L J 643 = A I R 1931 All 689, see also *Panchkari* v *Girdharimal*, 89 Ind Cas 347, *Veerav* v *Muga* 39 M

thereof
nullity, a

made by a Court
41 and 44 of the Indian
proof that the marriage
271 (F B)

un quam co habitatu' (Fraud
It vitiates the most solemn proceed-
ey, C J in the *Duchess of Kingston's*
Case, 20 How St Tr 355 It avoids all judicial acts, ecclesiastical or temporal *Ibid*, see also *Shedden* v *Patrick*, 1 Macq 535 But the difficulty is that no definition is given in the Act of the word "fraud" This section provides that any party to a suit may show that any judgment was obtained by fraud "It is clear" says *Martin C J* in *Bhikaji* v *Balwant*, A I R. 1927 Bom 510 Bom L R 1046, 'that some limitation must be put upon that section For instance if party A, and his witnesses in a particular suit came into the box and committed deliberate perjury on material points, that is clearly fraud On the other hand if a decree is eventually passed in favour of that party, even on the perjured evidence, it ca ... the opponent to start a new action exactly the same eviden
wrongfully believed by
doctrine of *res judicata*
party might alternately
Consequently the authorities show, I think, that if the case merely in effect, a re-hearing of the previous suit on substantially the same evidence then the Court will not hear the second suit. On the other hand it is to my mind clear that in a proper case the Court has jurisdiction to set aside a decree which has been obtained by fraud practised on the Court. If, for instance, the existence of certain evidence has been stoutly denied by one party and the Court has been ... to ... decree on the basis that that evidence ... of such

circumstances are looked at, that in that case the Court would ... original decree '

In Nanda Kumar v. *Ram Jiban*, 41 C 99 = 19 C L J 457 = 23 Ind Cas ... said The jurisdiction ...

the decree being the principal point in issue, it is nece ... investigated it by proof before the propriety of the prior decree can be investigated Decrees may be (1) by consent, (2) *exparte* or (3) after contest, apparent or ... and though each is liable to be attacked for fraud, the character of the fraud would vary with the circumstances of each case One who seeks to impugn a decree passed after contest takes on himself a very heavy burden and ... the conclusion that the
on in the former suit was
not be upset on a ...
where, and ...
k, 1 Macq ...

L. R 751=37 A

motion and acting in ord
for the purpose of actually a
fraud, must be fraud which
and that mere irregularity,
investigation of these righ
is not the kind of fraud which will authorise the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled" *Per Lord Cairns L J.* in *Patch* v. *Ward*, L R. 3 Ch 203, see also *Crew* v *Jhonston*, 2 Sch & Lef 308

In *Fowler* v. *Lloyd*, L R 10 Ch. D
Baggallay and *Thesiger L JJ*, the suit was d

to have been sub
nt question would
in the affirmative
action brought out
could be set aside
n to interrogatories,
of a process had
which the evidence
other wilfully and
corruptly perjured In this case, if the plaintiffs had sustained on this appeal the judgment in their favour the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury and so the parties might go on alter

proved that a
which judgm
These observa
Mohomed Go
"The principl
obtained by a fraud practised upon the other side by ... was prevented from placing his case before the tribunal which was called upon to adjudicate

S. 44.

Both the defendants contended that the Will was a forg... probate was induced by fraud. *Held* that the second defendant was barred by the decision of the District Court in the revocation matter from raising again the question in the Court of the Subordinate Judge. Further *held* that as regards the ...

he does not raise these questions by his pleading, although he has ... common cause with the second defendant in his defence .... As regards the second defendant, although he had a *locus standi* to make an application, his right is now at an end by reason of the unsuccessful result of his application for revocation. That being so, it appears to us that the first defendant has no defence to this suit.

The fact that the defendants have be... of all the land in the village implies a decision ... respect of any of the lands included in that village. ... decree of Court under section 11 of Regulation III of 1872. *It is open to* ... plaintiff to avoid the effect of such ... 25 A or sub-section (1) of section ... procedure laid down in section 24 o... interested to bring forward in the Settlement Court, ... any ... to make to any part of such record ...

... to the record ... *I*, 19 C. L. J 29; see also ...

... t XIV of 1882) can call ... against whom an order ... If he was ...

...he fraudulent nature of the ... the order passed upon it in any proceeding ... strength of that order. *Chumma* v. *Ram Dayal* ...

16 Bom. L. R. 648.

Judgment vitiated by fraud, whether the same should be set aside ... Whenever a party seeks to avail himself of a former judgment, fraudulently entered, the opposite-party may show the fraud, and thus avoid the judgment ... *Whart. Ev.* § 797. Now the question is whether fraud can be collaterally set up ... either directly or ...

and cannot resort to a ...

Whart. Ev. §§ 797, 798. So according to *Burr Jones* also "domestic ...

other words (confining our attention to so

from a provision such as the plaintiffs contend it is intended to be merely

ct on makes the same provision for
aud that it does for avoiding a
Now there can be no question

Sib Saran v *Rameshwar*, 60 Ind Cas 640=1920 Pat 363=2 P L T 40, *Kuiaram* v *Banomali*, 29 Ind Cas 838 The case of *Bansilal* v *Ramu Lal*

collateral proceeding." "In applying this rule it matters not whether the impeached ju
Highest Cou
every Court,

tes had fraudulently taken place under
in Ireland obtained by collusion between
person in whose favour a charge had

S. 44. been created, and the purchaser, and where the interests of the tenant in remainder had not been probated, the Court of Chancery in Ireland on the [illegible] on a bill filed to [illegible]

estate of mortgagor. *Nistarini* v. *Nundo Lal, ubi supra*, see also [illegible] v *Ramesh Chandra*, 2 Pat. L. T 528=62 Ind Cas. 962=(1921) Pat. 209 It is competent for every Court, whether superior or inferior to treat as null any judgment which can be clearly shown to have been obtained by manifest fraud *Maung Kyaw* v *Ammul*, 62 Ind. Cas 53=13 Bur. L T 198, *Manchha* [illegible] *Kalidas*, 19 B. 821; *Krishnabhupati* v. *Ramamurti*, 16 M. 198; *Admoney* v *Aimunissa*, 12 C 156

Compromise decree—Fraud Where a decree is alleged to have been obtained by fraud and misrepresentation it is competent to a party to show under section 44 of the Evidence Act that this amount was obtained by fraud and misrepresentation, and a separate suit is not necessary to set aside the [illegible]

[illegible] v. *Panchi Dasi*, 32 Ind Cas 849.

[illegible]

Pat 375=9 P. L T 375. Foreign judgments *in personam* [illegible] fraud of a party to the suit in foreign Court cannot be enforced by him in an action brought in an English Court. *Nistarini* v *Nundo Lal*, 26 C 591 [illegible] see also *Abouloff* v *Oppenheimer*, L R. 10 Q B D 295, *Valda* v *Lawes*, L R. 25 Q B, D. 310, *Codd* v. *Dela*, 92 L. T 5 10; *Hip Foong* v *Neotia*, (19 A. C 888; but see *Robinson* v *Fenner*, (1913) 3 K B 835

In *Abo*[illegible] B. D 295 it was held that even though [illegible] gated in th[illegible] committed, [illegible] an action claiming the value of goods and brought upon a [illegible] whereby the defendants were ordered to return to the plaintiff the goods, [illegible] judgment was obtained by [illegible] at the goods [illegible] the plaintiff [illegible] Lord Coleridge [illegible] it must be taken [illegible] foreign Court and that that the allegations of fraud were brought before the [illegible] the foreign Court came to a conclusion against the defendants, and whether the conclusion was right or wrong on the matters of fact the question of the plaintiff's alleged fraud could not be tried in the Courts of England, says [illegible] state the arguments for the plaintiff also in somewhat different words, namely that although the Russian Courts at *Tiflis* were led to decide [illegible]

defendants through believing a false . . . . S. 4
the plaintiff, nevertheless the defendan

l to a foreign judgment
it obtained in an English
ught. There may be a
difference where it is sought to enforce by the process of a Court a judgment of that very Court, because if that judgment has been obtained by improper means the objection does not arise in a new action brought on that judgment, but it arises with regard to the process of the Court to enforce a judgment of its own In a case of that kind it was perhaps formerly necessary to proceed in a Court of Equity in order to get rid of the judgment, but I doubt whether it was necessary, because, at least in my opinion, a Court of Common Law would have in the exercise of its own jurisdiction set aside a judgment procured from it by deception "

In the case of *Vadala* v *Lawes*, L R 25 Q B D 310, in which an action was brought by the plaintiff in the English Courts upon a judgment obtained
Bills of
Bills were
t without

in equally general language, *is perfectly well settled*, is that when you bring

Foreign judgment—how impeached under Indian law In India a foreign judgment shall be conclusive as to any matter thereby directly adjudicated

law in force in
1908)

Collusion No definition of the word "collusion" is given in the Act.
two
some
ment
in
It
may be of two kinds—(1) when the facts put forward as the foundation of the judgment of the Court do not exist, (2) when they exist, but have been corruptly preconcerted for the express purpose of obtaining the judgment." *Wharton Law Lexicon cited in Field Ev 7th Ed* p 170 No doubt a decree can be avoided on the ground of fraud or collusion under this section But

S. 44. there is a great
made the victim of
discovered the fr
a point of defence
collusion is a m
is a point which could and might have been raised before the decree was p
on the last occasion. A third party can undoubtedly avoid a decree on the
ground that it has been obtained collusively, but it is clear that a party to a
collusive decree can not avoid it on that ground. *Sahib Rai* v *Bal…* A.
I R (1927) All 494=101 Ind. Cas 765, *Chenur Appa* v. *Puttappa*, 11 B
Varadarajula v *Srinivasulu*, 20 M. 333; *Kandetti* v *Nukamma*, 31 M.
M. L J 576; *Venkataramanna* v *Viramma*, 10 M 17. That such a decree
by the case of *Rangammal* v *Venkat…*
li, A. I R. 1927 All 528=101 Ind Cas
rtgage decree was made more than th
absolute. After the decree absolute was m
judgment debtor transferred his equity of
judgment-debtors, though served with n
the application

questions and adduce evidence to prove the facts stated *Kama…*
18 C L. J 261

Who can plead fraud or collusion. The language of this section is
enough to allow a party to the suit in which the judgment was obtained, to sh
that it was obtained by the fraud of his antagonist, though the judgment
y to set up his own fra
ndian Code Vol II
h under the Engli h a
such judgment is
he suit in which it is
Aswani v *Banamali*, 21 C W N. 594; *Taylor* § 1713; *Phip Ev* 7th Ed
In England a party to a suit would not be allowed to defeat a judgment
showing that it has practised an … pon the Court
Anglo Ind Code Vol II p 829 In

, 27 C 11 …
st a judgment. *West* v …
Ves Sen 244, *Ahmedbhoy* v *Vullubhoy*, 6 B 703; *Prudham* v *Phillips*, 2 Amb
763 The rule that fraud can only be proved by an innocent party does not
apply, however to probate [*Birch* v *B*, (1902) p 130], or divorce [*Bonsjo…* v
B, (1892) p 402] cases.

Party cannot plead his own collusion or fraud. Section 44 of the Indian
Evidence Act, no doubt allows a judgment or decree, otherwise relevant, to be
shown to have been obtained by fraud or collusion But the whole
doctrine that a party cannot plead his own collusion to avoid a decree
supported by numero … L R 177=3 Ind Cas
1179; *Bhawabal* v … W. R. 157, …
Nundo Lal, 26 C. 891 … 705; *Varadara…*
Srinivasulu, 20 M. 333 (338), *Kondati* v *Nukamma*, 31 M. 485 (487)=4 M L
T. 331. A party cannot ask for relief against a fraudulent conveyance made
by him and which has been successfully used by him to defraud a cre…
Banku Behary v. *Rajkumar*, 4 C W N 289=27 C 231, *Gobardhan*…
Ritu Roy, 23 C. 962; *Kali Charan* v *Rasik Lal* 23 C 962 N "The maxim in
pari *delicto potior est conditio possidentis* is as thoroughly settled as any
tion of law can be. It is a maxim of law established, not for the …

S.

it is made the antagonist of his executor (ancestor ?) and *cessante ratione legis*

decree had been obtained by fraud
fraud was their predecessor in tit
The principle that a party to

1151 = 22 C L J 197 = 29 Ind Cas 699

Suit to set aside judgment obtained
section where a judgment has been obtained

decree, an *ex parte* decree or a decree passed after contest, is liable to be vacated on account of fraud *M A Maistry* v *Abdul Aziz*, 5 Rang 46 = 101 Ind Cas. 431 = A. I R 1927 Rang 130, *Raman Menon* v *Madhava*, 98 Ind Cas 176 = A I R 1927 Mad 96 To set aside a decree on the ground of fraud, it is not sufficient to prove constructive fraud, but an actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts and obtaining a decree by that contrivance *Bishun Singh* v

decree is whether there was fraud practised in relation to the proceedings [illegible]

[illegible]

sufficient ground for setting aside a decree *Kasiswar* v *Aminuddin*, [illegible] N 133=47 Ind Cas 84; *Baikuntha* v. *Prahlad* 31 C W. N 560, [illegible] v *Hari Mandal*, 24 C W. N 133=[illegible] T 735=60 Ind Cas 124, *Kripa* v *Nan*[illegible]
But a decree can be set aside which [illegible]

[illegible]

8 S L R 81

To sustain an action to set aside a decree on the ground that it was obtained by fraud, the fraud must be extrinsic to the proceedings before the Judge [illegible] must be in the conduct of the suit by keeping the plaintiff out of Court [illegible]

[illegible]

by him [illegible] *Madda Pedda* v *K*[illegible] [illegible] Ind Cas 498=21 L [illegible]

[illegible]

Suit to set aside an exparte decree A suit to set aside an *ex parte* [illegible] on the ground that the claim was a false one and the decree was obtained by perjured evidence will not lie, where the prior suit is a contested one or an [illegible] decree was passed after service of summons *Nalini* v *Hari*, 29 C. W. [illegible] 325=86 Ind. Cas 779=41 C L J 281=A I R 1925 Cal. 663, [illegible] *Prohlad*, 30 C. W. N. 560 The mere fact that an *ex parte* decree has been passed does not show that there was no service of summons on the d[illegible] [illegible] Court passing the decree [illegible]

[illegible]

P L T. 239=(1920) Pat. 209=56 Ind Cas 615; *Nagendra* v. *Parbatty*, 20 C. W. N. 819, *Gendu* v. *Saddi*, 44 Ind Cas. 983.

OPINIONS OF THIRD PERSON WHEN RELEVANT.

might be more accurate and sound than
mplation of law, a matter of no consequence.
in the most unequivocal manner, that the

It was for the jury to form opinions, and draw inferences and conclusions, and
y, or the Judge, the
the witness spoke
whether to believe
then the jury were
to judge of their import and their tendency The witness was not to say that he

centuries, and it was but slight before the present century In a sense, all
testimony to matter of fa
from phenomena and
Courts or in common lif

is not really to be called opinion evidence in the sense of the rule It has been said, judicially, that there is, in truth, no general rule requiring the rejection of opinions as evidence' (*Hardy* v *Merrill*, 56 N. H. 227, 241). Without acceding

S. 45.

the case

Matters of opinion—meaning of. I
phrase "matter of opinion" fails to repr
definite conception. As used in the law of e
shou
gical
es applies to the use of the rea
of opinion there relating to facts, is sepa

whole or in large part, of an act of reasoning, but propositions of belief, n
able of verification religious views, political principles and the like, as to w
certainty is practically impossible These are the matters of endless de
of argument pure and simple In cases of these debatable questions, the
of the trial, *res gestae* or probative, are in no way involved *Chamberlayne's E*
1791, 1792

Why opinion evide
evidence was a matter of t
tions In *Wright* v. *Tatha*
concede, though, it is not,
opinion of a witness even on oath is, as such, admissible evidence
question of competency. When you can bring the decision of that question
you sometimes may, to depend upon deductions from scientific premises

at the same time that this principle is becoming recognized, or

there occurs a general recognition of what seemed at the time as an exception to it—the use of skilled witness *Wigmore* § 1917 'Though the witnesses can in general speak only as to facts, yet in questions of science persons versed in the subject may deliver their opinion upon oath on the case proved by other

on the subject in dispute" *Peake's Evidence*, 142 Like other exclusionary rules in the law of evidence, that which undertakes to reject 'opinion' may be a

rfectly

nent of

is not

The

equate

knowledge on the subject His declaration, therefore, is said to be rejected as opinion *Chamberlayne's Ev* § 1793

person who had to be received by way of exception to that notion Thus, when an ordinary lay witness took the stand, equipped with personal acquaintance

ge, the circum

and expressed

oper It would

not occur to any Judge that this witness was doing a wrong thing In short, it was only 'opinion' as a mere guess and a belief without observation which they

3 Burr 1905, 1918 *Lord Mansfield* said "Mere

t opinion as an inference or conclusion from

did not think of disparaging That this was the

ver will appear from the following passages

hich witnesses speak from judgment and opinion,

ich he witness may form Mr *Espinasse*

when the early

had in mind

the case of the lay ncluded in his testimony an opinion or inference based on these data—as in the leading instances (used by those writers and Judges) of handwriting character, and

now an

witness

propose

made at

this opi

before the jury and they were as competent as he to draw an inference It must

ory,

It

r to

be no English rulings which indicate that the opinion rule has there been

S. 45.

bar *Wigmore* § 1917.

bsen
groun
giving
witne

nature It simply endeavours to save time
telling the witness: "The tribunal is on
materials of information as yourself, thus, as you can add nothing
materials for judgment ... is unnecessary, and
encumbers the pro
applied in each
the principle" ...
Mansfield in *Carter* v *Boehm*, 3 Burr. 1905, 1918. ...
rightly formed, could only be drawn from the same premises from which
Court and the jury were to determine the cause, and therefore it is improper
irrelevant in the mouth of a witness"

Opinion and fact, how to distinguish. Accurately to distinguish "matter of fact" from "matter of opinion" is not less difficult than to distinguish ... from "matter of law" In all supposed statements of fact the witness ... testifies to the opinion formed ... upon the pre ... senses Statement of opinion is th
fact. 1 *Whart Ev* § 15 An
"opinion" is found in cases wh
intangible to permit a correct or effective individual ...
permitted to state simply the impression, such phenomena produced ...
minds This apparently is simply another method of stating facts *Best Ev*
8th Ed p 473, *Corn* v *Sturtivan*, 117 Mass 122, 133 So also if we look ...

sense this may be said to be a statement of opinion—that is, ... the ...
the witness's mind upon a state of facts presented to his senses—and in the case
in question there was sufficient doubt as to the nature of the statement to cause
the objection to be raised, yet the Court held, and quite properly, that ... *Indianapolis*
speaking th
Ct Ry. Co ...
cases which
the witness
in several ways, and sometimes the use of one word will ...

S. 4

could not even have been raised, had the witness used, instead of the word "acknowledged" the word "said" *Hauuler* v *Davis*, 128 Iowa 216=103 N W 573 A witness may not be asked whether there was any room in a car for other men, but may state whether there was any vacant or unoccupied space in the car *Chicago Terminal T* ...

knowledge on the part of the witness testifying What he thinks in respect to the existence or non existence of a fact in issue is matter of opinion, and he cannot state it It is for him to put before the jury the facts as he has perceived them by his senses,

t of the robbery they recognized him by his
The testimony was objected to as opinion
The Court treats the question as follows The statement by the witnesses for the prosecution of a fact which they ascertained through the sense of hearing was not the statement of mere matter of opinion, but the statement of a conclusion reached directly ar
A witness can learn and
faculties—his five sense
Prof Wigmore no such
principle", says the lear
out of the question and considering only principle) that there is no virtue in any test based on the mere verbal or logical distinction between 'opinion' and 'fact' Further more, an examination of the so called opinion rule, as applied in its various instances shows that the opinion element is in the very law itself, a merely superficial and casual mark and not the essential feature" *Wigmore* § 1919

Entire Elimination of Inference Impossible The impression which first arises to the mind upon hearing the ideal position of the witness thus stated is a conviction of the impossibility for any one to satisfy such requirements
of the simplest fact
itive recognition of
ning Observation
by the aid of the
a that of inference or
reasoning viz, intuition so instantly and intuitively that the mind is seldom conscious of the process These sense-impressions are seized by the reasoning powers and the mind becomes aware of the concept rather than a mere percep-

when those original sense perceptions have become so overlaid by inference experiment that the re action of each upon the other can no longer be di guished
from the
practically

Involution of Reasoning, (1) Inference While the entire elimin inference is impossible, something may fairly be said as to the relati tion which observation and inference bear to each other in cert classes of mental re ult However distinct the e classes may be fr in broad outline they present the ordinary difficulties inhere where one class shades into another by almost imperceptibl distinct line is frequently difficult to draw Nor can it be

S. 45. approximate certainty as to how far the state of the case, or other similar considerations may influence a Court in making rulings even on a similar set of facts It may be ob
ficatior
which
the vi
suggest
of obs
obnoxi
divide t
according to the proportion
these mental acts or proc
(2) Conclusion, and (3) Judgment

Inference—In the first of these classes, that of Inference, the element of observation is at its maximum The ob
facts of th

reasoned

is
by

A reasoned infer red to the satu not instantly reasoning more or
intervenes between the phenomena and the "making up", as it were, of the mind A theory, simple, perhaps; but still a theory The mind is conscious of a distinct step, although, it may be, a short one *Chamberlayne's Ev* § 1802

Invol

under such a definition an intuitive inference of bankruptcy
a neighbouring
migh conclusion

that reasoning is then seen to be based, in a greater or less degree upon the existence of facts not verified and frequently unascertained —*Chamberlayne's Ev* § 1803.

result is styled a hypothetical. The
rrives is referred to as his Judgment.
termed an expert".—*Chamberlayne's Ev* § 1804.

Credibility of intuition The administrative reason for rejecting the S.

trustworth
operation
statements,
rience shows that instinctively acting the normal human mind tends to observe correctly and report
neous statement is
reasoning is not

almost as a matter of course, one more reasoned in its nature can be admitted only upon the exhibition of some satisfactory administrative necessity for so doing For the reception of a conclusion a still more imperative necessity is required Inability to offer other evidence or to prove a case without using this species of proof culminates when a judgment is offered *Chamberlayne's Ev* § 1806

omenon observed by the witness
d to the tribunal wherever possible,
cies
by
nds

essential, *in the second place, that the substituted evidence should be both* objectively and subjectively relevant to the existence of some fact in the *res gestae. Chamberlayne's Ev* § 1808

Scope of the rule rejecting the opinion of witness "The opinions of any person, other than the Judge by whom the fact is to be decided, as to the exis-

"The opinion of a competent person is
s in the
case of 'hearsay', there is an . the rule
may be stated as follows (1 express
ive an
doubt
45-50
person

is not allowed to express an opinion that a fact which is being enquired into exists (save and except in cases mentioned in 45-50), he is right in his statement of law But if his lordship meant that a fact-witness is debarred from stating his opinion in any case, when on the stand, his statement of law is evidently erroneous Observation and reason being practically inseparable, the real administrative problem is not as to whether reasoning shall be excluded *in to to* but rather in determining whether a particular involution of a given quantum of reasoning is necessary under the facts of a particular situation As facts become more complex, more compound, the proportion of reasoning almost of necessity, grows greater So intimate, in many cases, is the blending, that the

S. 45 Court is compelled to accept or reject the whole, despairing of success in separation *Chamberlaynes Ev* § 1837 In this connection the observation of Foster, C J in *Hardy* v. *Merril*, 56 N. H. 241, should be borne in mind "All evidence is opinion merely unless you choose to call it fact and knowledge as discovered by and manifested to the observation of ... to me quite unnecessary ... admission of such evidence, ... or isolated and arbitrary) to ... of some books and the c... rule requiring the rejection o... vidence A general rule can be said to exist, which is lost to sight in an enveloping mass of arbitrary exceptions" *Wigmore* § 1919 The Hearsay rule ... rule are the product of ... in E...

... will always ... while the Opinion rule ...

Proper scope of opinion ... his opinion ...

... good ground for excluding such evidence ... intimately connected with the main issue that its consideration is inevitable (b) So also, if certain evidential material, having a legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent, or by virtue of the personality of the witness tends to receive an exa... there is good gr...

... with the witness to draw an inference ... The witness's opinion is excluded, not because inferences as such are objectionable—for a witness's knowledge and all knowledge is made up of inference,—but because the inference under the circumstances is ...

S. 45

of in this
perfluous
essential
e opinion
ation
ions

ts from which a

be able to separate the facts and indications from which he has formed a conclusion from the conclusion itself *Yahn* v *Ottumua*, 60 Iowa 429=15 N W 257 From the many illustrations given below it will appear that, from the
often be received
ises is that, from the
described in such
language as will enable persons not eye-witnesses to form one accurate judgment in regard to it *Burr Jones* § 360 The opinions of non experts are admissible, therefore, provided they state, so far
n the
opinions are based on questions of
ings,
animals, or hand writing; and of the size
time
and distances; of the mental state or
and

or seemed hostile,
intoxicated They
can state as to who
oded or that a person
appeared rational
person looked excit

matters more within the common observation and experience of men, non-experts may, in cases where it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinion from such facts, where such opinions involve conclusions material to the subject of inquiry In
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fa
be
re
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Inference—condition of Admissibility—Necessity The necessity for a use of reasoning, more or less great, is practically insuperable. The simplest

S. 45. statement of a fact embodies an element of inference. In theory at least, original sense-impressions received from observations are brought to consciousness by faculty of intuition. The mind, however, seizes upon these material, with such instant avidity as to make the transition to inference practically unrecognizable. The statement therefore of an observed phenomenon, classed as one of fact, is, in reality, a declaration of what the observer inferred the fact to be. To this use of inference no administrative objection can be taken. Facts can be proved in no other way. They therefore continue thus to be stated. The necessity, however, for a larger element of inference, in a mental process somewhat more complex, at once discernible. Not only may the witness be powerless to state the simplest fact without stating his inference as to it. He may be compelled to state compound facts in the same way. True, it may be quite possible to declare certain of the component or constituent facts which go to make up a compound fact in such a manner tha[illegible]
it without the slightest difficulty [illegible]
facts Still he may, in most cases, by [illegible] clearest statement of [illegible]
[illegible] any adequate [illegible]
[illegible] hole, was observed by [illegible]
Under such circumstances, judicial administration, *ex necessitate rei*, permits [illegible]
[illegible]
the result to which they have led his reasoning faculties. [illegible]
Ev § 1810

[illegible]

in which t[illegible]
of a pers[illegible]
evidence, [illegible]
Ev § 1867 [illegible] or mental states may serve [illegible] of the inference of the witness as to [illegible] tity is a matter of opinion or belief [illegible] [illegible] and incommunicable [illegible]

a stranger, and there [illegible]
Expert and Opinion [illegible]
the voice alone, and [illegible]
the tones of voice in such a manner that from the description [illegible] The testimony of the [illegible]

[illegible] on as to the [illegible] not admissible to [illegible] 148 Cal [illegible]

707. In many instances [illegible]
the act of reasoning is [illegible]
numerous and minute to [illegible]
Chamberlayne's Ev § 186[illegible] A person may be [illegible]
v. *Frith*, (1896) P. 74, *Brooke* v *Brooke*, 60 Md. 529, 533, [illegible] 167 The same [illegible]
Nebr. [illegible] Gutierrez [illegible]
well [illegible] to give [illegible]
542 [illegible] Ev § 1862.
for the [illegible]

S. 4

it competent in itself as primary evidence It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such

uct of that

lcher, 117

an expert

f a thing,

still there

is no rule of law, and there can be non

know of property before he can be

He must have some acquaintance with ,

estimate of its value, and then it is for the jury to determine how much weight to attach to such estimate *Bedell* v. *Long Island R. Co*, 49 N. Y. 367; *Lawson*

be presumed to have a sufficient knowledge of the market value of property from the location and character of the land in question *Pennsylvania, etc. R. Co.* v *Bunnell*, 81 Pa St 426 The best and only legitimate evidence of the value of the land at the time of the sale would be the *opinion* of witnesses who had

founded *Illinois etc. Ry Co* v *Von Horn*, 18 Ill 257; *Burr Jones* § 363 So it is clear that the valuation of land must be arrived at by the tribunal by taking

. As regards

urt. *Stowell*

ates, 2 Story,

421 (Am); *Lawson's Exp & Op. Ev* pp 463 501, *Wigmore* §§ 1940 1941, *Narain Chandra* v *Cohen*, 13 C 56; but see *Dwarka* v *Ludar*, 4 O C, 247 As to how valuation is to be made under the Municipal and Land Acquisition Act *vide Manindra* v *Secretary of State*, 41 C 967; *Harish* v *Secretary of State*, 11 C W N 875; *Wenrick* v *Secretary of State*, 13 C W N. 1058; *Secretary of State* v *Shanmugaraya*, 16 M 369; *Government of Bombay* v. *Meruanji*, 10 Bom L R 920, *Heysham* v *Bholanath*, 11 B L. R 230; *Secretary of State* v *Belchambers* 33 C 103; *Tulsi* v *Secretary of State*, 14 C W N. lxxx, *Ram Sahoy Sha* v *Secretary of State*, 8 C W N 671, *In Esafali Salebhai*, 10 Bom L R 997, *Kailash* v *Secretary*, 17 C L. J. 31

S. 44.

Sanity. The reason for admission of non expert opinion evidence as regards sanity
N. H 144: "
by witnesses a
The opinion
no description
ordinarily he cannot give an adequate description of them' 'The said ...

80 (Am); *Wigmore* § 1934 "To ask ...
appeared peculiarly or strangely was s
opinion she was insane" *Per Doe J* ...
opinion of non-professional witnesse
such opinions are based upon their
person's appearance *Burr Jones* § 36

disease in any one" ... v *Mc Daniel* 4 Ired L 455 (*Am.*) ...
expert witness ...
person is sick
upon the nature
system of a ·p
days, however,
upon for their opinion as to sanity or insanity of the testator. ... 574 6
Caughman, 26 S E R 16 (S C); *Wheeler* v. *Alderson,* 3 Hogs Eccl 574 ... 8 Ves J 43
606, *Dew* v. *Clerk,* 3 Add Eccl 79; *Eagleton* v *Kingston,* 8 Ves J ... *Tatham*
Hadfield's Case, 27 How St Tr 1281; *Lowe* v *Jolliffe,* 1 W Bl 365, ... *Wigmore* § 19...

might have as to the bearing of the opinion rule *Wigmore* § 1933 ... capacity ar
as to sanity and opinion as to general testamentary or criminal capacity ar
entirely distinct The latter sort of opinion is inadmissible (when it is) beca...
a question of law may be involved, and witnesses' conclusions, are not neede
on such points. *Wigmore* § 1937

Opinion from necessity The opinions of ordinary witnesses derived fro...
observation are admissible in evidence when, from the nature of the subjec... the facts can no...

This rule, however, has its exceptions, some of which are as ... be ...
settled as the rule itself When all the pertinent facts can be able to ...
detailed and described, and when the triers are supposed to be able to ...

correct conclusions without the aid of
exception to the rule is allowed. But case

to deceive purchasers *Macdonald* v *Holland*, 10 S L R 175=41 Ind Cas. 539; *Swadeshi Mills* v. *Juggi Lal*, 24 A L J 975.

45. When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting *[or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, †[or in questions as to identity of handwriting] *[or finger impressions] are relevant facts

Opinions of experts

Such persons are called experts.

Illustrations

(a) The question is, whether the death of A was caused by poison

The opinion of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant

by
mir
the
relevant

(c) The question is, whether a certain document was written by A Another document is produced which is proved or admitted to have been written by A

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant

knowledge of the facts, and, in the final outcome, withdrew from their consideration any facts of which they had original knowledge, confining them to such facts only as should be presented to them at the trial This left to the jury simply the duty of drawing conclusions from facts presented In many cases it was impossible to present to the minds of the jury, who were supposed to have no

v *Chadd*, (1782) 3 Doug 157, was a case in which an engineer was called to

*The words 'or finger impressions" in both places where they occur in s 45, were added by the Indian Evidence Act, 1899 (5 of 1899) For discussion in Council as to whether 'finger impressions" include "thumb impressions", *see* Gazette of 1898, Pt. VI p 24

†These words in s. 45 were inserted by the Indian Evidence Act Amendment Act (18 of 1872), s. 1.

S. 45. show the effect of an embankment upon the filling up of a harbour. *Lord Mansfield* says: "*Mr. Smeaton* (the witness) understands the construction of harbours, the cause of their construction, and how remedied. In matters of
Thornton v. *Assurance Co.* (1790) Peak
Camp. 116. In such a case often just
The furnishing of such assistance to the

Principle. An expert *i. e.* a person having special skill in
than the jury to draw in

nces on the subject.
skilled observer, administration is
all times imposes

for the proof of his case to
actually tendered is relevant for the purpose
some cases the expert observes nothing. His proper work is
reasoning. Tal witnesses and enumerated
by them, it is
they indicate.
that his reasoning has a tendency to supplant that of the
instances when administration permits an invasion of the province of the
jury, an adequate forensic necessity must be shown for receiving the judgment of an expert. The administrative warrant differs, however, widely from that presented in case of the observer, whether ordinary or skilled. Where one is using sense-perception, the forensic necessity for admitting the secondary evidence of an inference or conclusion most frequently in this, that the original
ed by the witness as fully to be placed before
is allowed, after stating such constituting
ese and those previously detailed into the cited
his mind.

In case of the expert, however, the inadequacy which the witness is to supply No man can satisfactorily
reason of art, science or
trade he necessary data
both be unknown

could properly draw for themselves. *Chamberlayne*

When Opinion evidence of expert is admissible. The principle underlying this section is clear enough, but in leads to what seem to be inconsistent results. All must decide the question on a care
which it arises

more accuracy than the jurymen themselves. It is the nature of the subject matter

...f practical everyday matter that the
...example, is put before the jury to give
...year was a proper time to set fire to
...fe stable for horses, whether a fight is a
'prize fight' or whether the keeping of cows in connection with a hotel is unprofitable, the Court is presented with the question whether, because some

which permits of opinion testimony being given *Mckelvey's Ev* § *134.* In *Ferguson* v *Hubbell*, 97 N. Y. 507, 513=49 Am. Rep 544, the rule in regard to the admission of expert testimony is thus well stated by *Earl J* "It is not sufficient to warrant the introduction of expert testimony that the witness may know more of the subject of enquiry, and may better comprehend and appreciate it, than the jury, but to warrant its introduction, the subject of the enquiry must be one relating to some trade, profession, science, or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have The jurors may have less skill and experience than the witnesses, and yet
parties
nature
to them,
to resort to expert or opinion evidence." "The opinions of experts are, in *general, admissible whenever the subject is one, a knowledge of which can only* be acquired by special training or experience When however, it is one upon

his view is to prevail *The Beryl*, 9 P D 137, *The Gannet*, (1900) A C 234, 237, *The Australia* v *The Nautilus*, (1927) A C 145

S. 45. questions of science, skill, trade, and others of the like kind." *Best Princ. of Evidence* § 346. The rule on the subject is stated by *Mr. Smith* in his
to *Carter* v. *Bo*
appears to be
is admissible,
persons are u
without such assistance; in other words, when it so far partakes of the nature of science, as to require a course of previous habit, or study, in order to the attainment of a knowledge of it. See *Folkes* v. *Chadd*, 3 Doug. 157; *R.* v. *S*
2 M. & M. 75; *Thornton* v. *R. E. Assur. Co.*, Peake 25; *Chaurand* v. *Angers*,
Peake 44. While on the other hand, it does not seem to be contended that the
opinion of the witn
matter, the nature

s, the fact that the witness, though
a practising physician, was held to
(1894) 2 Q. B. 766; *Tullis* v. *Kidd*,
Ala. 648 (*Am.*); *Greenl Ev.* § 440. "The term 'expert' seems to imply both superior knowledge and practical experience in the art or profession; but generally nothing more is required to entitle one to give testimony as an exp

Shelluson, 8 C. B. 819; *Re. Whitelegs*, (1899) P. 257; *Halsbury*
p. 481.

witness must have special concerning which

existence of facts capable of being proved or disproved by
opinion as well as hearsay must be excluded. But this general rule has
broken in upon by the admission of various classes of exceptions, all
upon the common grounds of necessity. Such necessity is allowed to
when the facts in issue are not themselves accessible by evidence, being
future probabilities or mere contingencies, or else actual facts but not

ositive knowledge All of these must, of necessity, be judged of only from ther proved facts known generally to accompany or to indicate these in question, s, for instance, where the facts to be ascertained are inferred from some rule of rt or science, or observed law of nature thus proved; the knowledge by which

may not fall professional or cience relating

s frequently a question such as dealers in that article can alone decide There t is a matter of necessity to call in the experienced or instructed opinion of

ship after a storm udge of those neces- cts. Thus, also, in Nesbit, 1 Car. & P. landsmen to draw

any inference, and experienced of that kind amount to unjustifiable

, or the likelihood of their Indeed, it would be more en, professional or expert, *are not admissible as such*, but facts having been proved, *men skilled in such*

His scientific opinion is, in fact, his testimony to a law of nature All these are testimonies to general facts which the jury can ascertain in no other way, and

in words the minute and transient facts observed by the witnesses from the r in his

ne not r which which *Op Ev* herefore , must be necessary second ssary to 42 (Am); *Burr Jones* § 369.

made a study of the subject. On the other hand, he may be an expert although his knowledge has been derived from the study of the subject, and not from actual experience or practice in the business or profession Thus, it has sometimes been held that a physician may give opinions as to matters connected with his profession or with medical science, although in its own practice he may not have had experience as to such matters, and his knowledge in respect thereto is derived from study only, even though he may not have made the disease under

S. 45.

subject, he may be competent as an expert although engaged in some ... occupation, (*Detroit* v. *Van Steinbury*, 17 Mich. 99), or even if he has ... doned the business to which the enquiry relates. *Bearss* v. *Copley*, 10 N. Y. ... It is necessary that the witness should possess the requisite skill e ... actual study, experience or observation. The mere opportunity of ... such skill does not suffice. It must be shown that he is skilled or scien... at least that he has superior actual skill or knowledge in relation to the ... to that possessed by ordinary witnesses or observers. *Page* v. *Parker*, 40 N. H. 47. To prove or disprove infringment of trade mark evidence of men in the trade is not admissible to show whether or not a combination is such as ... deceive a purchase-
41 Ind. Cas. 539; ...
Lal, 49 A. 92=2 ...
is true "he must, in ...
the immediate line ...
differentia of the ...
few experts could be admitted to testify, certainly no Courts could ... capable of determining whether such experts were competent. A general ... the specialty belongs would seem to be ... Ala. 212. The value of the te... the experience or study of the ... *Wells* v. *Leek*, 151 Pa. 431; *Burr Jones* § 368. So "the first question that ... when we are dealing with an important witness who has made observations ... inferences is this: 'How intelligent is he? and what use does he make of ...

... ...mention for the Court ...

himself may be ...
subject under en...
may be called ...
give their opinions thereon. ... But the expert cannot give his own opinion as to his own qu... *Broadman* v. *Woodman*, 47 N. H. 120; *Braham* v. *State*, 143 Ala. 28 ... of the qualification of the ...

In India this practice does not obtain. In the examina... otherwise his testimony will be ... is purpose he should be examined ... But it seems that he cannot give ... opinion as regards his own qualification. No exact standard by which ... determine the competency of the witness exists, and much is necess... to the discretion of the trial Court. *Forgey* v. *First National Bank*, 66 Ind. ... Courts that the ...

"Wh...
tion, ...
the value of his testimony, and not to the Court for ...

his testimony." *Rog Exp Test* 50. The right to a full cross-examination is thus secured; and if, it turns out the witness is not qualified, the Court should

mination

witness,

rr Jones

§ 369.

Mode of examination of experts—Hypothetical questions It may be plainly inferred from what has already been stated that the testimony of those found qualified as experts is not confined to facts within their own personal knowledge, but that they may give their opinions upon an assumed state of facts, indeed, it is probably true that in the majority of cases in which experts are examined n facts assumed *Vide, Raghunı* , 15 C 589 Wl form of the hypothetical question in such cases, it is clear that the question should be so framed as to fairly and clearly present the state of facts which the counsel claims to be proved, and which the testimony on his part tends to prove. *Cowley* v. *People,* 83 as regards fact v *Bell,* 1 C If the other si

examination being within is fairly and reasonably con other words, the hypothet

would be defeated

Peerage, Le Marchant, Ed 379 The facts must *on,* 69 Mich 400 Where

is of course no basis for the superstructure *Burr Jones* § 371, *Whart* §§ 441, 451, 452

In *Lord Melville's Trial,* 29 How St. Tr 1065, *Lord Erskin L C* said "If you take away the foundation upon which it is made, which is matter for the Court afterwards, there is an end to the superstructure All that the witness has

S. 45. although the facts assumed by counsel to be true are not proved, or although the question does not state the facts as they actually exist The facts are generally in dispute, and it is sufficient if the question fairly states such facts as the proof of the examiner, fairly tends to establish, and fairly presents his claim a theory *Burr Jones* § 371 Although on questions of professional skill he may state in a general form what could be the proper course to pursue under the circumstances proved (*Sills* v. *Brown*, 9 C & P 601, 603, *Chapman* v *Wa*... 10 Bing 57; *Rich* v *Pierpoint*, 3 F & E 35; *Collier* v *Simpson*, 5 C & P ... may not be asked what his own conduct would have been under the circumstances (*Berthon* v *Loughman*, 2 Stark. 258, *Hatch* v *Lewis*, 2 F & F 457, ... *Ramadge* v *Ryan*, 9 Bing 333) *Phip Ev 7th Ed* 380

Protection ... the jury, it is ... existence of a fact ... is controverted upon the evidence ... not be invoked which of the two sets of witnesses is the more credible or regarding the relative probability of antagonistic stories told by ... tions raised by the ...

science or skill merely ... the case, (b) Where the issue is substantially one ...

cally, but not en bloc, ... the correct course is to put such facts to him hypothetically, and to state his opinion thereon, asking him to assume one or more of them to be true, ... been said that the former question, where, however, the facts are not in dispute, it has though not as of right" *Phip Ev 7th Ed* p 380

Form of questions Policy as well as principle, require the form of the question to be expressly hypothetical, because otherwise the jury, and perhaps the witness, may be misled by the statement as a proved or admitted fact, of that which is ... yet ...

considered, and the foll... (Del) 512, the form of the question was very ... question was adopted "You have ... ry to be satisfied that the ... her witnesses, are true, what ... ... of the alleged crime? ... the prisoner's mind, at the time of ... time of ... Was the prisoner in your opinion, at ... and what kind of insanity or delusion ... conduct of a person under such ... ... C J adopted the following form. ... *Rogers*, 7 Met (Mass) 500=41 Am D... "If the symptoms and ...

testified to by other witnesses are proved and if the jury are satisfied of the truth of them, whether in their opinion, the party was insane and what was the nature and character of that insanity, what state of mind did they indicate;

and at the same time to exclude their opinion as to the effect of the evidence in

ge as an expert (3) , or where inferences of facts must be drawn from the evidence, in order to be reasonably certain of the grounds on which an opinion is based, it is usually necessary that the facts should be stated hyp

rule for all cases,

presiding at the trial

or it will be held t

in a hypothetical question may be very numerous, it sometimes happens that

to answer a question which confessedly rest upon no sound basis of fact Substance rather than form is the important consideration with a sound judicial

of its

he jury

It is not deemed objectionable that the proponent uses the actual names as developed in the evidence in connection with his question to the expert Argumentative questions, that is those which involve a favourable argument which is assumed to be true, may properly be rejected *Chamberlayne's Ev* §§ 2489—2494

is the cross-examination of an

test his memory, observation,

stand as a skilled witness, his judgment upon germane matters may be tested by assuming premises and asking his conclusions *Wigmore* § 684 The fact that the expert was not in a fit state of mind or health to form a proper opinion, or is interested, or corrupt

be elicited in cross

v *Royal Exchange*

139) *Phip Ev* 7th

witness's opinion unless the passages to be used are put in cross-examination to the witness, for him to explain them if he can 46 Ind Cas 503-22 C W N 745.

and t

ment

that t

not testify that he saw a certain person at a certain time and that he was then

S. 45. labouring under an epileptic fit or
strucken down and rendered uncons
Felter, 25 Ia 75, *per Dillon C J*;
& I. R. Co v. *Bailey*, 11 Oh St 3 .
the witness had been a stranger to the actual facts, it would then have been necessary to assume a state of facts as the foundation of any opinion he gave; but no such assumption, it seems to us, is necessary when the witness is or is properly presumed to be himself personally acquainted with the facts of the case If an expert may give his opinion on facts testified to presumably with ... fact be want... by cross-exami...

and by testimony *aliunde*" *Ibid*

An ...
why a s...
parties to ...
calls him ...
the scientific opinion which he expresses, not the party by which such ev... is tendered *Lila Singh* v *Bejoy Protap*, 41 C L J 300=87 Ind Cas ... A I R 1925 Cal 768

Value of experts "Experts are the most important auxiliaries of ... investigating officer, in some way or other nearly always are the main ... deciding a case But everything depends upon knowing how to make ... questioned ... But it is ... he ought to ... ust know wha... re his know... t seize the ...

moment for putting his question i. e the moment when he is in poss... sufficient material to ren...

"Every Investigat...
problems, seeming to ... experts in ph... ocess, traces ...
chemical exp... once furnished the ...
with certain ... been cut with ...

encouraging feature of judicial enquiries in the present ... increasing appreciation of the application of science to proof. *Ibid* p 331

... a foreign country, the Court ... the Code as best as it can and it should not rely on the outside opinion ... eminent, as to the interpretation of that Code *Ibid* But in England ... should be ... law cannot be proved by produ...
as matters of fact. *Mostyn* v ...
11 Cl. & F 85; *Brenans Case*,
Moo P. C. 484 In England ...

'here the evidence is co . . . . . S. 4
'reeman, 10 Moo P.
'ew York, 96 L J. K. 1
ot by mere certificates
dmissible, for being
n authority. *M'Cormu*
'. 157; *Westlake* v *Westlake*, (1910) P 167; *Re Arton*, (1896) 1 Q B 509; *Barter* v *Barter*, (1907) P 333 Another reason for this is that the law is continually liable to change. *Phip Ev 3rd Ed 342* So foreign law is to be proved by expert testimony. The main controversy is whether a witness to foreign law must be by profession an advocate, attorney or Judge or whether a layman, if he claims knowledge may be trusted to speak as to the state of the law The earlier practice in England seems to have been very liberal. *Vide Sussex Peerage Case*, 11 Cl & F 117-134; *Venderdunct* v *Thellusson*, 8 C B 12, 824; *R* v *Dent*, 1 C & K 97 But in *Richardson* v *Anderson*, 1 Camp. 6, *Lord Ellenborough* insisted on the necessity of a professional character in the witness, see al ... , (1917) 1 K. B. 359; *Brad* ... *more* § 564 But the decision ... have been held competent — ... the Courts of his own coun ... *Hanson* v *Dixon*, 96 L T 3 ... non-lawyer, ... v *C K* 1900 P 65). A colonial ... to the law of his colony (*Sussex* ... holdinge the office of coadjutor to ... n marriage law A French Vice-

marriage law *R* v *Savage*, 10 East 281 But a mere tradesman in a foreign country can prove the law of that country *R.* v *Brampton*, 10 East 287, *R.* v. *Naguib*, (1917) 1 K B 359 C C A A person to become competent to ... expected to know the law from ... 11 Foreign law on particular ... *idha*, A. I R 1926 M 218 A ... *Ibrahim* 47 A 823 89 Ind Cas 690 So also his opinion of Hindu Law is admissible *Nara Sinha* v *Ramgaya*, 29 M 437

... ral, foreign laws are ... they can be verified by ... it respects the oath of an individual (*Church* v *Hubbart*, 2 Cranch 237) The usual mode of authenticating foreign laws (as it is of authenticating foreign judgments), is by an exemplification of a copy, under the Great Seal of a State, or by a copy proved to be a true copy, by a witness who has examined and compared it with the original, or by the certificate of an officer properly authorized by law to give the co ...
Hubba ...
laws, ...
by par ...
competent witnesses, instructed in the laws, customs, and usages under oath. *Church* v. *Hubbart*, 2 Cranch 237, *Dalrymple* v *Dalrymple*, 2 Hagg. Const.

S. 45. App pp. 115—144, *Brush* v. *Williams*, 4 Johns Ch 520 ... Cowp 174 Sometimes, however, certificate of per ons in high author[illegible] been allowed as evidence, without other proof" *Story on Con l of Law* 647; *Greenl Ev* § 486; *In re Dormoy*, 3 Hagg Eccl. 767; *R* v *P*... Howell's State Tr. 515—673 When foreign law is allowed to be proved b[illegible] of experts, he is allowed to refer to accredited authorities on the [illegible] refreshing memory. *Nelson* v *Lord*, 8 Beav 527

As regards proof of foreign law, *Vide Gangadhar* v *Swaminath*... 9[illegible] Cas 112 = A I R 1926 Mad. 218.

systematized, and has obtained method, relations and the forms of law *Davis J* in *Atchison & Co* v *U. S*, 15 Ct Cl. 140 Expert t[illegible] usually thought of in connection with enquiry as to technical or [illegible] scientific questions—questions requiring, as an essential to [illegible] judgment, a special training of the mind—and this is the f[illegible] which the usefulness of such testimony is most often felt. The ph[illegible] of human body, and the condition and operation of any of [illegible] tions, have been a fruit-field for this class of testimony *Young* v *M*... 103 Mass 50, *McKelvey's Ev* S 138 So on questions of science or [illegible] relating to some art [illegible] may give their opinions [illegible] to cause death, the o[illegible] J L [illegible] of th[illegible] sible [illegible]

testimony called for from medical and surgical practitioners, and the details of the various branches, upon which such evidence has been cal[illegible] and received, will disclose only portion of the area covered by the num[illegible] cases which increases with every discovery in either medicine or surgery opinions of physicians and surgeons may be admitted to show the phy[illegible] condition of a person, the nature of the disease, whether temporary or per[illegible] nent, the effect of disease or physical injuries upon the body or mind, as w[illegible] in what manner or by what kind of instrument they were made, or at what[illegible] wounds or injuries of a given character might have been inflicted, which would probably be fatal or actually did produce death, the cause, sympt[illegible]

a physician how certain wounds or injuries were actually given, [illegible] by what [illegible]

ment or medicines (*Matteson* v *New York C S Co*, 35 N ... 22 W... be proper treatment under a given state of facts (*Wright* v *Hardy*, 22 W... the probabilities of recovery from the effects of an injury [*Hall* v ... Watts (Pa), 227]; what, under certain circumstances, might cause d[illegible] ... *Powell*, 7 N J L 2[illegible] ... c. March. R, D... ity is real or feigned v *Hayden*, 51 Vt. 296), and whether or not great mental anxiety and [illegible] would tend to develop insanity, where there is an hereditary pre[illegible] (*Dearnette* v *Commonwealth*, 75 Va. 867) Upon the question of the [illegible]

edical practitioner testifying in mental cases, there is a diversity of decision, American Courts, the preponderance of authority being in favour of accepting
educ
ecial
prac
inch
nce with the subject may always be inquired into to enable the jury to estimate
weight
perience
ssessed
is groun
stimony
the causes, nature and effects of disease among animals *State* v. *Sheets*, 89 C 543 As a preliminary question as to his qualification as an expert, a edical witness may be asked whether the examination made by him was careful

ate whether the injuries he is a speaking of amount to grievous hurt or not, but ily to describe the nature of the injuries *Empress* v *Balwant*, A W N 1885,

edical man that has not seen the corpse, can give only expert evidence

ortem examinati
oticed by him
leher Ali, 15 C 5
erson is in issu
om wl
edical
hould
nd to whom extracts might be put *Shea Bahadur* v *Beni Bahadur*, 6 O L J 78=51 Ind Cas 419

Testimony of physicians and others as to poisons Toxicology is regarded n some jurisdiction as part of scientific knowledge of physicians, and to a ertain extent this is justified by the course of education of medical men Thus
is t
erienc
nd th
ician
resen
equisite knowledge of chemical science Although it is usual for experts to ubject compounds to a chemical analysis before testifying whether they are oisonous, or as to their ingredients, and although this has sometimes been eld indispensable, the better rule is that the opinion may be received, although his test has been omitted, it being a matter which affects the weight rather han the competency of the testimony *State* v *Slagle*, 83 N C 630, *Burr Jones* § 379.

Mechanics and machinists as experts When a witness shows himself expert in any particular art or craft, to admit of an examination properly addressed to persons of skill in that department of industry, he is competent to give an opinion upon matters of which the jury could not be expected to judge accurately from the mere detail of facts *Cole* v *Clark* 3 Wis. 323 Hence it is that the opinions of machinists and artisans may be received as
e with the
coming to
opinions are

S. 45.

(*James* v *Hods*
value of labour,
Cook, 69 Ill 581
v *Naglee*, 17 Cal
such work (*Shut*
such manner a
(U S) 167), or
by certain mac
certain force of n
certain mode of
machine itself w

Experts on agriculture As illustrations of the same principle the op
of those skilled in farming and agr... be received as to the pr
mode of
probable
stances,
probable
as to value, age, and weight of domestic animals and as to the u
proper management of stock Milk experts are competent to testify wh
certain liquid exhibited to them looked and tasted like milk and water
Burr Jones § 382

Insurers and insurance The opinions of persons specially skilled th
are admissible on questions
Expert & Op Ev 31, *Thornto*
Beckwith v *Sydebotham* 1
admitting the evidence said
say whether, upon such and such symptoms a person whose ... could at the time of the insurance have been in good state of health ...
can testify as to the average duration of life with respect to the value of
annuities *Rowley* v *London*, L R 8 Ex 221

admissible —

Turn

Knight, 43 Me 27

"*Book-keepers*—As to the meaning of an entry in a bank book ...
difficult to decipher *Knox* v *Savings Bank*, 93 Mich 19

"*Botanists*—As to whether the working of coke ovens near a park ...
the trees in the neighbourhood *Salvin* v *Coal Co*, L R 9 Ch App 705 ...

"*Chemists*—As to the effect of a particular poison *Railing* v ...
Park. 319

"*Engineers Civil*—*Eggers* v *Hoges*, 37 Pac. R 1037

"*Engineers, Electrical*—As to the imperfections of contrivance ... *Street*, 57 N L J ...

... tank was ...

... rail road was finished ...

... or quantity exists on the ...

in question

"*Inventors*—As to the value of the case of certain inventions ...
stock cars *Burton* v *Burton Stock Car Co*, 50 N E. R. 1029

"*Photographers*—As to the genuineness of a signature to a note ...
Barnes, 16 Gray 161

"*Post office—Inspectors*—As to whether a document is written in feigned or natural hand *R* v. *Cator*, 4 Esp 187, *Revett* v. *Braham*, 4 T R 4 97.

"*Surveyors—Grand Rapid S R Co* v *Chesboro*, 74 Mich. 766

"*Veterinary Surgeons*—That a horse has blind staggers *People* v *Bain*, 3 Mich 453" *Lawson Op & Exp Ev* pp 7—9

Handwriting The genuineness of hand-writing, including under this

ire, however, co

he law deems
and that the ge

amples of the use of circumstantial evidence extrinsic to, outside of, a docu-

thought, habit, character, as these, tend to develop each from the other, in this order, as a result of mental action In other words the tendency of mental, physical or metaphysical impulses to express themselves in physical action is the basis on which rests the probative force of resemblance in
es himself into his hand-writing To
Naturally, this can, as a general rule,
formation of physical habits. Practi-
l as it were,
trained eye
er. On this

the inference from resemblance is based

not have seen the person in question actually write. (*Chamberlayne's Ev* §§ 2177—2179)

An opinion c
disputed writing
English common
fully in *Doe* v
divided (*Lord Denman and Mr Justice Williams* favouring and *Justices Coleridge and Patteson* opposing) upon the question of admitting the testimony of an expert who had made an examination of admittedly genuine specimens on the first day of the trial, and was called to testify on the second, and at that time stated that he thought he had acquired a knowledge of the

S. 45. handwriting in question sufficient to enable him to tell whether the particular specimen was genuine. The Judges, however recognize with unanimity the established English common law doctrine that comparison of hands by the jury or by witnesses will not be allowed upon specimens introduced for that purpose. For purposes of comparison it is held that only original specimens may be used, press copies will not do. *Lord Denman,* in this case, speaks thus of this class of evidence "On the question whether handwriting, looked at by itself is genuine or forged, the cases appear to me to have justly exploded the notion that bare inspection by the most skilful person can form ... an opinion

in point of reason ... of evidence. "But where," says *Mr W. D. E*

... with the immed... is aided by the compari...

mind may be supposed to have acquired from the previous perusal of ... very writings or even from the casual inspection of a single act is received and acted upon without objection" *Mr W. D. Evans, Notes to Pothier,* II, ... That note was written by ... the scientific aspects of ... great Judge like *Lord Coke* ... the learned Judge said ... not to the formation of the ...

... has been selected, (still) ...

§ 1998 "T... as to the general ...

... corresponded with him" *Wigmore* § 1998.

Objection based ...

... with an admitted specimen placed before him. Therefore an ...

S. 4

genuine
additional
as to be
essential
lly stated
by *Lord Coleridge J.* in *Doe* v. *Suckermore*, 5 A. & E. 706: "If the

of *Lord Colerid[ge]* is based on the assumption that the first of these modes, as indicated by *Prof Wigmore* is the only one which is proper and possible and

S. 45.

§ 2000 But the better way to avoid ... second mode of evidencing genuineness ... proving it to the Judge. In *University of Illinois v Spalding*, 71 N H ... 51 Att. 731, *Remick J* thus said · "The third objection—that to permit comparison with specimens not otherwise in evidence, and admitted for the ... purpose of comparison, would introduce collateral issues and confuse and distract the jury—is when applied to specimens neither admitted by the par...

undoubted evidence This involves, indeed a marked departure from common law It does away with the common-law limitation of comparison ...

exceptions *Wigmore* § 2000

Thus stood the law in ... Procedure Act of that year (17 ... of a disputed writing with any ... to be genuine, shall in civil ... such writings and the evidence of witnesses respecting the ... submitted to the Court and the jury as evidence of the genuineness or otherwise ... years later a section in precisely the ... Evidence Act, 1865 (28 & 29 Vi... ... ference between the rules governing ... and criminal cases no longer ex...

Wills' Cir Ev p 233

Basis of expert testimony for proving handwriting "Manifold as are the points of difference in the infinite variety of nature in which one man ... from another, there is nothing in which men differ more than in ... and when a man comes forward and says, 'you believe that such a man is dead and gone; he is not; I am the man,' if I know the handwriting of the man supposed to be dead, the first thing I would do would be to say, 'sit down and write that I may ... of the man ...

handwriting of the defendant, and to compare it with that of ... *Roger Tichborne* and with that of *Arthur Orton*" *Tichborne Trial* ...

Nisi S.
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ent i
rom fi
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ormati
lmost automatic succession of acts stimulated by these habits Thus, a person's tyle of writing, in most details, becomes as fixed as the habit, and serves as a ontinuous inseparable mark of that one person Moreover the imitation of ne style of writing by another person becomes difficult, because the other person annot by mere will-power reproduce in himself all the muscular combinations
to this that modern apparatus,
f details, characteristic of the
the imitator (For a complete
of handwriting, the reader is
eferred to the following masterly treatise *Albert S Osborn*, 'Questioned Documents')

"Thus the data of graphic science make it possible to assert almost the universality of the proposition No two persons' handwritings are normally
This proposi-
finger-prints
and as such
rship of docu-
investigating

as a standard to

ermination of this skill must of
Courts as applied to the circum-
5 Various forms of test have
lute. In *Doe* v *Suckermore*
ess must be conversant with the
of a Court of Justice to be
012 The following persons
atters of handwriting —(1) Post
Ic 4th Ed p 556; *Last Ec* §
246), (2) Bank clerks, and (3) Lithographers. A solicitor can also give opinion as an expert if he has made a special study of the subject. *R v Silverlock*,

S. 45. Act V of 1899,
has been appl
parison being m
An *expert* may
his evidence But he cannot go on and assert his mere opinion or belief as
it were a *fact* within his knowledge. In this respect an expert witness
different position from a direct witness of fact. The value of ordinary or
expert oral evidence mainly rests on the credibility of the witness—his and
and capacity, for telling the trut
skill of the witness—the extent
Emperor v *Sahdeo,* 3 N. L R.

same combination of types, it has been said that the chances of a single
marks showing the same pattern as another's are as, to about 64 millio
hence the c
another ten
of the scienc
p 118 , see also *Public Prosecutor* v. *Virammal,* 23 Cr L J 694.

The accused was convicted of theft. He had three previous con
The previous convictions were denied by the accused, and, in order
slips, and the
pressions of the
finger impr
sheets he produced from the finger impression bureau, he declared
accused m
produced
not person
the sheets he produced *Held,* the previous convictions of the a
on the slips were not proved by the mere production of such slips.
King-Emperor, 4 L. B R 125=7 Cr L J 406. Where the thumb impr
on a document were blurred, and many of the characteristic marks were
from clear, rendering it difficult to trace the marks enumerated by an
witness as demonstrating the correspondence between the thumb impr
in the document and those made by the accused in Court, *held,* that
circumstances of the case the evidence was not reliable and the jury
is not acc
Hamid, 32
eyes and

no two human beings have the same thumb-markings, and, it

... is charged with having forged a document purporting to have been executed ... l of the Act, if their ... Empress v Fakir ... een cross-examined ... he had put a parti... alue and weight to ... ed by applying to it ... ected Sarwar v. ... a finger print expert ... and subjected to ... oss examination in open Court *Pitam* v *Baboo Singh*, A I R 1924 Nag 183 ... Court should be very chary in accepting an opinion of Finger Print Expert ... hen such ... itself so ... appears on ... e document *Ramlakhan* v *Dharamdeo*, 97 Ind Cas 335=A I R. 1926 ... at 575 Under this section the opinion of an expert formed by comparison ... the thumb impression of an accused taken in Court under Act XXXIII of ... 920, s 5 with his thumb impression on deeds is admissible in evidence. *Superintendent* v *Kiran Bala*, 30 C W N 373=43 Cr L J 79=93 Ind Cas ...=A. I. R. 1926 Cal 531 It cannot be laid down as a rule of law that it is ... unsafe to base a conviction on the uncorroborated testimony of a finger print ... expert. The true rule seems to be one of caution, that is to say the Court must ... ot take the opinion of the expert for granted, but it must examine his evidence ... order to satisfy itself that there can be no mistake and the responsibility is ... l th ... *Fare* ... 05; ... akin ... con. ... omp ... s not objectionable *Public Prosecutor* v *Kandasami*, 50 M 462=98 Ind. Cas. ... 9=A. I R 1927 Mad 696

... *Principles of Judicial Proof* p 123

Value of expert evidence generally ... considered to be of slight value, since ... unwittingly, biased in favour of the side ... to regard harmless facts as confirmation of preconceived theories; moreover ... ly be multiplied at will ... ie. & G 116, 128 *per Lord* ... *Ashton*, L. R. 17 Eq 373. ... deserving of notice is that ... if veracious and ... He combines ... witness—truthful,

S. 45. false, dogmatic, opinic- ... more bully this man ... truth You can no ...

... tenacity of opinion is his weakness I ... give up his opinion " *Richard Harris* ...

"It is known, for example' says *Prof. Wigmore*, "that the receipt of fees by experts tends to bias that kind of witness, as it would bias any ... and that in judicial trials incompetent persons who falsely pose as ... can often be obtained for hire. It is known too, that the selection and ... of expert witnesses by the parties, instead of their selection by the Judge, ... to create a partisan bias " *Wigmore's Principle of Judicial Proof* p. 334.

... th considerable ... *chu Mondal* v *E* ... s are not binding ... , that the determin... a matter to be ... ndness of the ... W. N. 465 In *B.* v *B*, 42 L Jo 402, the Court accepted the evidence of a wife as to the pa... of a ten months child, inspite of the unanimous opinion of several do... A tribunal should not accept the mere untested opinion of experts in ... ference to direct and positive testimony as to facts *Poynton* v *P*, 37 L T 54; *Aitkin* v. *Mc Meikan*, (1895) A C 310, *Newton* v. *Ricketts*, 9 A. L. J ... The evidence of a skilled witness, however eminent, as to what he thinks ma... may not have taken place under a particular combination of circumsta...

... taken by his own side Besides it must be remembered that an exp... called by one simply and solely because it may be ascertained that he ... views favourable to his interest. *Hari Singh* v *Lachmi Devi*, 3 Lah. L ... 110=59 Ind Cas 220; *Boisagomoff* v *Nahapiet*, 29 C 32 Where the ... called expert witnesses give no data in support of their opinions ... opinions should be rejected *Pirbhu* v *Secretary of State*, A. I. R. 1931 La... 364. An opinion of an expert witness not based on any well ... inexorable laws of nature cannot be taken as decisive especially where ... direct evidence opposed to it. *Mansel* v *Emperor*, 96 Ind. Cas. 641=27 Cr L J 977=A I R 1926 Lah 313 See also A. I R 1928 Pat. 568=161 Ind C... 698 "I am convinced" says *Prof Wigmore* "that the belief that such ... must be the best witness, is false, at least as a generalization ... have had such experience with expert witnesses, and most of us have ... observed that they often give false evidence because they treat the ... in terms of their own interest and are convinced that things must ... according to the principles of their trade However the event shapes itself ... inally implies their own appre...

... Every witness must be produced at ... trial, unless and until it is proved either to be actually impossible to pro... him or to be difficult to do so, that it is under the circumstances ... es such as those to ... ...

Gills v *Emperor*, 2 O. W. N. 377=12 O. L J. 497=83 Ind. Cas ... L J. 1232=A I R. 1925 Oudh 616. But it is not satisfactory to exa... expert witness on commission and not in the presence of the accused. The evidence of an expert has always to be carefully weighed but, when ...

commission, its value is considerably reduced. *Nur Din v. Emperor*, 10 Lah. L. J. 235 = 108 Ind. Cas. 369 = 29 Cr. L. J. 377 = A. I. R. 1928 Lah 533

the person whose
medical witness whc
as to the nature of t
In re K. Venkatar
Code does not precl
witness, that has ... elucidation,
. *Raghuni*
...al case the

certificate by itself is not a
person who gave it as a wit
L. R 893 = 47 B 74 = A
Cr. L J. 339. See also *Sa*
80. The certificate of a
in the form prescribed in th
His report on a case by
in evidence without proof of the truth of its contents *Raghunath* v. *Kurseong Municipality*, 76 Ind. Cas 394

Deposition of Medical witness. Section 509 of the Criminal Procedure Code lays down. "(1) The deposition of a Civil Surgeon or other medical witness, taken
taken on con
enquiry trial
... is deposition" S 509 does not
witness admissible at the trial
before the Court of Sessions it should be recorded by the Magistrate who is

even in the absence of the witness. 38 Ind Cas 764 = 18 Cr. L J 580

Report of chemical examiner Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any enquiry; trial or other proceeding under this Code. (s. 510 Cr. Pro. Code).

S. 45

The report of a chemical
the signature of the Examin
App 112=15 W. R. 49; 2 We-
before the institution of proc
in person 50 Ind Cas 26=20 Cr. L J 266 Chemical examiner's
does not require formal proof, but it must be tendered as evidence and
such It can not for the first time be used in appeal 21 A L J 889-83 I
Cas 904, but see 98 Ind Cas 177=5 Bur L J. 100=A I R 1926 Rang
Failure by prosecution to adduce evidence connecting the parcels cont
the blood stained clothes which reached the Chemical Examiner with

Cas 485=28 C. W N 561.

Report of experts The reports of experts are not legal evidence
, and are examined by parties in respect of
7=20 P. L R 125, 15 C. W N 728 Op
t evidence 76 Ind Cas. 425=1 Rang
Expert opinion given for the purposes of a previous suit is not
evidence and its evidential value is very little 110 Ind Cas 810=A. I R
Lah 921

Palm impressions Palm impressions are akin to finger impressions
expert evidence relating thereto should on the whole be admitted rather
excluded, to be weighed by the Court and the jury for whatever it is
Emperor v *Babu Lal* 52 B 223=29 Cr. L J 410=30 Bom L R 321=1
Cas 508=A. I. R 1928 Bom 158

involv
exper
stated by the Supreme Court of Ohio in *Clark* v *State*, 12 Ohio,
"Medical testimony is of too much importance to be disregarded When
with caution, and without bias in favo
speculation and favourite theory, it
even intelligent juries from following a
on inconsistent and unsound principles
and received with utmost caution, and, like the opinions of
acquaintances, should be regarded as of little weight if not well
reasons of facts that admit of no misconstructions, and supported by
to which the judgment of

Qualifications of a medical witness. If the judge be satisfied that
witness is competent to give an inference helpful to the tribunal,
essential that he should be able to produce a diploma to be engaged
practice or even to h The rule is the
in case of a specialist.
the witness, th
the fact as to wh
however must

ask
in murder, the defence was insanity, the judges were all of

S. 4

opinion on the very point which the jury were to decide, *viz*, whether, from other testimony given in the case, the act charged was, in his opinion an act insanity. *Wright*, R & Ry 456, 1821, on the authority of which *Park B* owed a medical man, who had heard a trial for cutting and maiming, to be owed symptoms of insanity it in *Mc Naughton*, 10 Cl & F 2 Russ Cr 2262 (h) See the t words of the Judge's answers In *T Mason*, 7 Cr A. R 67=76 J P 184= T. L R 120 (1911) murder it was held that an expert who has not seen the ly, but has heard its condition described by the witnesses in their evidence, y state his opinion that death was not self inflicted *Roscoe Cr Ev* p 170, . *Reg* v *Newton*, Shrewsbury Spring C Sess Pap 374; *Doe d Bainbridge* v *on*, ib 149, *Sills* v *Brown*, 9 C & P asonable principle" says *William Wills* such, shall be permitted to testify only such matters of professional knowledge or experience as have come within to such proved, so that testing

tness should be. "Assuming an injury of such and such a kind to have been flicted, what is your opinion as to the nature of the weapon by which it was ssibly or probably inflicted" *Roghum* v *Empress* 9 C 455 It is a settled questions entitled to be laid by *erwaji*, 10 an L R 907 (913) For questions to be put to medical witness, vide Achariar's Wills' Cr Ev App II

The most legitimate, valuable and wonderful application of expert evidence on charge of poisoning where poison is extracted from corpse by means of emical analysis *Best Ev* § 514

Medical Inferences—Probative weight Many considerations may, as is atural, affect the weight ... he inrence of a s not cently made pative rce which drawn om it In h part, pon the truth of the statements made to him by the patient or by others is garded as impairing, to a certain extent, merely the weight of his testimony either a jury nor the trial judge is presumed to have such technical knowledge pass upon the improbability of

y an examination an those reached by itness toward the ay, e g that the witness is interested to support his present contention in other onnections *Chamberlayne's Ev* § 2030

Medical I

In many instan- This being so; they

S. 46. are received by
case of any other
although the wit
men who have ob
value from the
facility and obvious incentive for accurate observation, and that their tra
would fit them to appreciate and describe what they observed *In the g*
Goppesser Dutta, 16 C W. N. 265 (273) But as regards expert w
has already been said that "Tenacity of opinion is his weakness. He
sacrifice truth itself rather than give up his opinion." Medical witness sh
be carefully watched in these respects. They are witnesses of theory
are most tenacious of their opinions. *Hints on Advocacy by Richard Har*
pp 84, 97, 117 The following observation of *Mr Justice Norman* in
v *Ahmed Ali*, 11 W R 25, is very pertinent: "The evidence of a me
man or other skilled witness, however eminent, as to what he thinks
or may not have taken place under a particular combination of circum
however confidently he may speak, is ordinarily a matter of mere opi
Human judgment is fallible, human knowledge is limited and imperfect
and previously unobserved phenomena which till they have been record
suppo
easy to
had be
comme
accepte
much
42 L J
a ten months child, inspite of the unanimous opinion of sever
Ev 7th Ed. p 375

Where the age of a party has to be decided for purposes of
No doctor can give the precise age of
o determine the exact date of that p
Lah 250=10 L L J 183=113 I
by a doctor that a person is of 21 years
and he voice and teeth of that per
opinion to the
P C
of the
W N 577=45 I A 284 P C =49 Ind Cas 540;
56 Ind Cas 313 Opinion of a doctor as to the physical condition of
patient on a future date, is hypothetical and cannot be relied upon at
against people who saw the person concerned on the said future date
v *Nilapagandu*, 83 Ind Cas 616=26 Bom L R 625, see also
Sudhir, 50 C 103; 9 A W N 74 The mere presence of semen
loin cloth of the woman, is not sufficient to prove, that she was con
party, especially in the absence of any spermato zo in the vagina.
v *Emperor*, A I R 1925 Lah 94=6 L L J 474.

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Facts bearing upon opinions of experts.

Illustrations.

(*a*) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant

(*b*) The question is, whether an obstruction to a harbour is caused

relevant.

it the round about way of stating that the
rroboration or rebuttal The illustrations
, for this purpose, *res inter alios acta* is
eivable *Nort Ev p* 225 So this section embodies a general rule which
s down that evidence of collateral facts cannot be received. *Vide Taylor Ev*
37. For purposes of corroboration, the proponent of the inference commonly
kes use of the text book statements at the stage of exmination in-chief
sting by means of them usualy takes place on cross examination. *Chamber*

oponent uses it to enhance and corroborate the force of what his expert says
ie right of a proponent, who has submitted an inference, conclusion or
dgment of a skilled witness to corroborate within reasonable limits, its proba-
re effect by showing the sound nature of the reasoning upon which it is based
ems unquestionable *Ibid* § 2528. The authority of the text writer can not
used as proof that the statements contained in the work are true The
arsay rule forbids the use of the declarations in their assertive capacity At

e same as that which it has on direct. In other words the statements contained

nto employing in their probative capacity This result the judge may attempt
o reach by mean
hey may use

by ss. 57 and 60
killed an expert

that madness is often of an hereditary character, evidence tending to show that none of the defendant's ancestors or near relations had been insane, would be admissible in support of the negative proposition; and on a question of disputed paternity, after proving as a matter of science, that children are apt to inherit the features or general appearance of their parents, evidence will be received of personal resemblance between the party in question and his alleged father.

S. 47. *Bagot* v *Bagot*, 1 L R Ir 308, *Tay Ev* (9th Ed) § 337. An expert w[illegible] himself paralysed in the arm and leg may support his opinion as to the e[illegible] of such paralysis by testifying to its effect on himself *Chicago R C* [illegible] *Lambert*, 119 Ill 255 (Am)

an [illegible]
157 [illegible]
up of a harbour, and e [illegible]
of the wall, proof that [illegible]
bankments, had began to be choked about the same time as the harb[illegible] question, was admitted, as such evidence served to elucidate the rea on, [illegible]
th [illegible]
[illegible]
wi [illegible]
Mr Smeaton's (the expert) opinion, but as to harbours in which there [illegible] embankments, we think it was improper, since *litem lite resolvit*"

47. When the Court has to form an opionion as to the p[illegible]son by whom any document was written [illegible] signed, the opinion of any person acquaint[illegible] with the handwriting of the person by wh[illegible] it is supposed to be written or signed that it was or was n[illegible] written or signed by that person, is a relevant fact.

Opinion as to handwriting, when relevant

Explanation—A person is said to be acquainted with th[illegible] handwriting of another person when he has seen that person wr[illegible] or when he has received documents purporting to be written b[illegible] that person in answer to documents written by himself or und[illegible] his authority and addressed to that person, or when, in the ordin[illegible] course of business, documents, purporting to be written by th[illegible] person have been habitually submitted to him.

Illustrations.

The question is, whether a given letter is in the handwriting of A [illegible] merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A [illegible] received letters purporting to be written by him C is B's clerk, whose [illegible] was to examine and file of B's correspondence D is B's broker, to wh[illegible] habitually submitted the letters purporting to be written by A for the purp[illegible] advi ing with him thereon.

The opinions of B, C and D on the question whether the letter is in [illegible] handwriting of A are relevant [illegible] nor D ever saw A wr[illegible]

Principle [illegible]
distinct kinds [illegible]
the act of writi [illegible]
act, secondly, evidence of the kind of handwriting [illegible] the establishment [illegible]

[illegible]

mode, there is always an inference from the type to the [illegible] ation is [illegible]

[illegible]

of an inference. The difficulty
has not been over the relevancy of
dwriting traits to show the authorship of writing but over the mode of
lencing them by circumstantial evidence, and that is by examining one or

cause when the specimens to be used are themselves before the jury, they may
imine them to form an opinion as to the standard or type of writing, and
ice the opinion of a person of ordinary experience only, based upon these
ecimens, being no better than that of the jury themselves, is not needed, and
excluded by the opinion rule, and hence the only persons whose aid need be
ced in studying these standards are those who have some special experience
er and above that of the jury Thus,
ses whether the person whose aid
ne skill not possessed by the jury"

"The rule as to the proof of handwriting, where the witness has not
cument in question may be stated generally
the party write on some former occasions
and the transactions have taken place between
g to have been written or signed by
supposition, the witness is supposed
, not so much of the manner in

specimens, but to the general character of the writing, which is impressed on
is as the involuntary and unconscious result of constitution, habit, or other
ermanent cause, and is therefore itself permanent. And we best acquire a

tainedly, but in his natural manner" *Per Coleridge J.* in *Doe* v.
Suckermore, 5 A & E 703.

he latter is to be regarded as genuinely an instance of the type in question.

S. 47. How to evidence the type of specimens—is a different matter. the mode of proving it by testi that he is acquainted with the typ situation the witness (1) must

of writing with which

the adequacy of this knowl

tness properly claim that opportunities of observation have been such as to give him a fair knowl of the general type or character of the person's hand *Wigmore* § 693 ordinary methods of proving handwritings are (1) calling as a witness a p who wrote the document or saw it written, or who is qualified to express

hand This section deals with opinion evidence of non expert wi prove handwriting A person is considered qualified to testify to handwr when he has seen the person whose handwriting is in question (1) wr (2) in the ordinary course of business, has become familiar with such per handwriting through the receipt of communications purporting to be wr by him, or (3) when in the ordinary course of business, documents purp ing to be written by that person have been habitually submitted to h *McKelvey's Ev* § 145 This section lays down another real exception to rule excluding hearsay evidence. The reason for the exception is p Unless a signature or writing has been made in the presence of a witness can afterwards identify it, the only possible proof of handwriting is op evidence, and opinion evidence of person specially qualified to testify have thus in proof of handwriting the same two classes of expert testi which have been before referred to,—that which is based on observation that which is based on special training, or education upon a particular There is some difference of opinion in the authorities as to just how familiarity from observation will to give his opinion handwriting The general rule he once specially qualifies a person *Varian*, 54 N Y 395; *Taylor* § 18

21 Wend (N Y) 557

There should ould control *Wigmore* the mark is habitual, & Ma. 516;

his signatu . initial amounts to a
signature . *Re Emerson*, 9 L
R I. 443; *R* andwriting includes
everything . *Webster*, 5 Cush 301
(*Am*); *Sayo* . ether " mark " can

) saw

ether
m v

writing,' we th
with his hand,

When he has seen the person write—Ex visu Scriptionis A person is acquainted with the handwriting of another when he has seen that person write whether often or seldom, much or little, recently or long ago *Lawson Op & Exp Ev* Rule 47 In *De La Motte's Case*, which took place in 1871, *Mr Justice Buller* said to the jury "The counsel on the part of the prisoner has just objected that similitude of handwriting is no evidence They certainly are right in the argument, but the objection does not apply to this case Similitude of

ody that has
nce is made
, but that is
the papers

which you have heard read; they have all been proved by persons who were

knowledge they say they believe the letters and papers are of his handwriting That, gentlemen is the only evidence that can be given of handwriting; except it happens that there be a person who saw the prisoner actually write the papers" *Hensdy's Case*, 19 How St Tr 1341 In *Hoper* v *Ashley*, 15 Ala

rule that seeing the per
Wigmore § 694 *Garrells*
William v *Warrall*, 8
Warren v. *Anderson*, 8 Sc

S. 47. write on any other occasion The Court admitted his evidence *Garrel v Alexander*, 4 Esp 37 The question is whether a paper is in B hand C seen him write only once His opinion is admitted *Horne Toke's Case* 25 H St. Tr 71, *Wellman* v *Warrall*, 8 C & P 380; *Warren* v *Anderson*, 8 S... A was sued on a note which he denied ever having signed To prove signature, B, who has seen A write but once, and then only to receipt a which B had paid to him,
that case the Court observed
called to prove the handwr
large number of times Handwriting, like the countenance, form gait gesture of a party, is recognized by some more readily than by other wit
nore decisive and obvious peculiarities than
ascertain whether the witness has seen h
he knows to be that of the party and he
he must, upon his oath, declare if the writing exhibited appears to him that of the same party The weight to be attached to such testimony depend upon the ordinary tests of knowledge, the capacity of the witne his disposition to tell the truth, and the means that have been afforded whether from the intrinsic nature of the subject itself or the familiarity of the witness with it, to acquire the information he assumes to have The w to the genuineness of the defendant's signature to the note was there properly admitted" See also *Hartung* v *People*, 4 Park C C 319, *Do* v *People*, 6 Park C C 120, *Lawson Expt & Op Ex* p 336 *Mr Evans* 'I have known the admission of this evidence carried so far as for an ato after the failure of other attempts, to stand up and swear to a knowledge the writing of the opposite party from having once looked over his sh when writing ... " *E...'s Pothier Vol II*, 160, see a

In *Powell* v *Ford*, 2 Stark, 164 where the witness had seen ... but his name only once, on which occasion he did not write it at length, but the initial of his Christian name, *Lord Ellenborough* said that "if the w had seen the defendant write his name at full length although but once ... lf ...

Christian name, and that it was as necessary to prove the ... as well as the surname to be in the defendant's handwriting, and that the was not to be inferred from the other, any more than the rest of the name could be inferred from proof that one or two letters were in his handwr But ten years later, in *Lewis* v *Sapio*, M & M 39, *Chief Justice* ... to be bound by this ruling In this case, to prove the defendant to be ... of ...

is the foundati
"When I first c
ton, 8 Ves. 424
Courts, was thi
party write. If he s
enough to introduc
be his handwriting
to go to the jury If he refused to answer to his belief, he was ... too much, to form a belief, but if he would not go to the l ...

S.

seen him
subsequent
. and if he
ht go to the
ture of all
& E 793,
Patteson J said: "All evidence of handwriting, except where the witness sees
o belief which a
an exemplar in
vledge may have

13 W. R 191

The question is whether a certain paper was written by T W, who has not seen T write for nineteen years, is called, and his testimony is received *Horne Tooke's Case*, 25 How St Tr 71, see also *Warren* v *Anderson*, 8 Scott 384, where the witness has seen the writer to write ten years before So in *Smith* v. *Walton*, 8 Gill 18 (*Am*) a witness was allowed to depose after six years In that case the Court observes "The impression made on the mind of a witness who has seen a party write his name only in a single instance may be exceedingly faint and imperfect, but it is nevertheless testimony, provided the witness

more vivid and lasting impression from the examination of a single signature

—an assumption
be acquired after
comes important

S. 47. to testify as to the genuineness of a signature where his knowledge was d ... o him purporting ... saw her write ... nature to be h ... The c

is whethe
is a merc
letters pur
the letter
Thorpe v
v *Fry*, 1 C
Bl 384; *Murieta* v *Wolfhagen*, 2 C & K 744; *Southern Ex Co* ...
41 Miss 216, *Parsons* v *McDaniel*, 62 Ga. 100. *Lawson Exp & Op Ev* ...
The question was whether a document was in T's handwriting B had re...
letters purporting to come from A, and had answered one of them, but
received no reply thereto B was held not qualified to prove T's handwr...
Webb v *Manro* Morris (Iowa) 411. "The witness in the present instance"
the Court in the above case "had received two letters purporting to come
the defendant, to one of which he had replied Had the corre ponden...
... ld have been so far rebutted ...

... fication that the ... 411 In ...
Bolinger, 59 Tex ... the legal ...
English case on the legal ... facts rec...
... hen speaking of the facts rec...
to introduce knowledge of handwriting, not from actual inspection but
corre pon lence I adverted to an expression in frequent use, and which ...
ha
let
it
the word act done the observation is without foundation ... the writer is ...
sort is necessary Anything from which the identity of the writer ... 559, ...
may suffice" In *Cunningham* v *Hudson River Bank*, 21 Wend 559, ... that a person had re...

and that merel
His belief is of
such a reason
that the

The law in *America* on this point is thus ... veral letters purporting ...

the part of the supposed writer, other than the letters ... from whom the ...
letters are genuine, and in the handwriting of the person from whom such ...
to come A person who has heard business correspondence with ... of his ...
upon by both parties, is competent to testify as to the handwriting of ...
pondent, although he may never have seen him write But when ...
have no relation to business transactions, but are letters of merely ...
... in some way ...

and contents of the letters. The testimony of ...

S. 4

ffect that he had known the plaintiff for fourteen or fifteen years, did not know whether he had ever seen her write; corresponded with her about fourteen years ago, received about a dozen letters in answer to his own, with her name signed to them; had received no letters recently, had some of the letters with her. The question was then propounded to him: From your knowledge of her ... l you know ... to be asked, ... ld not know

1 W. Bl. 384, per *Lord Mansfield*; *Barnes* v *Trompowsky*, 7 T R 265 *Ovenston* v. *Wilson*, 2 C & K 1; *Murieta* v *Wolfhagen*, 2 C & K 741; *Turner's Case*, 3 Cr App 103, 155 = (1910) 1 K B 346 In the last mentioned case a document of consent signed by the Director of Public Prosecutions was put in In ... for ... cu- ... by ... ust ... dy. ... at ... *lor* ... abit of ... ch any ... ndent's ... *In the* ... *math* v

... *Konkey* ... stimony of K was clearly competent The witness testified that he had corresponded with the merchant in New York whose signature was to be proved, by writing to him, and receiving letters from him, and in this way he had acquired a knowledge of his signature The objection was, the 'witness had not shown himself qualified to speak of it' It is within one of the above modes stated whereby the competent knowledge may be acquired, and the witness professed that in that way he had acquired his knowledge of his operations."

When in the ordinary course of business, documents purporting to be written etc —Ex Scriptio Olim Visis A person is acquainted with the hand writing of another when, in the ordinary course of business, writings purporting to be written by that person have passed through his hands *Berg* v *Peterson*, 49 Minn 420 (*Am*), *Tuttle* v *Rainey*, 98 N C 513 (*Am*) "The clerk" as *Lord Denman* remarked in *Doe* v *Suckermore*, 5 Ad & El 703, "who con-

by the supposed writer of the paper in question' In *Tidford* v *Anott*, (2 Jo...
Cas 214) it was held that the sig
person who had been in the habit of s
believed the signature to be his '.
plaintiff's notes, all of which, except o
notes, with his signature to them, une
made and subscribed them If, then

he handwriting, he was
ight to have been asked
handwriting if he
answered that question affirmatively, then the receipts should have been rec...
in evidence" *Lawson Expt & Op. Ev p 343* Where the genuine...
signatures to bank bills is disputed, the evidence of bank officers, th...
whose hands similar bills pass daily, is obviously of highest value. *L...*
pays...
...
...
all per...
not connected with the bank, but who have frequently received and paid
bills purporting to be issued by it, and who have cashed such bills at the b...
are competent to testify to the signatures of the cashier and president on
bills alleged to be forgerie
president write *Com* v
American Case, "that no
and cashier c
habit of rec
sound one
been in the

to be acqua
official posi
is settled
he can testi ...
cated with him by letter, although he has never seen him write at all
...knowledge in one ...

of knowledge of the party's handwriting which enable him ...
genuineness he should be permitted to give to the jury his opinion ...
subject." ...the peace may be pr...
recorder
in the off
become
Geoming

N. C 112); a jailor through whose hands letters signed by a prisoner received from him to parties out side have passed, may, from this circumstance alone, form a sufficient knowledge of the prisoner's handwriting *State* v. *Hastings*, 53 N. H. 450; *Lawson Expt & Op Ev* 399 In order to prove the handwriting or signature of another person one must show that he is acquainted

Emperor v *Pande*, 27 Bom L R 1031=89 Ind Cas 1042=26 Cr L J. 1474= A. I. R 1925 Bom 429

N Y 398.

Signature of a Partnership firm A witness may be acquainted with the signature of a firm without being able to identify the handwriting of either or any partner *Gordon* v *Price*, 10 Ired 385 "It is of no consequence that the

the witness The substance

witness has drawn the inference that they were made by one and the same individual The strength of his belief will depend on the greater or less degree of similarity He can only testify to his own state of mind on this question. The

S. 47.

belief was properly before

he could not sw
understood by
thereby to limit
to say that the
testimony of a p
that he is of *opinion*, or that he *thinks*, the paper is genuine, yet, ...
step further when the witness will only state that the handwriting is like ...
statement which may be perfectly true, but yet, within the knowledge of the
witness, the paper might have been written by an utter stranger ...
§ 1868

Knowledge of handwriting acquired for the purpose of testifying ...
ledge of handwriting, acquired for
where it is clear that there was no mot
to manufacture testimony *Reese* v.
Ind 635 (*Am*) ; *Lawson Expert & Op Ev Rule* 54 The question ...
a trial was as to the handwriting of A B was offered as a *witness* It appe...
that previous to the trial, A had written his name for the purpose of ...
B, his mar ... v. S...
Esp 15
because, h
common
ing letter,
handwritin

since the controversy on the subject arose To this general rule ... 13 Cr ...
can be taken *Chamberlayne's Ev* § 2198; see also *R.* v *Rickard*, 13 Cr ...
R 140, *Stranger* v *Searle*, 1 Esp 14; *Fitzwater Peerage*, 10 C. & F 193, *R.* v
Suckermore, 5 A & E 703

... on the burden

proof
burde
insufficient to qualify him *Henderson* v. *Bank of Montgomery*, ...
Lawson Expert & Op Ev. rule 56 In proof of a document a witness ...
he was acquainted with the handwriting of the writer, but he was not ...
examination-in-chief any question which would elicit any of the several ...
indicated in the explanation to section 47 of the Indian Evidence Act ...
1872) The witness was not cross-examined in the point, neither any ...
was ... sible. ...
Ram
the
exam...
as it stands *Taylor* § 1863 "It appears to us that this is ...
of the law in this country also,
expedient that the matters referred t

position to write to a ...
the handwriting" Per Jenkins C J in Sankarrao v. ...

S.

Therefore, where the witness has not been questioned on the trial as to his means of knowing a certain handwriting, no objection to the want of qualifications so to testify can be made on appeal. *Ibid*; *Berryman* v *Dahlgren*, 6 Rob 188, *Smith* v *Walton*, 8 Gill 81. So the evidence of a witness contained in a deposition that he knows a certain paper to be in the handwriting of a party is sufficient, on appeal, where the opposite party has declined to cross-examine as to his means of knowledge *Wither* v *Gould*, 8 Walls, 485 So where the

Ev 382.

nce The testimony of one witness to a sign the instrument, and whose credi-

the similarity and likeness to signatures of his which they have seen Such

features or their expression remain as we have been accustomed to see them We know the face, though derangement has imparted to it a new appearance, or when distorted by pain or disfigured by wounds and presented in an entire s the memory The and trees, and to dis- general class We

daily meet those who, with precise kind of fruit it will bea although, if questioned, they between the several species We judge of writings, as of other things, by its individual character as a whole We must take the opinion of those witnesses altogether, and judge of their testimony as under all the circumstances they shall appear entitled to weight, from their opportunity of knowing the *defendant's handwriting, and your estimate of their skill and judgment* A cashier of a bank is entitled to no more credit than any other person of equal skill" The jury found for the plaintiff *Lawson, Exper & Op Ev.* 380.

S. 48.

Opinion as to existence of right or custom, when relevant

48 When the Court has to form an opinion as to the existence of any general custom or right the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation.—The expression "general custom or right" includes customs or right common to any considerable class of persons.

Illustration

gation no better evidence can be obtained, or the facts cannot ... presented to the tribunal *Lawson, Op & Expert Ev* Rule 63 ... frequently collective where a combination of the known elements ... pressed in the form of a concl... Such inference is ...

are, so to speak, the depositories of the customary law just as the ... are the depositories of the general law *Jag Mohan Das* v *Ma...* B 528 (543)

Scope of the section In *Bai* ... 20 B 43 (...) said "Mere opinion evidence is ... custom must be proved by specific ... failed to adduce (*Rahimat Bai* v ... *Akbar Khan*, 1 A 441 But in a lat... a tribal or family custom excluding a daughter or sister from ... favour of a collateral may be proved by general evidence as to its ex... members of the tribe or family who would naturally be cognizant of ... and ... instances need ...

who would be likely to know of its existence, if it existed ... relevant, but such opinions must be given by witnesses who ... *Maung On* v *Maung Shwe Bwin* 1 L B R 80, *Hubraj* v *Chandra* ... 1921 Oudh 89=8 O W N 6 So the statements made by persons who ... a position to know of the existence of a custom or usage in the ... admissible under this section *Sanaullah* v *Pran Nath*, 26 C ... on the existence of ...

excluding daughters
papers, directed to be ...
usages of this kind of

under s 35 of the Evidence Act, though they had been prepared by the settlement

most important document contained in the official records relating to the village

of inheritance, or, under section 48 as the *record of opinions* as to the existence
it" So their Lordships think
who holds that opinion should
sed on hearsay *Vide Per Lord Davy* in *Gurudhuaja* v. *Suparandhuaja*, 23 A 37=27 I A 238 *supra*. So according to their Lordsl
admissible in evidence
tion of the section can
construction of the wordi
lay down certain well
is admissible. But these sections are not in any way exceptions to section 60 of the Evidence Act, which lays down that if it refers to an opinion or to the grounds on which that opinion is held it must be the evidence of the person

M L T. 1=5 A L J
and customs, public
in evidence Section
in cases in which the declarant cannot be brought before the Court, whether in consequence of death or from other cause This section refers only to general

has personally known the right or custom exercised as a matter of fact Custom is not a matter to be submitted to the senses It is made up of an aggregated repetition of the same hough a bare opinion is worth *data* on which it is founded; is to be

the lim ts of a village or t
exclusion of others, a right
roads, or plant trees, rights
of common and the like, will
Nort Ev 227

Customs A custom is a particular rule which had existed either actually obtained the force of law in not consistent with the general *od*, 6 Q B 50, *Halsbury Vol X* finite limited locality It may *ylor*, 4 Burr. 2305 For further annotations, *vide* p 211 *supra*

S. 49.

Right "It may be difficult, perhaps to define precisely the scope of the word 'right" but I think it was here intended to include those properties of an incorporeal nature, which in legal phraseology are generally called r...

6 C 171 (F B) at p 185 In the same case *Jackson J* said "It seems to

a very wide interpretation to the
has been said that, in section 13 of
refer to incorporeal rights only,
in ss 32 and 48, where the same word occurs in conjunction with the
'custom' it has been used in that sense. In the first place, it is by no means
clear that ss
to conceive
that in the ge
confined to that class only". See also *Tippu Khan* v. *Rajoni*, 2 C ... (F B), *Collector of Gorakhpur* v *Palakdhari*, 12 A 1 (F B), ... *Bapu*, 10 B 439; *Lakshman* v *Amrit*, 24 B 591; *Ramdas* v. *Apparu*, 12 M ...; *Venkatasami* v *Venkatareddi*, 15 M. 12; *Vythilinga* v *Venkatacha*, 16 M. 1...

Person who would be likely to know The opinion must be of the p... who are likely to know of its existence if it existed *Jugmohandas* v ... 10 B 528 (542) In *Sariatullah* v *Prannath Nandi*, 26 C 184, the question was whether occupancy right was transferable by custom In deciding ... competent to prove customs ... the Court observed "We ... in the present case also the
to know of the existence of
F

and I think that the opinion
out by the learned Judges under ...

custom *Nort Ev* 227. In *Wright* v *Tatham*, 7 A & E ...
5 Cl & F. 720, *Coltman J.* asked: "Where boundary is proved by reputation what is the guarantee for ...?" *Mr Starkie* replied: 'The public ...

v *Sparke*, 1 M. & S 690, per *Bailey J.*

Opinion as to usages, tenets, etc., when relevant

49. When the Court has to form an opinion as to—

the usages and tenets of any body of men or family,
the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or **S. 49** by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

Principle The matters mentioned in this section can only be proved by persons having special means of knowledge.

Scope of the Section The kind of evidence contemplated by this section must be the expres[illegible] petition of hearsay [illegible] the existence of a [illegible] information derived from deceased persons *Gurudhwaja* v *Suparandhuaja*, 23 A. 37=5 C W. N. 33 (P. C)=27 I A 238=10 M L J. 267 (P. C)=2 Bom L R 831 Where a certain member of a family accepted a certain interpretation of a clause in *Wajib-ul arz* the fact is admissible in evidence as to how a custom applying to the family is interpreted by members of that family. *Sharfuddin* v *Niamut Ali* 87 Ind Cas 8=A I R 1925 Oudh 688 Opinion [illegible]

R 6 O. 101.

[illegible]

omitting any reference to the legal effect. *Wigmore* § 1954 But the mere assertion of a "custom" does not involve opinion *Conner* v *R Co*, 146 Ind [illegible]

The effect is to be determined by the Court. *Hoskins* v *Warren*, 115 Mass 514, 535. "The inquiry . . is not after the opinion of traders and merchants in respect to the law upon a given question, but after the evidence of a fact, to wit the usage or practice in the course of mercantile business" *Allen* v *Merchant's Bank*, 15 Wend N Y 482, 488 So a party may exmine witnesses to prove a particular course of [illegible] of facts, but not to show what the law is [illegible] 145 (149) It is sometimes said that a [illegible] specific instances, or must at lea[illegible] statement of the general practic[illegible] *Lord Mansfield* and later Judges, [illegible] *Edie* v *East India Co*, 1 *W Bl* 295 (297), 2 *Burr* 1216 (1222), *Mansfield L C. J* said "Many witnesses were examined by defendants to prove this [illegible]

[illegible] *Benson*, 7 C. & P 711 (714) *Tindal C J* observed "Is there any general course of business? Let your mind revolve over instances I am not asking you whether it is just and proper, but whether there is any prevailing course of business." "But" says *Prof Wigmore* "there is no rule of exclusion The usage is itself a fact, and the opinion rule does not treat such testimony as an inference from data which can be adequately stated without the inference." *Wigmore* § 1954 This view is in accord with the opinion of *Lord Mansfield*, in *Camden* v *Cowley*, 1 W Bl 417, where he ruled that insurance brokers and others might be examined as to the general opinion and understanding of the persons concerned in trade, though they knew no particular instance in the fact, upon which such opinion was founded So the evidence of a well qualified witness as regards a trade usage, who could not state individual cases is admitted inasmuch as the *factum probandum* is not a single isolated act or

S. 49. occurrence, but the result or conclusion derived from a series of ... or circumstances, creating and establishing in the mind of the witness a c... tion or belief of the complex whol... *Nickerson* 13 All Mass 351; *Wigmor*... of a witness as regards trade usage... section 13, specific instances of usage... this section all usages of trade and... persons having special means of knowledge ... 1 Sm L C 546.

long ... able. 316, ... lished ... J. 240; *Lal Gajen* ... W R (1864) 20 ... this section it can b... ... ame. Family custom includes the ... r descent in a family and other customary ...

Tenets of any body of men. This will include any opinion ... dogma, or doctrine which is held or maintained as truth It will ... religion, politics, science, etc *Nort Ev.* p 228.

The constitution and government of any religious or charitable foundation ... The opinions of ... constitution and ... vant under this ... Thus in *Shore* v ... early part of the eighteenth century, had, in the deed of grant, ... objects of her munificence as 'Godly preachers of Christ's Holy Go...' it became necessary to determine a few years ago what persons were ...

(308) where the grant of land was for a meeting house, ... the worship and service of God The trustees and the majority of the ... gation having later ceased to be Trinitarian in belief a bill to ... making a decree for ...

... rases are employ... stood their ... and to give ...

v *Briggs*, 2 Car. & P 525; "in the Month of October" ... *Lucas* ... Peake, 43 ... 7 Taunt ... *Perrin*, 2 ... convey"

unless it comes from persons who are shown to have ...

There is thus analogy between opinion evidence under this section and hearsay evidence of custom based on hearsay Vide *Per Parke B* in *Crease* v. *Barrett*, 1 Cr M. & R 929, *per Parke B*

Opinion on relationship, when relevant

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act*, or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code†.

Illustrations.

(*a*) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant

(*b*) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant

Principle The question of presumption of relationship by conduct of parties often arises in cases of marriage and legitimacy When the fact of marriage is in issue, subsequent conduct of the man and woman, said to have been the parties to it, is receivable to evidence the marriage This conduct is traditionally spoken of as "habit", and this common source of proof, with the reputation evidence which usually accompanies it, has come to be known by the phrase 'habit and repute" The logical nature of the argument indicates it plainly to fall under the principle, that from the conduct of the man and the woman as married persons may be inferred their firm belief that they were at some prior time made husband and wife, and from this belief may be inferred

Scope of the section This section is taken from section 649 of *Taylor* which is as follows 'Next, *family conduct*,—such as the tacit recognition of relationship, and the distribution and devolution of property,—is frequently received as evidence from which opinion and belief of the family may be inferred, as resting ultimately on the same basis as evidence of family tradition For, since the principal question in pedigree cases turns on the parentage or descent of an individual, it is obviously material, in order to resolve this question, to ascertain how he was treated and acknowledged by those who sustained towards him any relations of blood or of affinity" The presumption in favour of wedlock is another instance of the rule *omnia praesumuntur rite esse acta* (all things are presumed to be rightly and solemnly done) *Fox* v *Bearblock*, 17 Ch D 499 It has its own special maxim *semper praesumitur pro matrimonio* 'By the as man there is a professs

*IV of 1869. †XLV of 1860.

S. 50. to be" *Per*
199; *Lyle* v
lightly repell
factory or conclusive *Per Lord Lyndhurst* in *Morris* v *Davis*, 5 Cl & F
This was approved by *Lord Cottenham* in *Piers* v *Piers*, 2 H L Cas p
see also *Langham* v *Thompson*, 91 L T 680, *George* v. *Thayer*, (1901) 1 Ch
456, *Haynes* v. *Caster*, 94 L T. 431; *Cunningham* v *Cunningham*, 2 Dow H.
L 507 ... But according to English La

L R
from th
of this
person
dead or cannot b
appears to afford a
to prevent any pe

to the religious usage of the party, the names of particular person
recited or omitted during the performance of ceremonies, and the observance
pollution, are instances of conduct within the meaning of this section and
admissible in evidence *Ramkrishna* v *Chinna*, 26 Ind Cas 110. When a
witness vaguely states that he is related to the parties his opinion is not ad-
sible *Mohan Lal* v *Tulsan*, 109 Ind Cas. 774 = A. I R 1928 Lah. 521

Relationship by marriage. "The parties' assertions of marriage
general reputation of the fact m ... with as much strength
distinctness by actions as by
elopement and return as married
ability was successfully relied
was dwelt upon as a strong fact by *Abott C J* in summing up
the case of *Bear* v *Ward* A similar weight was ascribed to the
husband procuring a woman to be presented at Court as his wife"

... of a prior time

by those who have witnessed the exchange of consent, and
of contrary evidence which would naturally have come to light
This net result of the sifting of the facts by gossip and by interested
is summed up on the community's reputation; and this, though
ordinarily be inadmissible by the Hearsay rule, is by long
sible under a special exception to that rule. Now these two sorts of
habit and reputation, are commonly found available together,

S. 5

commonly offered at the same time. They are admitted on distinct theories, the
ical
ase,
ute
vere
a
to
ord
the
rth
hat

the man and wom
and to stand in the
given by those ar
and acquaintances,
habit and repute ar
and reputed to be
combination of circumstances as evidence that consent to marry has been

Khoja Hedayet v Rayan, 3 M I A 295; Mahabta v Ahmed, 10 C L R 293

of direct proof, consent may be inferred f
established by reputation But when pr
mainly on reputation the circumstances
some caution because the same word which

Legitimacy as evidenced by conduct. In *Berkely Peerage Case*, Sir *James Mansfield* remarked, that, " if the father is proved to have brought up the party
legitimate."
e Merchant's
he supposed
his question
(of legitimacy) My Lords, when two women each claimed a particular child as hers, and called upon a person to decide between them, he ordered that the

s. 50 child should be severed in two parts, and that each take half; the true m...
... decided, upon that, that the child was ...
... s? Not, perhaps that mere declara...
... declarations, may be made for a temp...
purpose (in that case both women made declarations, and one of course ...
false declarations); but it teaches that the conduct of a parent, the feelin...
a parent—those feelings being inferred from such conduct—afford us
evidence assisting us in arriving at a right conclusion as to the ma...
controversy It has been argued at the bar that mere declarations of ...

ground for inference, for it comes from the least suspicious source, ...
the very individuals who are the most interested to give a different ...
If there ever was a case where circumstantial evidence of this descriptio...
admissible, it is this" In the same case ...

ment is sufficient evidence, if not rebut...
Wigmore § 269 So also the concealmen...
husband *Hargrave* v *Hargrave*, 2 C & K ...
such child by the person who, at the time of its conception, was living in a ...
of adultery with the mother, and the fact that the child and its ...

the family appear to have been mentioned in the Will, but ...
taken of such person is strong evidence to show, either that he was not the ...
... the Will (*Tracy Pe*...

W. N 130 (P C)

...nduct of parties is very ...
Mullangi v *Venkatasi*...
P 515 Such evidence is also ...
Maharaja Pertab v *Maharan*...

3 C. 626 P C = 1 C L R 113

Proviso The proviso is inserted, because in divorce, adultery and ...
cases the marriage must be strictly proved, that is, by the evidence of a ...
who was present at the marriage, or by the production of the regi...
copy of the register, or such other record as the law of the country, ...
a class, may provide. *Nort Ev* ... Vol 3 ...
bigamy proof of second marriage is ...
U S. v. *Miles*, 103 U S 304 But ...
Com. v. *Jackson*, 11 Bush. (Ky) 679 ...

an indictment or a civil action, the case for the prosecution is not made out **S. 50**

& W. 265; *Roscoe Cr.*
f the marriage, even
Williams v. *Williams*,

in *Morris* v. *Miller*,
hat case the opinion of
r to support an action
or criminal conversation, there must not be proof of an actual marriage'; the
ct was, they were married at *Mayfair* Chapel; the register or books could not

laintiff's power, (2) it was not an actual i e ceremonial marriage *Lord*

action .... Perhaps there need not be strict proof from the register, or by a
person present, but strong evidence must be had of the fact,—as by a person
present at the wedding dinner, if the register be burnt and the person and clerk

as before. But an action for criminal conversation has a mixture of penal
purpose by
they are not
an action a
1, 195 From
lear that this
ses of cases,
namely (1) where the charge is a criminal one and (2) in the civil action of
f of a marriage in fact" or actual
c. either by the register containing
of parson clerk or some other person

time, the action of criminal conversation occupied a far more prominent position
and was therefore more liable to abuse. *Wigmore* § 2081. Nevertheless the rule

S. 50. of law as laid down by *Lord Mansfield* in the above two cases is appl[illegible] in common law of England *Cathercood* v *Caslo*[illegible] 13 M & W [illegible] le Vile [illegible] days has

[illegible] The f[illegible] are [illegible]

cient to prove a marriage in a prosecution for bigamy or in pr[illegible] a divorce, or in a petition for damages against an adulterer But th[illegible] to put it too broadly The marriage and subsequent ceremony upo[illegible] the prosecution is based certainly cannot be so proved but it may [illegible] another marriage becomes material in such prosecution, and such marri[illegible] certainly be proved by a reputation, although it is proving a marriage [illegible] prosecution for bigamy" Thus in the case of *R* v *Wilso*[illegible] 3 F & [illegible] the prisoner pleaded that when she went through the first ceremony [illegible]

24 & 25 Vict C 100, § 57, Stat 20 & 21 Vic C 85 § 33 These exc[illegible] rest on the ground that such proceedings, being of a penal nature req[illegible] strictest proof, and a further reason for the exception in the cases of a [illegible]

another, as well as the injury to the progeny by placing them [illegible] without rights of legitimate children Now this deception and [illegible]

to be more cautious and tender in favour of an opponent [illegible] criminal charge in which the opponent has placed himself on a level [illegible] meanness below that of the least meritorious opponent in any [illegible] *Wigmore* § 2084.

Under the proviso to this section, in proceedings of the k[illegible] [illegible] not by itself [illegible]

in the ordinary way, *i e*, by other and more reliable evidence [illegible] mere opinion of a person who, as a member of the family or [illegible] especial means of knowledge. *Queen Empress* v *Subbaraya*[illegible] 9 M [illegible] 572 This is in accordance with the principle that strict [illegible] required in all criminal cases. *Empress* v *Kallu*, 5 A 233 [illegible] *Empress* v *Pitambar*, 5 C 566 But that principle is [illegible] inasmuch as in criminal cases a rule has grown up that the p[illegible] beyond a reasonable doubt. *Wigmore* §§ 2051, 2137 But [illegible]

's section in all prosecutions for adultery under s. 497 Penal Code, the irriage must be strictly proved. *Gopal* v. *Emperor,* 4 Bur. L. J. 107= I. R. 1925 Rang. 328. So the existence of a legal marriage has to be

ction under s. 497, Penal Code the actual fact of the marriage between the

rem Chand v. *Hira*, A. I. R. 1927 B. 594.

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Grounds of opinion, hen relevant.

Illustration.

An expert may give an account of experiments performed by him for the urpose of forming his opinion.

Principle "The mere opinions of the witnesses are entitled to little or no ·gard, unless they are supported by good /arrant them in the opinion of the jury. lusive, the opinions of the witnesses are wo ı *Harrison* v. *Rowan*, 3 Wash C. C. 587. "Opinion is no eviedence, without esigning the reason for such opinion." *Per Duncan J.* in *Rambler* v. *Tryon*, S. & R. 94; *Wigmore* § 1917.

Scope of the section. In all cases in which opinion of experts are receivible, the grounds or reasoning upon which such opinion is based may also be nquired into *Phip Ev 4th Ed.* 362; *Govt of Bombay* v. *Merwanji*, 10 Bom.

S. 51. that case the Court observed. "The ground on which an expert, a

Court that the witness should be permitted to explain the grounds and of his opinion to the Court and jury, they may readily perceive the force reasoning, the soundness or fallacy of his logic, and therefore ju capacity to give an opinion on the subject and the correctness of his

taken to be true because the witness has stated that he founds them, but this is quite a mistake In order to obtain facts the opin

all questions of fact upon competent evidence laid before

of science they may be aided by the more exact experience of the trained expert." *Lawson Expert & Op Ev pp*

CHARACTER WHEN RELEVANT.

it is said of a person that he bears a good reputation,

Chamberlayne's **S. 5**
racter which is a
on person, which
meaning of the

position in this, that the latter is easily moveable, the former of longer
ration and more difficult to be moved' I may notice that habit is formed
or passion, and that this repetition
Metaphysics Vol I p 178 Habit
Chamberlayne's Ev § 3263

Act In explanation to section 55, the
cter" includes both reputation and disposi-
That actual character" says *Prof Wigmore*
and the latter is merely evidence to prove
common use of the word 'character' in the

hers, especially the popular opinion, whether favourable or the reverse
tandard Dictionary 'Character lives in a man, reputation outside him"
olland, Gold Foil, C 19 p 219 "Character is like an inward and spiritual
ace of which reputation is, or should be the outward and visible sign"

of opinion arising from the deportment of a man in society As a man's deportment, good, or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion, that general opinion is allowed to be given in evidence" *State* v *Lanton*, 76 N C 216; *Burr Jones* § 153.

Scope of Sections 52 to 55 The framer of the Act has dealt with these sections under the heading 'character when relevant." But in the explanation of section 55 he has indicated how the character of a person can be evidenced We have
character includes both
erroneous. Character and
cases the term "general
But there are two distinct
ommon use of one word

S. 52. for two ideas has caused confusion. (1) Is a person's disposition—a or group of traits, or the sum of his traits—relevant and admissible for purposes? (2) Whenever it is so admissible as an evidentiary fact becomes in its turn a propc
first question is essentially
in to exclude relevant ch
entirely different quarter, it has nothing to do with character, as an evi fact, but with the mode of proving character, assuming it to be provable either as an evidentiary fact or as an issue *Wigmore* § far as the first point is concerned, character is offered as an evi fact—as a basis for an inference as to conduct—in section 52, 53
may also be a fact in issue (Vide expla
in the latter contingency, character not
ut character in the sense of "general ch or "reputation" may also be a fact in issue, as in the ca es of d tion Whenever a party's character is itself a fact in issue, whether sense of disposition or reputation, and whether it be in a civil proceeding a criminal case, proof of that character is always admissible *Taylor* *Best* § *258* So also whenever character is relevant as a basis of any inference (than the inference of conduct), it is admissible without n *Chamberlayne's Ev* § 3307. But when a party's character is requ proved not as a fact in issue but as an evidentiary fact to prove condu generally excluded So the general rule is that from a party's chara conduct can not be presumed. So in civil cases a party's charact evidentiary fact is wholly excluded Such evidence can be given only cases, where the amount of dam

good character has been offe
But the bad character of a party criminal case may also be a fact in issue In such a case of course, evid his bad character is always admissible These are the questions which essentially one of relevancy. Now we come to the second phase of the i e how the character is to be evidenced Two special proble second qu
Opinion
Hearsay,
on what

observations of the conduct of the person under peculiar circu man the estimated character, or reputation, of being honest, or of natured, or passionate, or humane, or cruel—*this general charac er,* as it is also a fact; it is the opinion which those who are acquainted with him proved in respect to his several traits of character This is also proving real character, which is the object in view *But it is* *the fact itself*

sible in more instances than the other," *Per Pearson* Jones L 160, *Wigmore* § 52. For further discussion on this point under s 55 *infra*

52. In civil cases the fact that the character of any concerned is such as to render improbable any conduct imputed to irrelevant, except in so far as such appears from facts otherwise relevant.

In civil cases, character to prove conduct imputed, irrelevant

Principle Evidence of a party's character in a civil suit is irrelevant for wo-fold reasons, namely, (1) A party's character is usually of no probative

issues and to

orcefully stated

9 "But in a

civil suit, where the personal rights of opposite parties are to be weighed in a nicely adjusted balance, no proof except that relating to the facts in controversy should be admitted to turn the scale" Here the rejection of evidence is on the ground of

principal and ev

evidence of good

admissible in evidence, because there is a fair and just presumption that a person of good character would not commit a crime But in civil cases such vidence is with equal good reason not admitted, because no presumption would

would be infinitely er C

in *Slaw* v *Come* er is

not in issue, the and

a very bad man may have a very righteous cause' *Thompson* v *Church*, 1 Root (Conn) 312 (1791) But in civil cases of a quasi criminal nature the reason for exclusion is not so clear in principle and the Courts do not speak

§ 3275 In

concur in

er has but a

been com-

ice is doubt-

ful and nicely balanced, it may then perhaps suffice to turn the wavering scale;

or to form their opinion upon the opinions of others The introduction of such

or bad simply renders his doing a particular act more or less probable It has not the belief compelling power, in reference to the proof of the matter in question, of a probative fact, properly so called *Chamberlayne's Ev* § 3266

words: § 2053 Evidence of good character of a party is not admissible in civil

S. 52. pursuant to a Statute to recover treble the value of property taken the Court said "All the rules of evidence applicable in civils are applicable to this" *Hall* v *Brown*, 30 Conn 551 So in an English case, [*Att Gen* v. *Bauman*, 2 B & P 532 note (*a*)] the q was squarely presented to the Court The trial was of an informa . for offering to corrupt w the defendant's charac nt the defendant was

the crime imputed to him The evidence was rejected *Eyre C B*, cannot admit this evidence in a civil suit The offence imputed by the tion is not in the shape of a crime It would be contrary to the true distinction to admit it, which is this, that in a direct prosecution for such evidence is admissible, but where the prosecution is not directly crime, but for the penalty, as in this information, it is not If ev character is admissible in such a case as this, it would be character in any charge of fraud upon the Excise and Custom *Chamberlayne's Ev* § 3280.

Crimin principle it received as case, the mo such action law of evide and must confusion w relevancy to make it worthy of consideration and to avoid course, similar objections exist in reference to the use of such criminal cases, but they are disregarded by reason of the humane law in view of the fact that in criminal cases human life and liberty

Character in action for fraud. Where the nature of a civil acti involve the general character of a party, evidence as to that char not be offered to contradict an imputation of dishonesty, or even of fra transaction presented in an ordinary civil case must depend upon stances, and not upon the character of the parties. In such a case, how serious a moral delinquency may be involved in a fact and the establishment of that fact may affect a party's reputation, he can the aid of his previous reputation to disprove the fact. Strob (S C) 372 The doctrine has been announced in a few cases in Courts that, if a party is charged with fraud or other act involving turpitude and the charge is based only on circumstantial evidence, rebut the charge by proof of his good character *Henry* v (Ten) 213; *State* v *Beebe*, 17 *Walker* v *Stephenson*, 3 Esp has said "And generally it with fraud from mere circu admissible to repel it." *Greenl Ev* § 51 But this view is based upon any

S. 5

be indictible or not is not material *Ward* v. *Herndon* 5 Port (Ala) 382; urr Jones § 154

cluding all evide
issue or relevant
tions for robbery.

insurance policy, when the defence was over valuation; for fraudulent burning of the property; for false representation as to the solvency of another; for curring a debt or other obligation; for maliciously burning property, for sault and battery; for embezzlement for malicious mischief, for fraudulent nveyance of property, for criminal conversation; for false arrest and imprisonment; for malicious prosecution; for divorce on the ground of adultery, and r procuring a deed of fraud. *Burr Jones* § 155 To some extent the reputation of parties is liable to be affected by any litigation; but this is not ground n which evidence of character is held material in such actions as slander, seducon and other *lunket,* 1 trob (S C 37 stated: If in every may be net by such ev might ot be introduced; trials would be insupportably tedious, and the result of a trial would as often depend upon the popularity of a party as upon the merits f his case" *Burr Jones* § 155

In criminal cases revious good character relevant

53. In criminal proceedings the fact that the person accused is of a good character is relevant.

racter then, as harged, is essenof crime arises and experience, course of con-
luct will depart from it . such a person may be overcome by temptation and fall into crime, and cases of that kind often occur, but they are exceptions; he general rule is otherwise. The influence of the presumption may be ve testi- aero the vidence esump-
tion from proof of good character is entitled to great weight and will often be sufficient to turn the scale and produce an acquittal' *Cancemi* v *People,* 16

which is confronted when bad character is sought to be shown *Chamberlayne Ev.* §3277.

S. 53.

only was altogether unsatisfactory to his mind It was said to be ... *vitae*, but he had no conception, according to the principle, of sound sense ... right reason, that character could be evidence in a case affecting the ... man, and yet not evidence in a case affecting his freedom, his property, ... reputation" *Wigmore Cas Ev Case No 21*; *Wigmore* § 56 As regards ... second limitation that such evidence was limited to doubtful cases only ... following charges to ... St Tr 217 are pertinent ... should have an effect, ... be permitted to operate where a crime is clearly proved, it would ... brought forward; because there is hardly any one who has not at some ... maintained a good character . . . . If the evidence were in even balance, ... should make it preponderate in favour of a defendant; but in order ... character have its operation, the case must be reduced to this situation" ... *more* § 56, see also *R* v *Broodhurs*, 13 Cr. App. R 12... But now it is ... settled that an accused in a criminal case can always adduce evidence ... good c... *Hardy*, (18...) ... (317) (... be per... for he ... general c... it not to prevail ... he defendant ... prosecutor may ...

Scope. The prosecution in ... accused's bad character as a b... that such evidence is too likely to move the jury to con... his actual guilt of the offence charged *R.* v. *Rowton*, Leigh & C... But the accused himself may always invoke his good character as ... disprove his commission of the offence, no matter what the gra... offence, and no matter how strong the evidence against him ... § 11 (*b*) The character, by whichever party offered, must be as to the ... *trait—e g honesty, violence, charity, etc, involved in the fact charged* ... *Erskine* in *Hardy's Trial* 24 How St Tr 1076 It has already ... that the rule ... was in early ... Y. 501 (507) ... and it was ... ference that the accused would not have committed the ... That ... that therefore the crime was not in fact committed by him ...

are left in doubt It is to be treated just as other circumstances

S. 5

is to be
N. Y.
be the
Moett, 23 Hun (N Y) 60, 65 "This
of importance only where there is a
in which case such evidence is entitled
to the ch n *Irish*
Judge sur xcellent
character, *ner*, 6
How. St (Mass)
295–52 A question

Against
any times
t is one of
nce there

evidence of good characte
principle What is in the
circumstances, evidence of
The very *fact that it is*
McKelvey's Ev § 118 In
latter part of the judgmer
crimes, testimony of good c
to the jury, and a specie
See *Cancemi* v *People*, 16 N
criminal cases is always
given weight except in a

the rules of

, there is a
cter is made
passionate,

confined to those particular traits which have some logical connection with the nature of th St 55 In *Dovers' Trial*, 6 How rged with seditious publication, as a faithful member of the traine *C J* said Do not mistake yourself The testimony of your civil behaviour going to church, *appearing in the trained bands, going to Paul's, being there at common service,*— this is well But you are yet be a naughty man in King's subjects" In *Tur* far as my experience goe,

58 Ala. 221

"It is needless to dwell on the fact" says *Mr McKelvey* "that the character the offence s a limited" Character than of the

S. 53. deed in question. This relevancy depends on the assumption that it was substantially unchaged in the meantime Character at the earlier or later time is offered not to prove or disprove the act in question but to prove the character at the time when the deed in question was done All that is required is that the character must relate to a period proximate to the period of the supposed offence. *R* v *Swandson*, 14 How St. Tr 596 Similarly character in one place stands on precisely the same footing as character in another place. The person is the same wherever he is and ...

... reputation in a community other than the prisoner's home may be ... *Wigmore* § 60 So far as this section is concerned which deals with relevancy those questions do not arise and more so as under the Indian Evidence character includes both reputation and disposition No importance can attached to evidence of good character where the case against the accused clear When it is doubtful some weight must be given to it *Queen E v Nur Mahomed*, 8 B 223.

Effect and operation of evidence of good character Good character should be permitted to operate as a positive, appropriate and substantive defence. No distinction should be made, in application and effect, between evidence to prove exculpatory facts and evidence to prove the character of the accused *State* v *Mury*, 118 Mo 7, 25, ... *Stannard*, 7 C & P. 673 Both rest ... character is a fact making strongly ...

... es, of to ... *Underhill Cr* ...

... turn their attention to his good character. [Vide *R.* v *Davison* (1808) ... St. Tr. 99 at p. 217 *per Lord Ellenborogh*) It is, however, submitted ... deference, that the good character of the party accused, when ... established, is an ingredient which ought always to be submitted to the ... together w... charge ar... ingredient ... any case, ... own conc... previously ... he is called upon to answer' 2 *Russ Cr* 7... The correct rule is ... cases a good character, if proved, to the satisfaction of the jury must be considered *People* v *Van Dam*, 107 Mich 425

... quit if it exist ...

... question of the guilt or innocence of the accused. The jury have ... separate it from the mass of the testimony, and to say that they ... accused has a good character and that therefore they will ... evidence of guilt. *Sweet* v. *State*, 75 Neb 263 But while proof of ... character alone may not be sufficient as against proof of guilt beyond a ...

of
not
the
putation for honesty and
and require an acquittal,
might be convincing, and
If the evidence of guilt
will be justi-
with all the
e, 220 Pa St.
d character considered in
ent to create a reasonable
verdict of
consider-
he accused
evidence
fact that
fact led
a life of honesty during the past, is no reason to suppose that he will not succumb to temptation at the close of his career, but before a man of this type and such antecedents is adjudged guilty, the evidence against him must be of an unimpeachable character *Mangat Rai* v *Emperor*, 10 Lah L J 262=29 Cr. L. J. 740

Trait must be relevant It is a rule well enforced by reason and sanctiond by authority that character evidence, introduced for the purpose of laying a

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ot tend
t of that
a good
on trial
of this
onceded
2 The
character should relate to a period proximate to the period of trial *R* v *Swendson*, 14 How St. Tr 696

Adultery In a criminal prosecution for adultery, the previous good *character of the defendant for chastity is admissible in his favour Chamberlayne's Ev* § 3289

t nearly relevant is
would most likely
citizen can not be
290

Assault The defendant's good character as a peaceable, law abiding citizen is admissible in his favour in a prosecution for assault with intent to

prosecuted for
the commis-
relevant. For
example, the accused in a criminal action for burglary who had been employed

S. 53. on the police force of a city was not allowed to show by the chief of po... his work had been of a satisfying character *Chamberlayne's Ev* § 329...

Carr ... peaceable, ... carrying ... offence ...

Fraud In criminal actions for fraud or involving fraud, the good cha... of the accused with respect to the trait involved may be shown in his ... but his personal habits or character for sobriety and morality are irrelev... is likewise his reputation for industry. *Chamberlayne's Ev* § 3294

Homicide Character evidence is probably more *frequently* used on ... f ...

... in such a case to the accused has sometimes led to a liberal construction ... general rule The good character of the accused for peaceableness and q... is admissible even where the instrument of death was poison Exampl... evidence, offered as character evidence on behalf of the accused, wh... been excluded are that the accused was industrious and honest, a go... valiant so... worker *That the decea*... case of ... may, on the other hand be ... by the ac... v *Biggin* (1920) 1 K B ... *R* v *Macarthy*, Russ Cr. (8th Ed) 1931, n(b)), but not the fact that h... engaged in selling whiskey, was unchaste or that he was a *drinking man* ... there was no evidence that he had been drinking on the occasion in q... *Chamberlayne's Ev* § 3295

Indecent assault The character of the accused for *chastity* is ... relevant in such actions.

... *re the victim is other than* ... y regarded *as the only relevant* ... would seem *that other tra*... as cruelty, brutality and their opposites ought often to be *considered* ... view has been recognized in a case of infanticide *wherein the accused* ... allowed to show that he was of a humane and kindly disposition *toward* ... *Chamberlayne's Ev* § 3298

Larceny In larceny cases, proof of character must likewise be co... to the trait involved in the crime, honesty, being regarded as such tra... good character of the accused for truthfulness is not admissible in h... nor is his character in respect to sobriety. *Chamberlayne's Ev* § 3299

Libel The reputation of the accused in a *prosecution for criminal* ... for truth and veracity, is inadmissible as is likewise his reputa... peaceableness and orderliness What trait would be relevant in a l... appears ... *Chamberla...'s Ev.* § 3300

has ... Howe ... establ ...

Rape The Courts have experienced some difficulty ... trait of character of the accused in a prosecution for *rape* is a ... favour His reputation for "morality, virtue and honesty in his ... in that context ...

... commit rape, the defendant's reputation for truth and ...

S. 54

n rejected as was likewise evidence of his general character. The reputation the prosecutrix in rape for chastity may always be shown by the accused as iring on the question of consent It must be observed that proof of character chastity of the female involved in all cases of this general class, which ludes adultery, rape, seduction and the like, is proof of the character of a placed upon proof of character tion by the prosecution in the first berlayne's Ev § 3303.

Receiving stolen property. The trait of character regarded by the Courts relevant in a prosecution for receiving stolen goods is honesty The accused ay introduce evidence of his character for honesty and probity for the purpose raising an inference that he is not guilty of the crime charged but traits her than honesty are not regarded as relevant and are therefore excluded ie language, however, which is used to express that general trait may vary, e words probity and interigity, for example, not being objectionable The putation of the person from whom the goods were received as a regular and mest dealer in goods such as those in question is relevant on behalf of the cused Such evidence bears upon the good faith in which the goods were ceived and tends to prove absence of criminal intent *Chamberlayne's Ev* 3304.

Seduction
on may not be
haracter for virtu
rebuttal the t
as accused of the crime *Chamberlayne's Ev* § 3305

Train wrecking In a prosecution for attempting to wreck a train by lacing a tie upon a railroad track, the good character of the accused as a eaceable, orderly and law abiding citizen was held admissible in his behalf *hamber ayne's Ev* § 3306

Previous bad character not relevant, except in reply.

54. *In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2—A previous conviction is relevant as evidence of bad character.

quires The evidence is relevant to the issue, but is excluded for reasons of

* This section was substituted for the original section 54 by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891), s 6

S. 54. *Nath,* 10 W. R. Cr. 17 ; *R* v. *Tuberfield,* 10 Cox. 1 ; *Amrita* [illegible] *Emperor,* 42 C. 957. But after a defendant has attempted to sh[illegible] character in his own aid, prosecution may in rebuttal offer as evi[illegible] character. *Wigmore* § 58. The reason for the reception of this evid[illegible] stated by *Earle J.* in *R* v. *Rowton supra* ; "If the prisoner, [illegible] character, misleads the Court . . . the false impression should b[illegible] See also *Per A* [illegible] . . *Shrimp*[illegible] Cr. C. 322. In [illegible] . by gi[illegible] own character " [illegible] v. *Pen*[illegible] 333 (339).

Old Section. Before the amendment of the section by Act [illegible] s. 6, the section ran as follows : " In criminal proceedings, the [illegible] accused person has been previously convicted of any offence is releva[illegible] fact that he has a bad character is irrelevant unless evidence has bee[illegible] he has a good character in which case it becomes relevant (*Expla*[illegible] section does not appl[illegible] a fact in issue)." [illegible] tions are in every [illegible] had been given of good character or not. *Queen-Empress* v *Kart*[illegible] *Das,* 14 C. 721 ; 2 Weir 760 ; *Empress* v *Sukha,* A. W. N. 1886, [illegible] *Roshun Dosadh* v. *Empress,* 5 C 768=6 C. L R. 219. In framing t[illegible] section the framers of the Act said : " We permit evidence to [illegible] previous convictions against a prisoner for the purpose of prejudicing [illegible] do not see why he should not be prejudiced by such evidence, [illegible] *Report of the Select Committee,* see also *Queen Empress* v. *Kartick* [illegible]

[illegible] to rebut such evidence by giving evi[illegible]" *Queen-Empress* v *Hughes,* 14 A. 25=A. W. N. 1891, 170.

Scope of the present section As a general rule the badness of th[illegible] [illegible] ed is not a fact in issue, or relevant to [illegible] that he is of bad character or tha[illegible] [illegible] it the same kind of offence as that of [illegible] [illegible] petent for the prosecutor to adduce [illegible] tending to show that the accused has been guilty of criminal acts o[illegible] the o[illegible]

[illegible]

Sir James Fitzjames Stephen in his general view of there [illegible] [illegible] a weak [illegible]

[illegible]

it is an inflexible rule of English Criminal Law [illegible] transaction." *Woodroffe's Ev. p.* 451. Under this section the [illegible]

...used has a bad character is irrelevant, and cannot be admitted whether ...ited by the prosecution or by the defence. *Mi Myin* v. *King-Emperor*, 6 L. ...R. 4=9 Cr. L. J. 576=2 Ind. Cas. 349; see also *Emperor* v. *Wahiduddin*, 54

...ore the passing of the Indian Evidence Act. *Queen* v. *Mahima*, 6 B. L. R. ...) 131=15 W. R. 37 Cr; *Queen* v. *Behary* 7 W. R. 7. Cr.; *Queen* v. *Phoolchand*, ...V. R. Cr. 11; *Queen* v. *Gopal Thakoor*, 6 W. R. Cr. 72; *Queen* v. *Bykunt*, 10 ... R. Cr. 17; *Queen* v. *Kulum Sheikh*, 10 W. R. Cr. 39; *Reg* v. *Timmi*, 2 B. H.

...) consideration for the ...used was tried, and ...ence for which he was t...

...accused person has not been

...Cr. L. J. 411. Such ...

...it he has a good character or where the bad character of any person is itself a ...t in issue. *Wasir* v. *Empress* 7 P. R. 1895 Cr. Except for the purposes of ... of s. 75, ... Act. III of ... as other ... *Emperor* v. ... L. R. 1034. ...evant fact ...der s. 14 of the Act. *R* v. *Naba Kumar*, 1 C. W. N. 146. In a trial for an

...vidence which is required to prove a motive for the crime which is otherwise ...levant. *Jagua* v. *Emperor*, 5 Pat. 63=93 Ind. Cas. 884=7 Pat L. T. 396= ...I. R. 1926 Pat. 232. See also *Emperor* v. *Aloomiya*, 5 Bom. L. R. 805=28 ...t. 129.

...cular locality. And in regard to this second question the ordinary rules of evidence do not apply or at least are greatly relaxed. The Indian Law has

S. 54. adopted the policy of lea
discretion of the Cour
no bearing whatever upc
tion ; after an accused
charged it is relevant for the purpose of enhancing the sentence to b
on him. *Emperor* v *Nga Ba,* 111 Ind. Cas 453=29 Cr L J
1928 Rang 200 (F. B); see also *Emperor* v. *Ismail* 39 B 3
Emperor, A I R 1929 Mad 306. So also records of such convict
put at the end of the trial *Queen* v. *Shiboo,* 3 W. R Cr 38; *Delnr*
50 C 367.

Accused person's bad character is relevant The evidence
prove that the accused person's character is such that he is likely
the act of the cheating
v. *Choun,* 26 P W R
v. *Emperor,* 48 C L J
of the accused in the fi
character *Felsenthal* v *State,*
rule and practice of our law in relation to evidence of character
deepest principles of truth and justice The protection of law is
the righteous and unrighteous The sun of justice shines alike for
for good, the just and the unjust The crime must be proved, not
on the contrary, the most vicious is presumed innocent until prov
The admission of a contrary rule, even in any degree, would open
only to direct oppression of those who are vicious because they are
and weak, but even to the operation of prejudices as to religion
character, profession, manners, upon the minds of honest and well
White, 24 Wend. 574
disposition is not relevant
ole, 1 *Phil Ev* 503 The
Peckham J in *People* v
N Y 78 (Am), when he said: "Two antogonistic methods for the
investigation of crime and the conduct of criminal trial have
many years One of these methods, favours, this kind of evidence
that the tribunal which is engaged in the trial of the accused may
the whole pa
cuces, and
This is

which is pursued in France, and it is claimed that course
to be done where such course is pursued than where it is omitted.
law of England, however, has adopted another, and, so far as the party
In order to prove

is an exception (which is a peculiarity of precedents
ing *relevant* evidence of a defendant's general and notorious
commit such crimes or torts as that with which he is charged
evidence is relevant, the law acknowledges by receiving in criminal
in some civil cases, evidence of a defendant's good character in
allowing such evidence to be rebutted; and by receiving
character of witnesses and of other persons. The exclusion
is a plain depai
material eviden
in a usurpation
to mitigate the
way of its operat
given for the purpose of showing that the accused were
they were likely to commit the crime charged But
own and pro

S. 54.

mperor, A I R 1931 Pat 345=12 Pat L T. 471 But evidence is otherwise levant if it is not rendered inadmissible merely because it shows bad character the admission of offences other than the offence with which the accused is harged. *Saroj* v *Emperor*, A I R 1932 Cal 474.

examined *R* v
B 464=90 L J
man slaughter, it
eed he ran down
nd killed a boy, the accused in cross-examination was repeatedly asked and

was called by the accused for the sole purpose of producing some letters This

was not endeavouring to establish a good character merely because a witness whom he called volunteered a statement as to the appellant's good character not only uninvited but probably also against the appellant's wish, and therefore the
of ba
put his
(Am),
incident

that he should have the advantage of a character which in point of fact is undeserved *R* v *Routon*, L. & C. 520 (529); *Wills' Ev* 2nd *Ed*. 55.

S. 54. prosecution may rebut the evidence of good charracter either by cross
C. & P. 6
App R. 113
only be
prevent the accused person from pleading that the act under consideration committed without a dishonest intention. *Emperor* v. *Bakhtawar*, L R. 313 = 102 Ind. Cas. 492 = 28 Cr. L. J. 556. The presumption ar. evidence of good character, and of the fact that an accused person is an man of good family connection, which would render it *prima facie* unl he would be guilty of crimes of violence, cannot be pressed too far in of offences originating in extreme political feeling. *In re* Lo... 6 M. L T. 17 = 11 Cr. L. J. 30 = 4 Ind. Cas. 700. But in other cases character of an accused person, and the insignificance of the gain whi result from the offence committed by him are circumstances which cases have occasionally great weight, but neither of them can dispo and undisputed facts. *Government of Bengal* v. *Umesh Chunder*, 16 C.

must
involv
in which the evidence is offered. *Chamberlayne's Ev.* § ... other traits is irrelevant. *Vide* notes under s. 53.

Previous conviction when relevant under other law. Previous c... may also be relevant in cases where the accused is liable to enhanced ment; *vide* s. 75 of the Indian Penal Code; ss 221, 310, 311, 511 of the Procedure Code.

Explanation I. This section is not applicable in cases when the bad ... *Emperor*, A. I. R. ...

of that section. *Sher Zaman* v. *Empress*, 10 P. R. ... 54 of the Evi...

of bad character is admissible.
murder to prove that the accused
as being evidence of character it is ...
prove habit and association. *Khulauan* v. *Emperor*, 5 O. ... 1928 Oudh. 430.

Explanation II. Whenever under this section evidence as ... character of an accused is admissible, his previous conviction is also ... as evidence of his bad character. But in other cases evidence of ... conviction is not admissible unless accused produces evidence of ... character. Such evidence of the previous conviction of an ... amounts to evidence of bad character. *Teka Ahir* v. *Emperor*, ... 766 = 60 Ind. Cas. 331 = 22 Cr. L. J. 219; see also *Bahimuddin* ... C. L J. 578; *Emperor* v. *Dunning*, 5 Bom. L. R. 1031. The ... conviction may be considered in enhancing the sentence after ... proved. *Rahim Bux* v. *Emperor*, 5 O. W. N. 121 = 110 Ind. Cas. ... strict proof must be given of previous conviction. *Emperor* v. ... Upon the conviction of an accused, the Court has to determine ...

award, and, to do this, should take into consideration, not only the nature and gravity of the offence committed, bu ... The ... d character of the accused then beco ... f bad ... haracter being admissible as affecting ... only general reputation and general disposition and not of particular acts by which ... putation and disposition is shown ... ception to this rule Evidence of d ... r the above purpose *Naga Po* v ... he object of this section is to lay down ...

... N 851, see also *Rahim* v

Character of prosecutor when relevant In a prosecution for rape or ... r attempting to ... ross-examine the p ... as a general bad ...

... nay call evidence to rebut it. *Wills Ev 2nd Ed* 86

S. 55

55. In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Character as affecting damages

Explanation.—In sections 52, 53, 54, and 55, the word "character" includes both reputation and disposition, but *[except as provided in section 54,] evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

Principle The possession of a particular trait of character or the contrary by one of the parties to ... tion in that regard must often be ... aw of ... The ... larger

*These words and figures in the *Explanation* to section 55 were inserted by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891), s 7.

S. 55. amount of damages, while a contrary finding may properly result award of damages or none at all. Reputation rather than actual ch usually investigated as that is commonly the important considera ion it is difficult to always draw a line of demarcation between the two related (in law) intangible subjects *Chamberlayne's Ev* § 3303.

Scope of the section. In civil cases, good character being pr... not be proved in aggravation of damages; but the party attack... general evidence of bad character by general evidence of good cha... meet evidence of specific acts of impropriety by disproof of su h a... not by evidence of general good character. *Jones* v *Jam s*, 15 L... *Narracott* v *Narracott*, 33 L J P & M 61, *Patp. Ev 7th Ed.* ... obvious that, on the principle so generally accepted for an action of de... (*vide infra*), the plaintiff's reputed character may be considered, in ... of damages, in any other action in which the law of damages rec... harm to reputation as one of the elements of recovery This has al... conceded for the actions of seduction, criminal coversation, malic... breach of promises of marriage, malicious prosecutions, etc ... see also *Per Pigot* C B in *Bell* v. *Parke*, 11 Ir C L 423, 47...

[illegible]

sible an affecting the question of damages, is a point which ... controverted On, the one hand it is urged, that the admission of such ... would be cruelly unjust, as it would throw upon the plaintiff, ...

[illegible]

is not ad...
cannot b...
any man ...
good name, even by means of the very action which he should ... him-elf from the effects of malicious slander" *Per Graham B* in *L*... 11 Price 235, 256, 269 In the same case *Garrow B* said. "If it ... become the law that such evidence should be admissible, the ... become a m...

[illegible]

tion; that every man who demands compensation for ... character ought to be prepared to rebut any evidence of ... character; that the danger of admitting testimony of this kind is ... since the witnesses, on cross-examination, might be compe... grounds of their belief, that, as any failure in the evidence ... much increase the damages, witnesses would scarcely be ... support of a decisive case; that the law will not presume ...

criminal conspiracies to ruin reputations, and cannot be moulded to suit the **S. 5**

best, if not only, arrive at a safe conclusion on this point, by inquiring what opinion was previously entertained respecting him, by those with whom he was

person of whom they are made, he had a right of action The damage, however, which he has sustained must depend entirely on the estimation in which he was previously held He complains of an injury to his reputation, and seeks to

damages with one of unsullied and unblemished reputation A reputed thief would be placed on the same footing with the most honourable merchant, a virtuous woman with the most abandoned prostitute To enable the jury to estimate the probable quantity
previous character is not only mat
is said that the admission of suc

friends who have known him to prove that his reputation has been good'
Wigmore § 70, *Wood* v
defamation the defendant,
in substance and in fact
Wood v. *Durham*, 21 Q. B

or of the character of the plaintiff without the leave of the Judge unless seven

If the general issue is pleaded, the amount of damages is properly in issue, and

S. 55. amount
award of
usually
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Scope of the section. In civil cases, good character being p
not be proved in aggravation of damages; but the party a ta ke
general evidence of bad character by general evidence of good ch
meet evidence of specific acts of impropriety by disproof of such a
not by evidence of general good character *Jones* v *James*, 18 L
Narracott v *Narracott*, 33 L J P & M 61, *Phip Ev* 7th Ed
obvious that, on the principle so generally accepted for an action of
(*vide infra*), the plaintiff's reputed character may be considered in
of damages, in any other action in which the law of damages rec
harm to reputation as one of the elements of recovery This has al
conceded for the actions of seduction, criminal coversation, and
breach of promises of marriage, malicious prosecutions, etc *Wig*
see also *Per Pigot* C B in *Bell* v. *Parke*, 11 Ir C L 423, 475

Character evidence in suits for defamation Whether, in an
ntiff's previous general cha
, he laboured under a general
to him by the defendant,

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good name, even by means of the very action which he sho
himself from the effects of malicious slander" *Per Graham B* in *Jones*
11 Price 235, 256, 269 In the same case *Garrow B* said "If ever
become the law that such evidence should be admissible, the
become a much more
protection
of his malic
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to vindicate their characters in Courts of Justice, and thus
a most dangerous impunity. *Taylor* § 359 To this it is repl
force, that, though the arguments on the other side would be ent
weight, if the question respected the right of proving partic
conduct, they do not apply where evidence is offered of merely ge
tion; that every man who demands compensation for the
character ought to be prepared to rebut any evidence of
character; that the danger of admitting testimony of this kind
since the witnesses, on cross-examination, might be compelled
grounds of their belief, that, as any failure in the evidence
much increase the damages, witnesses would scarcely be
support of a decisive case; that the law will not presume

S. 55

riminal conspiracies to ruin reputations, and cannot be moulded to suit the onvenience of irrational timidity; that to estimate the extent of the injury which a plaintiff has sustained, and, consequently, the amount of damages to which he is entitled, the jury must first ascertain what was the real value of his haracter at the time when it was attacked by the defendant, and that they can

ecover damages for that injury, and it seems most material that the jury who have to award those damages should know, if the fact is so, that he is a man of no eputation 'To deny this would', as is observed in *Starkie on Evidence*, be to decide that a man of the worst charac
damages with one of unsullied and
would be placed on the same footin
virtuous woman with the most abandoned prostitute To enable the jury to estimate the probable quantity of injury sustained, a knowledge of the party's previous character is not only material but seems to be absolutely essential It is said that the admission of such evidence will be hardship upon the plaintiff,

friends who have known
Wigmore § 70, *Wood* v
defamation the defendant,
in substance and in fact
Wood v. *Durham*, 21 Q. B

umours or
English-
Art 57,
Pen Add
70, *Ellershaw* v *Robinson*, 2 St Ev 641;
Barber, 2 St. Ev 641, *Kirkman* v *Onley*,
tens 11 Price 235 *Waithman* v *Weaver*,
D & R. N. P C 10, *Cornwall* v *Richardson*, Ry & M 307, see also notes under s. 12 at p 176 *supra*. But in England where the defendant does not plead the truth of the libel he cannot give evidence in chief in mitigation of damages, of the circumstances under which the libel or slander was published, or of the character of the plaintiff without the leave of the Judge unless seven

If the general issue is pleaded, the amount of damages is properly in issue, and

S. 55. the result [illegible]
pleaded, [illegible]

[illegible] nitting the plaintiff's bad reputation [illegible] l') his general bad reputation alone [illegible] for the particular trait involved in the [illegible] tion, e g. honesty, chastity, etc, or (d''') both may be used' *Gre* § *14 (d).*

Seduction Character evidence of the daughter is admissible in an [illegible] for seduction, for here the disgrace to the father must naturally be [illegible] lacking if the daughter is already of bad reputation for chastity, [illegible] bad reputation may therefore be shown *Bamfield* v *Massey*, 1 Ca[illegible] *Dodd* v *Norris*, 3 Camp 519, *Carpenter* v *Wall*, 11 A & E 804, [illegible] § 75 The father's own reputation is immaterial *Ibid* In such an [illegible] element of damage is the wounded sensibility of the injured party, [illegible]

[illegible]

shown *Smith* v *Milburn*, 17 [illegible] § 3308, *Phip Ev 7th Ed* p 186. [illegible] character is not admissible under [illegible] *supra*

Criminal Conversation In an action for criminal conversation the [illegible] previous bad reput[illegible] *305* § 75, *Smith* [illegible] reputation is immate[illegible] or character, for this [illegible] well serve in mitigation, in as much as the loss of his wife's virtue [illegible], thus the reputation is here rec[illegible] *more* § 75; *Bromley* v *Wallace*, [illegible] [illegible] character is in question [illegible]

[illegible] he can claim [illegible] 362; *Jones* v [illegible]

T. N. S , *Narracott* v *Narracott*, 33 L. J. P. & M 61

[illegible] in an [illegible] repu[illegible] The [illegible] 153 [illegible] from [illegible]

assault would be less than that of a modest and virtuous woman [illegible] *Work*, 13 R. I. 645 , *Wigmore* § 75

[illegible] The bad character of the [illegible] is clearly [illegible] mitigation of [illegible] such a [illegible] woman [illegible] tions of [illegible] is of [illegible]

unchastity a defence the defendant must not only prove [illegible]

S. 55

unchaste, but also that he had no knowledge of such unchastity at the time of making the promise to marry. *Foster* v. *Hanchett*, 68 Vt. 319 (*Am*).

Malicious prosecution In actions for malicious prosecution, the defendant may show the general bad reputation of the plaintiff as known to him when he launched the prosecution *Martin* v *Hardesty*, 27 Ala. 458 (*Am*), *Chamberlayne's Ev* § 3308

Explanation. rac-
er cannot include ion.
' That actual charac it,
nd the latter is merely evidence to prove the former, ought to be a truism" *Wigmore* § 1608 " The term ' character ' when more strictly applied, refers to the inherent qualities of the person, rather than to any opinion that may be
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, so that
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, on the
, as we
ubject are
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n *Bucklin*
Craufords-
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re § 1608
rm " cha-
55, has been used in the sense of
to prove the disposition of a person,
e given and to prove his reputation, his

English law Under the English law the term 'character' was normally applied to the actual qualities, and not to the community's estimates of these qualities. *Wigmore* § 1981 In *Thomas Hardy's Trial*, 24 How St Tr 999, evidence was admissible to the effect ' I have always esteemed him as a man of a mild and peaceful disposition"
Trial, 31 How St Tr 186, *Lord Ellenborough*.
as to the general character of the accused,
likely to be guilty of
§ 1981, see also *Trial of*
1180 ff, *Ferrers's Trial*,
How St Tr 40, *Butler's*.
spoke from personal knowledge alone, and often (though less frequently) from personal knowledge plus reputation, but to speak from reputation alone is regarded in the 1700 S as improper On this point the law in England was afterwards changed and allowed reputation alone *Wigmore* § 1981 In *Jones Trial*, 31 How St Tr 310 (1809), *Lord Ellenborough C J* incidentally said. "It is reputation; it is not what a person knows" But the isolated phrase above in *Jone's Trial* somehow caught the attention of later

s equally clear when we understand the usage of the term character in this connection *Peake Ev 2nd Ed.* 8 (1802), *McNally Ev* 321 (1814) *Starkie Ev 1st Ed* Vol. II, 366 (1824); *Phillips Ev. 1st Ed* 72, 105 (1814) That personal belief, estimate, or knowledge—under whatever name—was proper and unquestionable testimony to character seems
whole period
Cox Cr. 25,
Cockburn C. J

S. 55 that a prisoner is entitled to give evidence as to his gene
What does it mean? Does it mean evidence as to his reputa
those to whom his conduct and position are known or does it n
of disposition? I think it means evidence of reputation only
h on put deliberately to a witness called on behalf o
a the way, and the only
his mind
knowledge
in which I find the that
text-writers of authority upon the subject d in all the
consider the question of what in the strict interpretation of th When
limit of such evidence I must say that in my judgment, it must be
to this *the evidence must be of the* man's general reputation and
vidual opinion of the witness The witness who acknowledged th
nothing of the general character, and had no opportunity of know
sense of reputation would not be allowed to give an opinion as t
character in more limited sense of his disposition' *Pollock C B*
Blackburn Byles Keating Mellor and *Shee J J* and *Martin, Ch*
Piggot B B concurred and *Earle C J* and *Willes J* dissented
same case *Earle C J* said 'What is the principle on which ev
racter is admitted? It seems to me that such evidence is adm
purpose of showing the disposition of any party accused and b
a presumption that he did not commit the crime imputed to him. D
cannot be ascertained directly, it is only to be ascertained by
formed concerning the man which must be founded either on p
rience or on the expression of opinion by others whose opinion
be founded on their personal experience The question between us is
the Court is at liberty to receive a statement of the disposition of
founded on the personal experience of the witness who attends to g
and state that estimate which long personal knowledge of and acqua
the prisoner has enabled him to form I think that each so
is admissible You may give in evidence the *general rumour* preva
prisoner's neighbourhood and according to *my experience* you may
the personal judgment of those who are capable of forming a more
tial guiding opinion than that which is to be gathered from general
have never seen a witness examined to character without an
made into his personal means of knowledge of the character Th
goes to the jury depending entirely upon the personal experience of
who has offered his testimony Suppose a witness to chara
This man has been in my employ for twenty years I have had
of his conduct but I have never heard a human being expre
him in my lif I have always regarded him with
esteem and that he is
worthiest me *Chief Ju*
down would where
To my mind personal experience evidence
a statement as, I have heard some persons sp ll of h
heard general report in favour of the prisoner' has a v
comparison Again, to the proposition that general character
sible the answer is that it is impossible to get at it.
as general character it is the general inference supposed to a
a number of separate and disinterested statements in favour of
But I think that the notion that general character is alone a
accurate It would be wholly inadmissible to a
he has ever heard give his opinion of a particular fact
I attach considerable weight to this distinction, because in my
character is that which is the least talked of The argume
upon the branch of the case have commanded my assent
confirmed by the case of *Rex v Davison*, 31 St. Tr. In
Ellenborough held that the personal experience of a wi
founded upon his personal experience was admissible
recollection there were thirteen witnesses to character
five or six gave evidence of very considerable personal

S. 55

prisoner, so as to show the means they had had of forming an opinion upon his disposition. The first witness stated the length of time that the prisoner

was not

Then

ussible.

Each of the witnesses was asked as to his means of knowledge and his opinion of the prisoner's disposition, and *Lord Ellenborough* says, 'the correct inquiry is to the general character of the accused and whether the witness thinks him likely to be guilty of the offence charged in the information' This is very strong proof that the practice is to stop a witness when he refers to particular

gave his answer according to the

that experience But the witness a

brothers Strictly that specific fact

involving a very important question, I cannot rest my decision on the particular

cular witness, is superior in quality and value to mere rumour. Numerous

character, because the prisoner was charged with an offence which would not only be committed in secret if it were committed at all, but would be likely to be kept secret by the persons who were subjected to it Such being the case,

Davison's
fraud?'
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attended to In 1794, in *Hardy's Case*, 24 How St Tr. 999, there is a passage in the examination of witness, *John Carr*, which shows what was then regarded as the true rule, and how common it was to disregard it 'How long have you known Mr *Hardy*? Upwards of twenty years Have you known him well

e during that time? The

—From what you know of

sturbance, or commit any

acts of violence? Never.—*Mr Attorney General.* That is a question never put,

S. 55. that a prisoner is entitled to give evidence as to his general c
What does it mean? Does it mean evidence as to his reputation a
those to whom his conduct and position are known, or does it mean
of disposition? I think it means evidence of reputation only. No
heard of a question put deliberately to a witness called on behalf of a
as to the prisoner's disposition of mind; the way, and the only wa
his mind i
knowledge of
... general conduct. Now, that is t
in which I find the the word 'character' used and applied in all the bo
text-writers of authority upon the subject of evidence. When we
consider the question of what, in the strict interpretation of the l
limit of such evidence, I must say that, in my judgment, it must be r
to this: *the evidence must be of the* man's general reputation, and n
vidual opinion of the witness. The witness who acknowledged that
nothing of the general character
sense of reputation, would not be
character in more limited sense
Blackburn, Byles, Keating, Mellor and
Piggot, B B, concurred and *Earle C*
same case *Earle C J* said: "What ...
racter is admitted? It seems to me that such evidence is admi
purpose of showing the disposition of any party accused, and b
a presumption that he did not commit the crime imputed to him. D
cannot be ascertained directly; it is only to be ascertained by the
formed concerning the man, which must be founded either on per
rience or on the expression of opinion by others whose opinion aga
be founded
the Court
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and state that estimate wh
the prisoner has enabled
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prisoner's neighbourhood,
the personal judgment of those who are capable of forming a mo
tial guiding opinion than that which is to be gathered from general r
have never seen a witness examined to character without an e
... character. The

esteem and respect, and have had abundant experience that he
worthiest men in the world.' The principle the *Lord Chief Justi*
down would exclude his evidence, and that is the point where I dist
To my mind personal experience gives cogency to the evidence; w
a statement as, 'I have heard some persons speak well of him,' or
heard general report in favour of the prisoner,' has a very sl
comparison. Again, to the proposition that general character is
sible the answer is that it is impossible to get at it. There is no
as general character, it is the general inference supposed to arise
... statements in favour of ...

upon the branch of the case have commanded my ass ... In
confirmed by the case of *Rex v. Davison*, 31 St. Tr. ...
Ellenborough held that the personal experience of a man ...
founded upon his personal experience, was admissible ...
recollection there were thirteen witnesses to character call...
five or six gave evidence of very considerable personal ...

evidence than that of a witness who testifies to the general repute of this person **S.** as to this mental characteristic? His testimony is based upon hearsay, and quite likely rumour and gossip If mental characteristic is a fact, there is no valid reason why this fa .
Personal observ
than general reput
others to which
from those who know" *Wigmore* § 1986 Similarly in *State* v *Lee* 22 Minn 409, *Berry J* said "As it is the fact of disposition which is important and material, there can be no reason why this fact may not be proved by any witness who knows what it is There is certainly no reason why general repute is any

Except as provided in section 54 The character evidence as is contemplated in section 54 is not confined to general disposition or general reputation The character or disposition offered whether for or against him must involve the specific trait related to the act charged *Wigmore* § 59 "The object and effect of such evidence is to disprove guilt by furnishing a presumption that the defendant could not have committed the offence and hence the character sought to be proved must be such as would make it unlikely that the party would do the controverted act" *McClellan J* in *Morgan* v *State* 88 Ala 224 (*Am*), *Wigmore* § 59

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i e as a testimonial assertion It may be a part of the very issue, as where the reputation of a plaintiff is in issue to determine the damages in an action
in issue, in
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concern this
ible, (2) the
d to testify to

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accusation may have contributed to colour the reputation and render it untrustworthy *Greenl Ev.* § 461 (*d*), *Chamberlayne's Ev* § 3329

Nature and formation of Reputation In enquiry into the limitations affecting the nature and formation of a reputation, it must be remembered that

55 reputation is used only by way of an exception to the Hear ay rule it must therefore take such a solid and definite shape as to be worthy of . and to justify the exceptional resort to such evidence Mere rumou course not reputation
of the community as a
but what the community
Scott v *Sampson*, L R 8 Q. B D 491 If the public opinion be d

proportion of them, should have been heard to speak on the subject, it

the person's veracity or honesty or other quality in question is un
deemed to be equivaler
and therefore to be
be trustworthy only so
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persons among whom
where he has merely sojourned; the form of the question usually runs
opinion in the neigl
vary *Greenl Ev.*
another aspect A
or occurrence, whih
a man's reputation, for example, may declare him honest, and yet a rumour may have circulated that this reputed honest ma has defaulted accounts *Wigmore* § 1611.

The persons qualified to testify to reputation The witness to must be one who, by evidence in the community, or otherwise, has opportunity to learn the community's estimate, and the preliminary whether he knows the person's reputation, is usually insisted upon v *Norris*, 103 Mass 566 A person who lives out of the neighbourh therefore not qualified and it has been doubted whether a per on
express purpose of learning the
4 Esp 102, *Douglass* v *Tou*
236), *Greenl. Ev* § 461 (d),
layne's Ev § 3315.

Cross-examination of a witness to reputation In testing a who speaks of good character, it will expose the untrustworthiness of testimony if he admits that rumours of misconduct are known to him, knowledge of such rumours may well be inconsistent with his ass rtion the person's reputation is good *Wood* 5 Jur
ingly, the propriety of
reputation he has support
usually been conceded
tion may be tested on cross-examination by requiring him to specify
of his information, and in particular the persons whose remarks have
give rise to his assert because there is
no other effective way
reputation *Weeks* v
conceded to be proper.
defendant's or other persons' reputation as well as of a
Greenl Ev § 161 (d), *Chamberlayne's Ev* s 3311.

said that the
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If the
harmony, the
other hand,
impossible to exact unanimity; for there are always dissenters. Is precisely that quality of public opinion thus commonly described as therefore a difficult thing *Wigmore* § 1612. "A reputation,

putation at all, must be a general reputation It may be eith r one of two
pposites; for instance, either good or
partly one and partly the other;
ould then be no general reputation
en obviously, it does not exist as a fact
r a partial, limited, or qualified repute The existence of a diversity of
nion is one of the means by which a witness may know there is general
utation, but this means of knowledge, apart from the fact that there is or

actual commission of the crime *In the matter of the petition of Pedda Sur*
di, 3 M. 238 = 2 Weir 51

General Disposition Here the character is applied to the actual qualities
l not to the community's estimate of these qualities The term "general
distinguished from the "particular
'character" (i e general disposition
showing it) seems to have been
original and natural source of the phrase and the orthodox application of
In *Layers' Trial*, 16 How St Tr 246, various discreditable facts being

he particular facts to charge the reputation of any witness, but only *in general*

nself" *Wigmore* § 1981 In *R* v *Cobbit*, 2 State Tr. N S 789, 873, *Lord*
nterden C J said. "The proper inquiry for a gentleman who has known Mr.
many years is as to his general character, not as to any individual or
ticular acts .. you may ask wh

rticular witness—such opinion being the result of the witness's personal
perience and observation—will also be evidence as to his character But the
idence need not show that such general opinion is based on the personal
nowledge of the man by his neighbours generally, nor does it show that such
neral opinion has been publicly expressed by his neighbours *Duma Singh* v.
ing Emperor, 5 O C 203

PART II.

ON PROOF.

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED

S. 56. Fact judicially noticeable need not be proved

56. No fact of which the C[ourt will] take judicial notice need be proved.

Scope of Part II In part I of the Evidence Act, what fa[cts ...] what facts may not be proved in a civil or criminal case has been [...] After ascertaining that question, the framers of the Act now propo[se in this] part to deal with the question what sort of evidence must be given [...]

the contents of a document, must be proved by oral evidence Ora[l ...] must consist of an a[...] the fact to the ex[...]

been reduced to a documentary form, the document in whic[h ...] that transaction, and its contents cannot [...], be varied by oral evidence though [...] tents of the document *Step Dig Ev I[ntroduc]tion* pp xiii, xiv

Proof The terms "evidence" and "proof" are often used in such a [...] as to include at one time the media by which facts are established, and at a[nother] the effect or conclusions produced by the testimony It is true the attem[pt ...] frequently [...] to distinguish betwe[en ...] terms "e[...] more of [...] viction, [...] accurately, proof [...] of proof *Best Ev* [...] produces assurance and certainty Evidence, therefore, [...] The words e[vidence ...] cause from effect *Wills Cir Ev 2, 3*; *Greenl Ev 1* however the latt[er ...] and "proof" are often used as synonymous, in strictness, evidence is that w[hich ...] an effect of the former 'Proof' is that which convinces, evidence is that w[hich] tends to convince" *Jastrzembski* v *Marxhausen*, 120 *Mich* 677=79 [...] 935 (Am); *Burr Jones* § 4

Scope of Chapter III "The second chapter having decided what fa[ct] is relevant we proceed to show how a relevant fact is to be proved In the [first] place, the fact to be proved may be one of so much notoriety that the Court [may] take judicial notice of it, or it may be admitted by the parties In either of th[e] cases no evidence of its existence need be given Chapter III, which relat[es to] judicial notice, disposes of this subject It is taken in part from Act II of 1[...]

part from the Commissioner's Draft Bill, and in part from the Law of gland" *Draft Report of the Select Committee—The Gazette of India, July, 1, '1 Part V p 273* "W

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known already, and ...

ted and reasoned upon without discussion. Often, also, much of which re might, in point of mere theory be a doubt, will, as a matter of established actice, be allowed by the Court, in the first instance, without formal proof, id there is much which belongs to a dubious and arguable region as to which Court may or may not proceed in this manner *Thayer Pre Ev 277*

In another case proof by evidence may be dispensed with, namely, where e opponent by a solemn *infra judicial* admission has waived dispute This known as Judicial Admission *Wigmore* § 2565.

Facts which need not be proved *Stephen* in his Digest of the Law of vidence (1st and 2nd editions,) Chap VII originally dealt with "judicial tice" under the general head of 'Proof and the special head of Facts hich need not be proved,' as in this Act For this he was taken to task by acute critic (in 20 Solicitors' Journal, 937) who suggested that since *Stephen's* t 93, ... that whoever desires a judgment to ... e or non existence of facts which asse... not exist,' and since art, 59 bout judicial notice) declares that some facts asserted by a party need not be ... art ... imp ... han

otice, of consciously recalling to the mind a fact known, but not for the moment dverted to, is an act of precisely the same kind as listening to the evidence of a

ted to the Judge's inspection in Court But the true conception of what is

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S. 56. being present [illegible] proof (i.e. othe [illegible] the situation as one where "no proof whatever was offered [illegible] defendant." The Judge was not a witness, and the [illegible] is not ent[illegible] itself [illegible] which the Court take[illegible] notice [illegible] here (granting a[illegible] [illegible] of [illegible]

[illegible]

lower tribunal [illegible] place at the trial, or their view that it is impossible to have [illegible] of exceptions when the trial Court avails itself of "real evidence" [illegible] illustration of "proving that it is raining by telling the Judge to [illegible] of the window, is another instance of the use of real evidence—[illegible] 280, 281.

Judicial notice, meaning of The expression "to take notice of a[illegible] in our ordinary popular p[illegible] [illegible] or remark [illegible]

[illegible] knowledge of a thing [illegible] the leg[illegible] [illegible] as *indicating the* [illegible] without [illegible] to an [illegible] change [illegible] When [illegible] teenth ce[illegible] notice, [illegible] common [illegible] Neither of the o[illegible] terms see [illegible] inapplicable, for common knowledge is by no means an [illegible] judge's function The constant use of this *knowledge is equally* not [illegible] [illegible] enable the word "notice [illegible]

[illegible]

said the Court will take judicial cognizance [illegible] they will be taken as proved. And the importance of the [illegible] in which there [illegible] *notice can hardly* [illegible] some matters whic[illegible] which it is tried, [illegible] a subject [illegible] *Burr Jones* § 105. [illegible] Evidence [illegible]

Pla[illegible]

not, as a part . . . a negative S. 5
sense, in th . . . s not always
necessary to . . . case. The
fact may be . . . l not require

Thayer Ev pp 278-280

Principle. Judicial notice is based upon very obvious reasons of convenience and expediency; and the wisdom of dispensing with proof of matters

tion. There is, however no rule of any practical importance which governs
arises must be decided
precedents, than the
words of *Greenleaf*,
"Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction" *Greenl Ev* § 8; *Burr Jones* § 105 (a) "Courts will not pretend to be more ignorant than the rest of mankind" *Fisher v. Janson*, 30 Ill. App 91.

notoriety, then he would take judicial cognizance of it. It would be absurd to

(2) all public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed:

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(3) Articles of War for Her Majesty's Army, "Navy or air force" :*

(4) the course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils Act,† or any other law for the time being relating thereto.

Explanation.—The word "Parliament" in clauses (2) and (4) includes—

(1) the Parliament of the United Kingdom of Great Britain and Ireland ;
(2) the Parliament of Great Britain ;
(3) the Parliament of England ;
(4) the Parliament of Scotland ; and
(5) the Parliament of Ireland :

(5) the accession and the sign manual of the Sovereign for *the time being of the United Kingdom of Great Britain and* Ireland :

(6) all seals of which English Courts take judicial notice : the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General‡ or any Local Government in Council: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India :

(7) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment to such office is notified in the Gazette of India or in the official Gazette of any Local Government :

(8) the existence, title and national flag of every State or Sovereign recognized by the British Crown :

(9) the divisions of time, the geographical divisions of the world, and public festivals, fasts, and holidays notified in the official Gazette :

(10) the territories under the dominion of the British Crown :

(11) the commencement, continuance and termination of hostilities between the British Crown and any other State or body of persons :

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*Substituted by Act X of 1927. †24 & 25 Vict. c. 67.

‡For lists of such Courts, *see* the notifications printed on pp. 372 to 374 of the Western India Volume of Macpherson's Lists of British Enactments in force in Indian States

S. 57. (12) the names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it:

(13) the rule of the road *[on land or at sea]. In all these cases and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

Whether the list is complete. A similar list is also given by *Sir J[illegible]es Fitzjames Stephen* in art. 58 of his Digest on the Law of Evidence. As regards that list he remarks: "The list of matters judicially noticed in this article is not intended to be quite complete. It is compiled from 1 Ph. Ev. 458—67 and T. E. ss 1—20, where the subject is gone into more minutely. [illegible]

[illegible]

the ordinary course of nature, the meaning of English words, and all other matters which they are directed by any Act to notice, such as, in Bengal, list of land holders who have not made road-cess returns (Ben. Act IX of 18[illegible] s. 19[illegible]

[illegible]

cases that which was already and more widely the law, have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment; resting on the maxim, *expressio unius est exclusio alterius*. But th[illegible]
cases. The only inference which a Court c[illegible]
provisions (which generally find a place in [illegible]
and idle doubts) is that the Legislature was either ignorant or unmindful of the

*These words in section 57, para. (13), were inserted by the Indian Evidence Act Amendment Act (18 of 1872), s. 5.

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real state of the law, or that it acted under the influence of excessive caution and if the law be different from what the legislature supposed it to be the implication arising from the statute, it has been said, cannot operate as a negation of its existence; any legislation founded on such a mistake has not the effect of making that law which the legislature erroneously assumed it to be so." *Maxwell*, 548. Similarly in *Krishna Kamini Dasi* v. *Abdul Jabbar*, 73 Ind Cas 312 at p 316 = A I R 1923 Cal 66, *Mr Justice Mookerjee* said "The only inference which a Court can draw from such superfluous provisions (which often find place in Acts to meet unfounded objections and idle doubts), is that the Legislature was either ignorant or unmindful of the real state of the law or that it acted

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shall take judicial notice" In the circumstances the proper meaning of the section is that it does not forbid the Court to take judicial notice of any fact which is a proper subject of taking such notice, but the Court must take judicial notice of the facts mentioned in this section and as regards that the Court is not at liberty to exercise any discretion It was pointed out with regard to *the corresponding section of Act II of 1855 that the list mentioned therein* was not exhaustive and the Court was at liberty to take judicial notice of any fact of which English Courts take judicial notice *Queen* v. *Nabadwip Goswami*, 1 B L R O Cr 27 28, *Woodroffe's Ev 8th Ed* 469 But why should it be confined to facts of which the English Courts ordinarily take judicial notice? The maxim that what is known need not be proved *manifesta* (or *notoria*) *non indigent probatione*, may be traced far back in the civil and canon law, indeed it is coeval with the legal procedure itself We find it a *maxim* in English law

set judici, si notum non sit in forma judicii. *Per Coke C J* in *Crawford* v.

future possibility of the doctrine of judicial notice. Courts may judicially notice much which they cannot be required to notice That is well worth emphasising, for it points to a great possible usefulness in this doctrine, in helping to shorten and simplify trials It is an instrument of great capacity, in the hands of a competent Judge, and it is not nearly as much used, in the region of practice and evidence, as

daily to smother trials

Thayer Prel Treat Ev 30

by Judges? One reason is that they apparently forget that (as *Professor Thayer* says) they might notice much that they cannot be required to notice by general rule made in advance, *e g*, a rule requiring them to notice always the incumbency of a sheriff's office might go too far, but they may in a given case be justified in declaring a specific sheriff to be notorious; and so on, in a thousand

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7. notice given to this branch of the subject is, that diversity of opinion has existed as to whether certain laws of a private nature were entitled to the judicial notice, and it has therefore become the task of the legal chronicler to mark them The law of the jurisdiction is peculiarly a matter of judicial cognizance It is only on the presumption that the law is known to the Court that there can be any proceedings whatever in Courts of Justice ' *Burr Jones* § 119 The Mahomedan Ecclesiastical law is a law having the force of law in British India and as such will be taken judicial notice of by Courts *Whitley Stokes* Vol II p 887, *Queen Empress* v *Ramzan* 7 A 461 The general rules of Hindu and Mahomedan law do not require proof They can be ascertained by making necessary reference to authoritative text books, judicial decisions as well as from the opinions of the Pandits or Maulvis *Bhagwan* v *Bhagwan, supra* The Court can take judicial notice of what the Hindu Law is with regard to Hindu custom, that always must be proved *Per Garth C J* in *Jagat Mohini* v *Dwarkanath,* 8 C 582 (587) But where a custom in judicially recognised it need not be

ham v *Zamindar of Pilapur,* 23 C

alir 93 Ind Cas 321, 78 Ind Cas

. I R 1926 Oudh 352, see also

Ramalinga, 12 M I A

customs of any particular community may acquire, by being repeatedly proved in the Court, such a status as to make it unnecessary in any subsequent case for

to prove the existence of a body of customs Assuming that a rule of *Hijasa ilana*

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Acts of Legislature In the case of laws enacted by the Legislature, Courts have to take judicial notice not only of the effect of the rules but also of those facts which are necessary for showing that

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this Act shall be deemed and taken to be Public Act, and shall be judicially

taken notice of as su h, unl ss the contrary be expressly provi le l and declared by such Act." This provision is now repealed by the Interpretation Act, 1889, 52 and 53 Vict C 63, which provides, by s 8 that every Act passed after 1850 "shall be a Public Act and shall be judicially noticed, as such, unless the contrary is expressly provided by the Act" So now every p rsonal Act or local Act, should also be taken judicial notice of by the Indian Courts

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Clause III. The Court will recognize without proof the Articles of War, whether in the naval, the marine, or the land service, as well as the auxiliary forces,—that is the militia, yeomanry, and the volunteers,—and also the reserve force, (*Taylor* § 5), but not of a book call d the Rules and Regulations for the Government of the Army (*Bradley* v. *Arthur*, 4 B & C 304) nor the Regulations of the territorial force (*Todd* v. *Anderson*, [1912] S C J 105)

Clause IV The English Courts take judicial notice of the laws of England and Ireland, including the laws and custom of Parliament and the privileges and course of proceedings of each House of Parliament *Stockdale* v. *Hansard*, 9 A & E 1=2 P & D 1, *Inaurance* v. *Gosset* 12 Q B D 271 The Indian Courts should take judicial notice of debates of Parliament *The Englishman* v. *Lajpat Rai* 37 C 760=14 C W N 713 "The proceedings of the Legislature" says *Prof Wigmore* "as shown in its journal are by some Courts noticed, but this is an artificial theory on principle, the proceedings as contained in the 2577 from 713 (726)

of the sovereign *ingle*, 2 M & Rob l and all matters stated under it. *R.* v. *Gully*, 1 Lev 98, *Mighell* v. *Sultan of Jhore*, (1894) 1 Q B 149

Clause VI The English Courts take judicial notice of the Great Privy Seal (*Lord Melville's Case*, 29 How St Tr 707; f royal proclamation, of the signature of the cler *Lewinstein*, 1 R P C 170), seal of the Corp

Crown Office Act, 1877, the Seal and the Privy Seal of the Duchy of Lancaster, the Seal and the Privy seal of the Duchy of Cornwall, the Seals of the old Superior Courts of Justice, and of the Supreme Court and its several divisions; the old nt office nd, the P of Stanneries, the Seals of Courts constituted by Act of Parliament, if Seals are orce and matters nd of its district Court of nsolvent ency in Ireland, which since the 6th of August, 1877, has been called "The Court of Bankruptcy in Ireland, of the several in Ireland, of the Landed Estate C of that Court, and of the county Court the city of Glasgow is not one of judicial notice *In re Henderson*, 22 C 491 Where the seal is not distinctly

7. notice given to this branch of the subject is, that diversity of opinion has existed as to whether certain laws of a private nature were entitled to the judicial notice, and it has therefore become the task of the legal chronicler to mark them The law of the jurisdiction is peculiarly a matter of judicial cognizance It is only on the presumption that the law is known to the Court that there can be any proceedings whatever in Courts of Justice ' *Burr Jones* § 112 The Mahomedan Ecclesiastical law is a law having the force of law in British India, and as such will be taken judicial notice of by Courts *Whitley Stokes* Vol II p 837, *Queen Empress* v *Ram an*, 7 A 161 The general rules of Hindu and Mahomedan law do not require proof They can be ascertained by making necessary reference to authoritative text books, judicial decisions as well as from the opinions of the Pandits or Maulavis *Bhaguan* v *Bhaguan*, *supra* The Court can take judicial notice of what the Hindu Law is with regard to Hindu custom, that always must be proved *Per Garth C J* in *Jagat Mohini* v *Dwarkanath*, 8 C 582 (587) But where a custom in judicially recognised, it need not be proved *Jadulal* v *Janki*, 35 C 575 *Raja Ram* v *Zamindar of Pitapur*, 23 C W N 173 (P C)=41 M 778 *Tulsidas* v *Takar* 93 Ind Cas 321, 78 Ind Cas 161; *Bagrudi* v *Rahim*, 93 Ind Cas 332=A I R 1926 Oudh, 352, see also

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formed nation cannot without proof be recognized as such by the judicial tribunals of other nations until it has been acknowledged by the sovereign power under which those tribunals are constituted (*City of Berne* v. *Bank of*

belonging to the executive

to such acknowledgment

is a fact by other competent testimony, and the existence of such unacknowledged government or state may, in like manner be proved, the rule being, that if a body of persons assemble together to protect themselves, and support their own independence, make laws and have Courts of justice, this is evidence of their being a State *Greenl Ev.* § 4 citing *Yrisarri* v *Clement* 2 C & P 223 But the rule in *U S* v *Palmer*, 3 Wheat 610, 634, seems limited to the case of a defendant denying piratical intent by pleading the authority of a government having colourable existence and engaged in a revolution On the general question, the correct rule seems to be the contrary of the statement in *Greenleaf* i.e., a Court will look solely to the action of the Executive where the existence of a foreign nation or government is involved *U S* v *Hutchings* 2 Wheel Cr Cas 543, *Rose* v *Himely* 4 Cranch 241, *Gelston* v *Hoyt*, 3 Wheat 246, 324, *Nueva* v *Anna* 6 id 193, *Williams* v *Ins Co*, 13 Pet 415, 420, *Kennett* v *Chambers* 14 How 38 51; *Mighell* v *Sultan of Johore*, (1894) 1 Q B 149 In the last mentioned case *Kay L J* said at p 161 "The status of a foreign sovereign is a matter of which the Courts of this country take judicial cognizance—that is to say a matter which the Court is either assumed to know or to have the means of discovering, without a contentious inquiry as to whether the person cited is or is not in the position of an independent sovereign Of course the Court will take the best means of informing itself on the subject if there is any kind of doubt, and the matter is not as notorious as the status of some great monarch such as the Emperor of Germany Here the person cited was the *Sultan of Johore*, and the means which the Judge took of informing himself as to his status was by inquiry at the colonial office." Later on the learned Judge said. "The next point is this It is

his right to immunity, and may tre

agree, but how is that to be dor

clear Supposing, by way of illustration, that some well known potentate, such as one of the great European Emperors, were to be sued in a Court of this country, and took no kind of notice of the proceeding; *it would be the duty of*

in Council See also *Lachmi Narain* v *Protap*, 2 A 1 (17), *Bhocam* v *Bombay Baroda*, 9 B 244

While the Courts will take judicial notice of the existence of foreign governments, the rule must be taken with the qualification that it relates only to such governments as have been recognized by the Home Government The Courts will not anticipate the action of the government in this respect, and in case of a rebellion or a revolt in a foreign state, they will consider the former state of things as existing until the proper department of the government recognizes the change *City of Berne* v. *Bank*, 9 Ves 347, *Taylor* v *Barclay*, 2 Sim 213 Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government

S. 57. legible, Courts will not take judicial notice of it *Jaker Ali* v *Raj Chandra* 10 C L R 169 A registered power of attorney was admitted under this section without proof, the Registering
Brown, 11 C 176 But the abo

Court can take judicial not e
Radha Mohun v *Anjendra*
Nath, 105 Ind Cas 422

Clause VII Courts will judicially recognize the political constitution or frame of their own Government; its essential political agents and public office sharing in its regular administration; and its essential and regular political operations, powers and actions Thus, notice is taken, by all tribunals of the accession of the Chief Executive of the nation or state, under whose authority they act; his powers and privileges (*Elderton's Case*, 2 Ld Raym 980), a d
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. senator the appointment,
ell, 2 Rob (La) 160) In
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English doctrine does not extend to this length *Taylor* § 11 So also in

be taken of the signature of a Deputy Commsr of Police *Walchar* v *Em* 53 C 718=30 C W N. 713; see also *Tamor* v *Kahdas*, 4 B L R
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being alike members of the great family
d to recognize each other's existence and
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nationality and sovereignty are the national flag and seal Every sovereign therefore, recognizes, and, of course, the public tribunals and functionaries of
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upon a civil war in any country, one part of the nation shall separate itself from the other, and establish for itself an independent government, the newly

public feasts and festivals. *Taylor* § [illegible] facts in the case of the average man [illegible] the fact itself; he merely knows wh[illegible] the period of limitation for a suit expires on a gazetted holiday and the plaint is presented on the day the Court re-opens it is not necessary for the plaint explicitly to state that on the day on which the period of limitation expired the Court was closed *Tek Chand* v. *Mt Pilo*, 16 N. L. R. 193=76 Ind Cas 926 This clause empowers the Court to take judicial notice of any public holidays notified in the official gazette. *Ibid*

Geographical Divisions Courts, in [illegible] phical features of the country covered [illegible] the country as a whole, and of the entire [illegible] Courts take judicial notice of political subdivisions of the country as it was made by law, and of the state or territory where they hold their sessions, and of the judicial districts within it. Courts will take judicial notice of the local divisions of the state into counties cities and towns and of the facts that certain cities are in such subdivisions *State* v. *Pennington* 124 Mo 388, *Rogers* v *Cady* 104 Cal. 283 (Am) *Dobbs's Case* 4 B & Ald 243, *R* v *Fly*, 15 Q B D 827, *R* v. *St Maurice* 16 Q B D 908 The Court takes judicial notice of the existence, extent, and geographical position of the British dominions and of the territory of the foreign States. *Halsbury*, Vol 13, p 493 In *Cooke* v. *Wilson*, 1 C B N S 153, *Crowder J* at p 164, held that the Court was bound to take notice of the existence of the colony of Victoria and *Cresswell J* at p 163, that it must recognise that the colony was out of England In *Birrell* v *Dryer*, (1884) 9. App Cas 345 where the question was whether the words "St. Lawrence" in a p[illegible] confined to the r[illegible] that the Court sho[illegible] names applied t[illegible] [illegible]miralty

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cognizance of the fact that, assuming these tribes to be independent, they do not possess jurisdiction over certain territories. This is a matter which appears to me must necessarily be within the cognizance of Her Majesty, because, for the protection of her lieges in the ordinary way, she should know whether redress should be applied for to the Sultan of Morocco or to the head of the various independent tribes of Suss Sound policy appears to me to require [illegible]

[illegible]

at p 221 said "The judgment proceeded, not on the question whether the Court should give relief or not, or give discovery or not, and withhold relief, but upon the question whether the King's Court should attend to the case [illegible]
persons [illegible]
Govern[illegible]
sound [illegible]
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Case, 1821, 4 B & Al 1 243, *per Bayley J* and *Best J*) unless such situation is recognised by statute (*R* v *Holborn Union Guardian*, 6 E & B 715) nor of the particular diocese within which any town is situated *R* v *Simpson*, 2 Ld Raym 1379, *Halsbury* Vol 13 p 1 . judicial notice that a certain city referred to and the pleadings do not *Wheeler*, 162 Mass 429 (*Am*) In

state, without proof of the fact. v *Strong*, 42 Ill 148 But in an notice of the fact that *Ilchester* was in the county of *Somerset* *R* v *Burridge*, 3 P Wms 139 196, see also *Thorne* v *Jackson*, (1846) 3 C B 661, *Brunne* v *Thompson*, (1842) 2 Q B 754, *Humphreys* v *Budd* (1841) 9 Dowl 1000, *Church* v *Imp Gas Co*, 7 L J Q B 118 In England the Courts will take judicial notice of the different counties palatinate, and counties corporate in that country *R* v *S Maurice*, 16 Q B D 908, *Deybil s Case*, 4 B & A 248 That a particular colony or place in it, is not, in England need not be proved to an English Court *Cooke* v *Wilson* 26 L J C P 14 The Courts take judicial notice of the leading geographical features of the country, for example the existence and general location of im-porta
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and in *R* v *Isle of I* a divi-
sion of a county 2 B &
Ald 301 the Court place named Dublin in the world, and therefore refused to construe an allegation in the declaration that a bill was drawn in Dublin as meaning drawn in Dublin in Ireland *Ibid*, see also *Kearney* v *King*, 2 B E Ald 301 But a statement by the Attorney General on the Instructions of the Home Secretary as to whether a certain spot in the British channel was within the limits of H M's territorial sovereignty was held binding upon the Court (The *Farqurness* [1927] p 311, cf *Engelke* v *Mursman* [1928] A C 433) *Phip Ev 7th Ed* 22 Judges are aware, with the rest of the community, of the existence of the principal lines of railroad which are wholly or in part within the county The common knowledge includes locality, course and direction of such a railroad What places are on the line of a railroad, have stations in it, or constitute its termini, or railroad centres, through what other localities it must pass in order to connect two places, what is the distance between two points on a railroad, within what county these points ar and similar facts pertaining to judicially know But details, ... must be proved ...
Ev § 741

Clause X ' All Courts of Justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the Government whose laws they administer, or if its recognition or denial of the sovereignty of a foreign power as appearing from the public Acts of the legislature and executive although those Acts are not formally put in evidence nor in accord with the pleadings" *Jones* v *United States*, 137 U S 214 (*Am*) In England the Courts notice the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government and the local divisions of the country as arishes, and the like so far as the but not the relative positions of ndaries further than they may be he Foreign Jurisdiction Act, 1890 any question as to the existence or eign country, arising in proceedings in a Court in the British dominions or held under British authority, is to be submitted to the Secretary of State, whose decisions for the purpose of the proceedings is final 'If it be true said *Lord Selborne* in *Damodhar* v *Deoram*, 1 B 367 at p 404 (P C) " that the Indian Courts might take judicial notice of the territories of the Queen in India, then, if there has been a cession of terri-

tory, they must take n tice of that, and they must do so independently of the Gazette, which is no part of the case, but only evidence of it."

Clause XI The Courts take judicial notice of wars with foreign states if a state of war has been declared by the proper authorities. *Doller v. Lord Hanim* ..., 11 Ves. 292. It is submitted that the law is as stated in the text, although Lord ... said during argument: "You would be obliged upon an indictment for a libel to prove that France is now at war with Austria, not as to the war with this country, the Court taking judicial notice of that with reference to our own country." See also ... Vol II p. 433, *Rex v. De Berenger*, ... March 5, 1808), ... (1915) 3 K B 643 ..., *Re ...* (1916) 1 K B 268 ... § 18. But if no such declaration has been made the fact of a state of war is one to be proved. 1 Hale P. C. ... A war between foreign powers is not judicially noticed. ... When it is said, however, that the Courts take judicial notice of wars with foreign states, it must be interpreted that the Courts take judicial notice of the act of their own executive with reference to war with a foreign state. The executive recognition is the warrant for the Court ... 4 Wheat (U. S.) 246. It is the determination of a political question by another department of the government which is binding on the Judges. *Jones v. United States* 137 U. S. 214 (...), *Burr Jones* § 107 (a). As regards the commencement of hostilities see *The Teutonia Duncan v. Koster*, 8 Moo. P. C. (N. S.) 411 = L. R. 4 P. C. 171 = ... L. J. ... Under s. ... and ... of Act II of 1855 the Gazette of India or Calcutta Gazette containing official letters on the subject of hostilities between the British Crown and the ...

Representative v. Peninsular and Oriental Branch Service (1923) A. C. 191 = 92 L. J. K. B. 142 = 128 L. T. 546. The statement by H. M.'s Commissioner and Consul General for *Uganda* is sufficient for the Court's taking judicial notice, under s. 57 Evidence Act, of the existence of hostilities between *Kaberja*, the King Unyoro and Her Majesty the Queen and the protected states of Uganda. *Imperatrix v. Juma*, 22 B. 54.

Clause XII. According to English law under the general principle of recognising domestic officials, notice is taken of the incumbency of other officers ... to the extent to ... ficers, particularly ... *Fullerton's Case*, ... v. *Turner*, 6 Q. B. ... *Wigmore* "It ... ies and authorities to the incumbents, but whether the incumbent at a given time and place is a specific person depen... notorious, but sometim... principl...

...not *Wigmore* § 2576. But in ... rule is forced and all Courts must take judicial notice of the names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and ... process, and of all advocates, ... ersons authorized by law to ... Act II of 1855, the Court was ... *... Chackerbutty v. Sheo Narain*, 8 W. R. 276.

"law of the road,' was not to be considered as inflexible, since, in crowded streets situations and circumstances might frequently arise, where a deviation from what is called the law of the road, would not only be justifiable, but absolutely necessary Where the defendant was driving on the wrong side of the road, which was of considerable breadth, and the plaintiff's servant, who was on horseback, without any reason crossed over to the side on which the defendant was driving, and on endeavouring to pass, his horse was killed *Lord* [illegible] danger, and that the he plaintiff 685 And f the road, if he kept to v 719 As regards rules of road, *vide Leame* v *Bray*, 3 East 593, *Turley* v *Thomas* 8 C & P 104

The Court will take judicial notice of the following rules with respect to navigation,—first, that ships and steamboats, on meeting "end on or nearly end on, in such a manner as to involve risk of collusion' should port their [illegible]

In all cases and also on all matters of public history etc Notorious facts of foreign history will be noticed, whether ancient or contemporaneous The existence of a war in a foreign country, at a given time, will be regarded as a fact of common knowledge But special historical facts of comparatively slight general importance connected with a particular state and the consequen. regarded as commonly known D importance will be considered in determining what facts of foreign history minor Any Court of a nation will know as matters of common knowledge notorious facts in the nation's history Where these are a direct result of legal action the knowledge of the Court may also be judicial,—as in the case of [illegible] im jud im suc of ma state, what was the tenure of office of the succession, chief magistrates state, the date of a general or national election need not be established by evidence *Ibid* § 798 The general history of the great—national parties is a fact of common knowledge *Ibid* § 799 When in doubt as to any matter to be judicially noticed the Judge may refer for information to appropriate sources *Phip Ev 4th Ed* p 17 *Taylor Ev* 10th Ed § 21 The Judge may resort to such means of reference as may be at hand, and as he may deem worthy of confidence *Greenl Ev* § 295, *Tay Ev* § 21 The provision that the Court may resort for its aid to appropriate books' is an advance on the English Law under which though an expert called as a witness, will be allowed to refresh his memory by referring to a professional treatise regarded by him as of authority yet th [illegible] but see *Willo*

judicial cogniz of some matter for his Court's knowledge and notice must frequently [illegible] demand upon him, to which, without some means of reference—or refresh ing h [illegible] ight not be able to respond It does not neces sarily [illegible] when his me whethe resolve happen

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r ation concerning t atters wh ch I ave not been referred to in the evidence, in wh che it is l s duty to resort to any s urce of information which in its nature is calculated to be trustw rthy and helpful, always seeking first for that which is most ap ropriate; s m ti es too concerning matters of law, and in other case he r ay use all proper means for satisfying himself in any way that appears to him satisfactory *Tar J nes* § 152 In a New York case the opinion shows that the Court had referred to various documents and to Pollard s and Greely's histories of the Civil War *Scmmet n v Columbia Ins Co*, 37 N Y. 174 In the celebrated *Dred Scott* case *Chief Justice Taney* evidently had

. . . . ordinances and works of history, ... light upon the social and political . . . . s of the country *Dred Scott* v *Sanford* 19 How (U S) 393, *Tar J nes* § 152 *Dr Wharton* illustrates the principle thus: "The Judge may consult works on collateral science s or arts, touching the top c on trial. He may draw for instance, on mythology, in order to determine the meaning of similies in an amb guous writing He may refer to almanacs (*Page* v *Fau et*, Cro Eliz 227), h may appeal to his own memory for the meaning of a word in the vernacular (*Ince* v *Woodward* 1 Moo C C 323, *Cowen* v *Golling* 2 Camp 25 *M n ey* v *Cole* L R 7 Ex 70); he may, as to the meaning of t r s, refer to dictionaries of science of all classes (*Thomas* v *Golling*, 6 C & P 186, *Pris Case* 1 Leon 242, *Att Gen* v *Drummond* 1 C & L 210, *Snere* v *Hetten* 9 C l & F 55; *Bumer* v *Ulque* Skin 11; *In re St Catherine's Hosp l* 1 Vent 149 *Stainer* v *Droitwich* 1 Salk 281; *Cowen* v *Golling* 2 Camp 25 he may determine the meaning of the abbreviations of Christian names and others, and of other common terms, as to a point of . . . . he may consult . . . . 221, *Mighell* v . . . . 811), he may . . . . *Lloyd* 1 Man & E 685), and *Lord* . . . veyancer as to a rule of . . . R 772)" *Wharton* Ev . . . is called upon to decide as to what particular date in the English calendar a certain date in the Fasli year corresponds with, may resort for its aid to appropriate books or documents of reference, and in such a case an almanac containing the British and Fasli calendars may be referred to Oudh Judicial calendar was not compiled expressly for the purpose of showing corresponding dates in the different era, and was not an appropriate document of reference in such a case *Raghubar* v *Sheo Charan* 4 O C 182 In all those and the like cases where the memory of the Judge is at fault, he resorts to such documents or other means of reference as may be at hand, and may deem worthy of confidence

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. . . ces of war which were not produ . . . that they ought to have been produced Cited by *Buller J* in *R* v *Holt*, 5 T R 446 But in many other cases, the English Courts have themselves made the necessary inquiries, and that, too, without strictly confining their researches to the time of the trial *Taylor* § 21, *Taylor* v *Barclay* 2 Sim 221; *The Charkieh* 42 L J Adm 17 cited in *Lachmi Narain* v *Raja Partap* 2 A 17, *Chandler* v *Grieves*, 2 H Bl 606 na *Dee* v *Lloyd* 1 M & Gr 68, *Worseley* v *Filisler*, 2 2 Roll . . .
follow . . .
v *Bor* . . .
Lachn . . .
516 . . .
"from producing evidence, it . . .
make a request for it. Up . . .
said to declare the fact noticed, or at least to make the investigation which it

deems necessary No doubt, in most instances, the rule of law has the plain consequence of compelling the Judge to declare the dispensation, not to do so would be to err, precisely as under any other rule of law But it must not be supposed that this is universall
numerous topics, near the line
Court may but not must, tak
nized, erely authorised the Court to
notice 2568 As regards the meaning
of the and Ali v Zafar Ali, 46 Ind
Cas 114. In a suit for declaration that a church and its properties were trusts and the plaintiffs were its trustees and for possession of the same from defendants certain documents consisting of printed letters of the Priests of the
dated about 75 years ago were ad
of reference to prove the history of
Catholic Mission Held, that, though
the books were admissible to prove facts of public history, they could not be relied upon to prove where certain particular Missionaries were living or when they died The Court can dispense with evidence only of what may be regarded as notorious facts of public history Ambalam v J M Barthe (1912) M W N 152=13 Ind Cas 99 A document may be referred to in connection with ancient facts of a pulic nature provided it is an approved, public and general history It is provided by this section
literature science or art the Court may res
books of reference Tira Chainnamal v
the question whether a certain property
wakf property cannot be deemed to be a matter of public history within the meaning of this section, and historical works cannot be referred to for the purpose of deciding the question Sant Singh v Ralia Ram, 126 Ind Cas 741= A I R 1930 Lah 738 "It is to be observed that the section does not say how
any fact histori
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before the suit in which the usage of the institution and its history are described, both being matters relevant to the suit. Augustine v Medlycote 15 M 241 Evidence of the sources of common knowledge, if not its extent may perhaps be obtained by reference to a cyclopædia and the list of text books to be found but detailed information supplied from such sources requires usually to be supplied by experts. United States v St Albans, 131 Ind Cas 771=A I R 1931 P. C 189

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sections When the Court b
art, the opinion upon that point
art are relevant facts under s 45
the rule in regard to the admission of expert testimony is thus stated by Earle
'It is not sufficient to warrant the introduction of expert testimony that the witness may know more of the subject of inquiry and may better comprehend and appreciate it, than the jury, but to warrant its introduction, the subject of inquiry must be one relating to some trade, profession, science or art in which persons instructe
more skill and
generally to have
witnesses, and y
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reference to them, and draw inferences from them, as witnesses, then there is

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cations, will be judicially noticed, but they must be of such universal notoriety and so generally understood that they may be regarded as forming part of the common knowledge of every person *Burr Jones* § 123 So *Mr. Justice Markby* is not correct in his interpretation of this section when he says "What perhaps it meant is that, though the parties must obey the law as laid down in ss. 45 and 60, the Judge may resort for his own aid to appropriate books without restriction" This principle of the rule contained in this section . *The Corporation of Calcutta*, 22 C. W. N. 745, the Court by the prosecution in support of As regards the admissibility of these bo these books I see that one or mo Magistrate's Court. In my opinion did thereby to make these books and all their contents evidence in the case. The use of such books by the Court is regulated by sections 57 and 60 of the Evidence Act

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dence may be referred to *Hatim* v *Empress*, 12 C L R 86 A Court, *suo motu*, will know whatever every one, as a rule knows about the characteristic properties of material substances, in solid, liqu
Regarding solids, the Court will notic
familiar,—as that certain substances are
the movements of gases The Court w
dynamite are dangerous by reason of their liability to create an explosion So also no proof need be offered of the well known qualities of common forms of matter in a liquid state
specified conditions, to ex
conducted in pipes, and
should bring out the expl
knowledge *Chamberlayn*
established and notoriou
tribunal The conclusions of such inve
regarding matters of general interest, are c
tions of scientific knowledge, about which
opinion, must be proved, if their truth is to
layne's Ev § 720 The scientific pri

of soft coal in factories
mechanical occupations, these and similar facts, so far as popularly known, will be known by the Court upon ordinary principles *Chamberlayne's Ev* § 765.

7. Facts of Social life No proof need be offered of facts which are well known incidents of the social life of the community *"Quicquid agant homines"* said *Lord Mansfield*, "is the business of Courts, and as usages of society alter, the law must adapt itself to the various situations of mankind" *Barwell* v *Brooks*, 3 Dougl 371, 373 "It is the duty of Courts judicially to know what is the general course of the transactions of human life." *Duncan* v *Little*, 2 Bibb (Ky.) 424, 126; *Chamberlayne's Ev* § 705

Private Knowledge of the Judge In deciding a case a Judge cannot base his judgment on his own personal knowledge *Durga Prosad* v *Ram Doyal*, 38 C 153 There is a real but elusive line between the Judge's personal knowledge as a private man and his knowledge as a Judge The latter does not necessarily include the former, as a Judge indeed, he may have to ignore what he knows as a man, and contra wise *Wigmore* § 2569; *Chamberlayne's Ev* § 574 That rule was laid down so far back as the year 1406 In arguing a question as to the duty of the Court not to have rendered a certain judgment, counsel put this case "Sir let us put the case that one man kills another in your presence, ... guilty is indicted before you and is

report to the King, to give him

this case, before causing those to appear by whose hands the King was paid *Gascoigne C J* said Once the King himself asked of me the very case that you have put, and asked me what was the law, and I told him just as you say it, and he was well pleased that the law was so" Year Book, 7 H IV, 41, pl 5 cited in *Wigmore Cas Ev* 751, *Wigmore* § 2569, *Partridge* v *Strange*, Plowd 83; *Marriot* v *Pascal*, 1 Leon 159, 161 But *Mr Hawles*, Solicitor General arguing said, 'It is said, though a Judge do think in his conscience a person

at the
behavior ...
the truth of such incidents is contested between the parties, he should mention

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his private knowledge of such incidents to the parties and he should refuse to be the judge in that case unless both the parties, after he so mentions to them his said personal knowledge of that particular incident, state that they have no objection to his continuing as Judge." See also *Harjushal v. Sheo Dial*, 3 I. A. 259=26 W R. 55 P C. Similarly where a case is to be tried by jurors, "the personal knowledge of any juror concerning any probative fact involved in the case under consideration is not to be considered in deciding the case. Such a juror should communicate his information to the Court, and if he is not excused from service and it is deemed proper to his cognizance of such a fact in the trial, he must be sworn as a witness and examined, subject to … But any … experience … knowledge … good prove fatal. It is common knowledge, also, that a forest tree cut nearly in two at the butt will fall, if a high wind blows against it. If a witness should testify to the contrary to these ordinary phenomena, the common knowledge of the juror derived from his experience in such matters would naturally compel him to discredit that witness. Many illustrations might be given where men are normally and legitimately influenced in considering testimony by their general knowledge and experience. It is utterly impracticable in the administration of Courts of justice to secure a juror whose mind is totally blank as to questions involved in the ordinary transactions of life. Triers of fact cannot, in the nature of things be divested of general knowledge of practical affairs. The Court cannot do otherwise than to direct them to use such experiences as are common *to all men in the decision of questions of fact. It is part of the jury system* which cannot be dispensed with." *Per Burnett C J* in *Rostad v Portland* R L & P. Co, 101 Or. 569 (Am), *Wigmore* § 2570.

… dicial notice … no standard … *O'Donnell*, … Ald 303), … *Toot*, L R. 3 Q B 197); *Phip Ev 7th Ed* 25. So a Court will take judicial notice of matters of universal notoriety its general knowledge of daily life. But a Judge cannot use from the Bench under the guise of judicial knowledge that which he knows only as an individual observer. He cannot therefore import into a case his knowledge of the previous conduct of the accused. *Shamburam v Emperor*, 25 S L R 213=132 Ind Cas 176. It would be unfair to the Railway Company to take judicial notice of thefts on the … *Lal*, 111 Ind Cas 523=A I R … judicial notice of the fact that there is … between the arrival of a registered … from the Post Office or in other words that a registered letter takes 24 hours longer than an ordinary letter. *Firm of Chaterbhuj v Secretary of State*, 99 Ind Cas 622=A I R 1927 All 215. So also judicial notice can be taken of the course of post, the stamp of post-offices on letters, and the fact that post cards are un… them, and … *Huth v Hut*… repeatedly … *Sano v Pu*… community … be taken ju… 186=A I … 2 O W N … Courts are … *Bux* 93 Ind Cas 332=A I R 1926 Oudh 302. Courts must take judicial notice of provisions of s 24, Paper Currency Act, without defendant having raised the objection in his defence at all. *Mirza Hidayat v Nga Kyaing*, U B R (1914) 1st Qr 13=24 Ind Cas 721. A registered power of attorney was admitted under s 57 of the Evidence Act without proof as the registering officer is a Court under s 3 of the Act. *Kristo Nath v T F Brown*, 14 C. 176. In England

7. judicial
Denis v
Universit
8 E & B
domestic animals *Nye* v *Niblett*, (1918)
have also noticed judicially that boys a
Hardwick 32 T L. R 159 H L ; *Williams* v
Smith, 17 T L. R 235, 423 ; *Sullivan* v
Dublin Co, 39 Tr L T. R. 126); *Phip Ev 7th Ed.* p. 25.

Judicial notice of facts transpiring in Court A Court can take judicial notice of facts transpiring in Court. *Chattra Kumari* v. *Mohan Bikram*, 121 Ind. Cas. 337 = 1931 Pat 114

§ 2567. Since judicial notice is an expedient for hastening the trial and elimina

Books referred to by Courts. The following are some of the books which the Courts often resorted to in order to ascertain the matters of history, literature, science, art, etc.—

(1) Directions for Revenue Officers in the North Western Provinces, promulgated by the Lieutenant Governor and prepared probably by Mr. Thomason ... Rul 29

1 (17)
Forester
Ajmodin.

17 B 448
(7) Buchanan's Journey in Mysore, *Ibid* pp 56, 57
(8) Todd's Rajasthan, *Ibid* pp. 56, 57 ; *Moharana* v *Vadilal*, 20 B. 61 (72)
(9)
(10)
(11)
(12) *Ibid* 29 (82)
(13)
(14)
(15) *Framji Nanabhai*,
7 B H. 443 (444); *Ranga-*
sami v 2
(16) *ir*, 12 B H C. R
199 (207)

Roman Law. *Jotindra Mohun* v *Ganendro*

Dictionary *Hormasji* v. *Peddar*, 12 B H C R 199 (207).
(20) Domat, 2413 *Jatindra* v *Ganendra*, *supra*.
(21) Mr. Prinsep's Table *Forester* v. *Secretary of State*, 18 W. R 359 (364).
(22) Seaton's letter. *Ibid*.
(23) Histories, *firmans*, treatises, and even replies from Foreign office The *Charkieh*, L R 4 A. & E. 59; *Phip. Ev 4th Ed* p 17; cited in *Lachmi Narain* v *Rajah Partap*, 2 A. 1 (17)

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(24) The collection of treatises originally published by Mr Aitchison, the Secretary to the Government of India. *Lachmi Narain* v. *Rajah Partap*, 2 A. 1 (17)

(25) Aitchison's Treatises. *Lachmi Narain* v. *Raja Partap*, 2 A. 1(15).

(26) New Oxford Dictionary. *Dalabhai* v. *Jamsetji*, 24 B. 293.

(27) The work of Grotius, Vattel, Puffendrof, Chalmers, Wheaton, Phillimore and Twiss. *Damodar* v. *Deoram*, 1 B 367 (P. C); *Lachmi narain* v. *Raja Partap*, 2 A. 1 (23).

(28) Lord Palmerston's speech in the debate on the relinquishment by the British ... *r* v. *Gordhan*, 1 B 380.

... House of Lords on the

... p 387

... Munro. *Venkatanarasimha* v. *Dandamudi*, 20 M. 302

(32) Dewan Bahadur Srinivasa Ayyanger's "Progress in the Madras Presidency" *Ibid*.

(33) Richardson's Manuke. *Mathen Shwe* v *Maung Kan Gyi*, U. B R. (1897—1900) Vol. II, 112.

(34) Letter's Manual of Buddhist Law *Ibid*

(35) Kin Wun Mingyi's Digest. *Ibid*

(36) *Wagaru Dhammathat, Dr Forchhammer's*, *Ibid*

(37) Crokes on Caste and Tribes *Mariam Bibee* v. *Sheikh Mahmood*, 28 C. L. J. 306

(38) Risley's Tribes and Castes in Bengal *Santala* v *Badasuari*, 27 C. W. N 669

(39) Hunter's Imperial Gazetter of India *In the matter of the German Steamship Dranchenfels*, 27 C 860.

(40) Encyclopaedia Britannica. *Anna Kumaru* v *Muthupayal*, 27 M. 551=14 M. L. J. 248.

(41) District Gazetteer of Bengal. *Lalu Dome* v *Bijoy*, 13 C. 217=20 C. W. N. 401.

(42) Hunter's Statistical ... *Badasuari*, 27 C. W N. 669, *Secretary of S*...

(43) Mandsley's Respon... -*Empress* v *Kader Nath Sha*, 28 C 608

(44) Bucknill and Tuke's Psychological Medicine *Ibid*

(45) Simcox's Primitive Civilization *Rama Sami* v *Nagendra Narain*, 19 M 33.

(46) Notes on Buddhist Law by Jardine. *Ma Me* v *Ma Shwe*, 16 C W N 529 (P C)

... *Anna Kumaru Pillai* v *Muthupayal*, 27 M

... Pearl Fisheries and Marine Fauna of the

... Fisheries Ibid

(50) Rajendra Lal Mitter's Buddha Gaya *Jaipala Gir* v *Dharam Lal*, 23 C 60

(51) Martin's edition of Buchhanan Hamilton's Eastern India *Ibid*

... and Custom *Cheru Kuneth* v *Vengunat*,

... of Malabar *Agustine* v *Medlicot*, 15 M

... 19 M 31

(54) Dr Lyon's Medical Jurisprudence for India *Ikan Singh* v *Dhan kuar*, 24 A 445

(55) Medical Gazette *Ibid*

(56) Murphy's Obstet Rep. *Ibid*.

(57) Playfair's Midwifery. *Ibid*.

(58) Treaty with Nawab of Bhopal by the East India Company *Lachmi*

... *Damodar* v *Deoram*, 1 B 367 (P. C)

... *abhan* v *Bai Hiraabhai*, 7 C W. N. 71

... oms and ceremonies." *Ramasuami* v

S. 58.

(62) Shakespeare's Dictionary *Gajraj Puri* v *Achaibar Puri*, 16 A 191 (P C)

(63) Fergusson's History of Architecture *Secretary of State* v *Shunmugaraya* 16 M 698 P C = 20 I A 80

(64) Houghton's History of Christianity in India *Augustine* v *Medlicot*, 15 M 241

(65) Stephen's History of Criminal Law of England. *Queen Empress* v *Kedar Nasye*, 23 C 604 (608)

(66) Geographical, Statistical and Historical Account of Orissa by Stirling *Shyamanand* v *Rama Kanta*, 32 C 6, 13

(67) ' India Orientalis Christiana" *Augustine* v *Medlicot*, *supra*.

(68) Wilk's History of Mysore *Lakir* v *Trumala*, 1 M 213

(69) Ibbetson's Census Report *Ghulam* v *Secretary of State*, 6 Lah 269

(70) Wynyords Settlement Report *Byai* v *Bhupendra*, 17 A. 456 (P C).

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.

Facts admitted need not be proved

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admission.

Principle A Court, *in general* has to try the question on which the parties are at issue not on those on which they are agreed *Burjorji Cursetji* v *Muncharji*, 5 B 143 (152), *Mc Gowan* v *Smith* 26 L J Ch 8 An express waiver, made in Court or preparatory *to trial*, by the party or his attorney, conceding for the purpose of the trial the truth of some alleged fact has the effect of a confessory pleading, *in that the effect is thereafter to be taken for granted*; *so that the* one party need offer no evidence to prove it, and the other is not allowed to disprove *it*. This is what is commonly termed a solemn—*i. e*, ceremonial or formal—or judicial admission, or stipulation It is, in truth, a substitute for evidence, in that it does away with need for evidence *Wigmore* § 2588 It waives or dispenses with the production of evidence *by conceding for the purposes of litigation* that the proposition of fact alleged by the opponent is true. *Wigmore* § 1058 " Agreements of this character, intelligently and deliberately made,—whether made by the parties in person, or by their attorneys or solicitors of record,—are encouraged and favoured Their purpose generally is to save costs, and to expedite trials, by relieving from rules of practice which in the particular case are deemed mere hindrances, or the dispensation with mere formal proof, or, as in the present case, the admission of uncontroverted facts, of the existence of which the parties are fully cognizant " *Per Brickel J* in *Prestwood* v *Watson*, 111 Ala 604 *(Am.)*; *Wigmore* § 2588

Scope of the section No evidence is required of matters which are admitted for the purpose of the trial. Admissions for the purpose of dispensing with proof at the trial which are called judicial admissions must be distinguished from those tendered at evidence,—the former not being usually receivable in other proceedings and the latter not being usually conclusive *Phip Ev 7th Ed 18* This section includes judicial admissions including admissions made *in* the pleadings The effect which a judicial admission produces is of course an effect showed in common with certain other legal acts *In the first place*, a pleading may, by confessing a fact, place it beyond the range either of needing evidence or of permitting dispute, and an omission to plead in denial may have the same consequence The distinction between a pleading and a judicial admission seems to consist in the circumstances that the latter may be made after issues joined or trial begun, and may thus counteract or diminish the effect of a pleading, that it is not a part of the required statements defining the parties' issues; and that it is therefore not subject to the rules of time,

form, amendment, and the like, which govern the allegations of pleading. *Wigmore* § 2589 Under this section no fact need be proved which the parties at the hearing or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings Where a plaintiff admitted, in a written statement in a former suit and in
question, an agreement set up by the defendan
took for consideration not to redeem a moi
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in the face
Maung Kot
to civil as well as to criminal cases *Bhulan* v *Emperor*, 91 Ind Cas 233, *Bansilal* v *Emperor*, 30 Bom L R 646=52 Bom L R 686=A I R. 1928 Bom 641 This section has in general no application to divorce cases *Over* v *Over*, 27 Bom L R 251=A I R 1925 Bom 231=49 B 368 This section normally relates to agreed statements of facts made between both parties to save time and expense at a trial But
facts, and no pleading has been put in
admission has been made in his pleadin,
plaint to the contract in suit having n
practices of the office is no indication whatsoever to the defendants that the plaintiffs rely on one of the supposed terms of this "office dhara" in support of their claim, or that one of the supposed terms of this 'office dhara" is an implied stipulation

ful consideration, with regard not only of
, but with regard to the time at which they were
made, their use in the action of which they form the basis, their use *dehors* that action, the change
brief by the circumst
making them, includin
knowledge and those
allege matters of fac
evidence against such
272. The admission
relating to the progr

must be some other proof of authority to make the admission *Wagstaff* v. *Wilson*, 4 B & Ad 339

There is another class of judicial admissions, made by the payment of money into Court, upon a rule granted for that purpose. Here, it is obvious, the defendant conclusively admits that he owes the money thus tendered in payment (*Blackburn*
558); that it is due
Bendict, 5 Bing 28;
285, *Huntington* v
to claim it in the character in which he sues *Liscombe* v. *Holmes*, 2 Camp. 441); that the Court has jurisdiction in the matter (*Miller Williams*, 5 Esp. 19 21); that the contract described is rightly set forth, and was duly executed (*Gutteridge* v. *Smith*, 2 H Bl. 374, *Israel* v *Benjamin*, 3 Camph. 40); that it was broken in the manner and to the extent declared (*Dyer* v. *Ashton*, 1 B & C. 3), and if it was a case of goods sold by sample, that they agreed with the sample (*Leggeth* v
money into Court
obliged to prove in
Stapleton v. *Nowell*,
Walker, 9 Dowl 21,

58. onceded to be any further or contradict ... no evidence *Ibid* § 2591 A party or his agent may make admissions for the purpose ... by agreement or otherwise, before or at th ... admissions may be made by pleadings ... 226; *Burjor*. ... the client. ... to a decree ... 6 W. R. 132 ... by reference ...

admission of oral evidence contained in the 4th proviso to section 92 of the Evidence Act *Ibid*. But in the same case *Seshagiri Aiyar J* said: "The rule of law enunciated in *Slatterie* v. *Pooley*, 6 M. & W. 664, which accepted oral admissions of every kind as proving documents, has no doubt been departed from in India [see section 22 of the Evidence Act and sections 59 and 65(b)] ... are in the nature of ...

... proved.

Differ nt kinds of judicial admissions This section deals with admissions ... ion or made voluntarily, or pursuant to a notice ...

... counsels or of shorthand writers, are admissible to controvert the statemen... the Judge. *Reg.* v. *Pestonji*, 10 B. H. C. R. 75(81).

... facts admitted at the ... If it means before the ... ready applies to it. If ... then, in a civil case, no ... the

... a plea of not guilty, can ... "At the hearing", mea ... an one, the final hearing. Thus where A ... and B at the first hearing orally asserts payment in full, at the final hearing no evidence of title or tenancy need be given. *Whitley Stokes*, Vol. II, p. 889. When an

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that
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810 Where the defendant admits the signature of his father in the mortgage deed, the plaintiff is relieved under this section from any further responsibility of proving the document. *Lakhichand* v *Lalchand*, 42 B 352=20 Bom L R 354=15 Ind Cas 351, *Arjun Sahu* v *Kelai*, 2 Pat 317=71 Ind Cas 150 Where the fact of a prior partitio
parties, the same need not be proved .
is not registered will not make th
purpose *Maung Po Kin* v *Maung Shwe* 1 Rang 405=1924 Rang 155.

facts
be pro
need 1
before the hearing it is
as evidence, and for this pu
or not Admissions in w
under consideration when the Judge is considering what issues are to be tried
› be genuine, unless they are admitted
on given to the Court by the last
isions of the Civil Procedure Code,
at issues are to be tried before the
to allow a party to withdraw his
Markby Ev p 51 Each party
he
are
s §
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isel
has
been held to preclude any evidence on the point *Urquhart* v *Butterfield*, 37 Ch D 357, 369, 374 C A, *Ellis* v *Allen*, (1914) 1 Ch 904, *Phip Ev 7th Ed* 18
Admissions made ... action,
or by stipulations ... be withdrawn if not true, ... party in which to prepare his case, and provided such party has not been injured by relying on such admissions *Wallace* v *Mathews*, 39 Ga 617 (*Am*) Such admissions will not be allowed to be withdrawn, however if the situation of the parties has been substantially changed, as by the death of a party or of a witness *Wilson* v *Bank of Louisiana*, 55 Ga 98 (*Am*) If a party desires to withdraw admissions of the character under discussion, he should give full and timely notice of his purpose, so that the other party may have reasonable time to supply the proof *Hargraves* v *Redel*, 43 Ga 142, *Ellons* v *Larkins*, 5 Car & P. 385, *Burr Jones* § 274

Admission by pleading. "Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability" *Civil Pro Code, Order* 8, *rule* 5 That rule states what amounts to admission
defendant must deal
not admit the truth
if not denied in the written statement or stated to be not admitted, shall be taken to be admitted by the defendant (*Vide Mullas' Civil Pro Code, note under rule*

tion of his opponent, or he may state he does not admit the allegation But an allegation which is not specifically denied, or stated to be not admitted, is treated as admitted *Byrd* v *Nunn*, 5 Ch D 781 aff 7 Ch D 284, *Green* v. *Sevin*, (1879) 13 Ch D 589; *Collette* v *Goode*, 7 Ch D 842 A refusal to admit must be stated as specifically as a denial. *Thorp* v. *Holdsworth*, 3 Ch.

58 D 637, 640; *Hall* v *L & N W Ry Co*, 35 L T 849 Leave in a proper case may be given to a party to recall admissions which he has made. *Hollis* v *Burton*, (1892) 3 Ch 226 C A Where a document is by reference included in

In revision it was contended that the plaintiffs had not proved the notice *Held* that the defendants must be deemed to have admitted notice under order VIII, rule 6, C P Code, and proof was dispensed with under s 58 *Commissioners* fo

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make the suit triable only by th

however, made over the trial of tl

who had no jurisdiction to try it,

Neither party raised any objection on the ground of jurisdiction and no issue was raised relating to it The trial proceeded on merits and the subordinate Judge passed a decree for partition in favour of the plaintiffs The defendants in their appeal to the District Court raised for the first time the question of jurisdiction on the strength of the market values stated in the plaint The objection having been overruled, they appealed to the High Court. Held that as neither party raised any question as to want of jurisdiction arising from the allegation in the plaint, and as they by their conduct and silence treated the market value to be the amount sufficient to give jurisdiction to the Court, they dispensed with proof on the question by their tacit admissions, and thus the principle of law laid down in s 58, came into operation and prevented the result of the statement of the market value in the plaint *Jose Antonio* v *Francisco*, 12 Bom L R 712 Where the defendants in their written statements admitted that they had executed a deed of mortgage on account of an old

the production of the mortgage deed was unnecessary under the provisions of section 58 of the Evidence Act *Maung Khan* v *Maung Myat*, 11 Ind Cas 840 Plaintiff sued for redemption alleging that he had sold the land in suit out and out to the defendant for Rs 250 less than 12 years before suit but that at the time of sale a stipulation was made for repurchase by the plaintiff at any time on payment of the purchase money *Held* that as the plaintiff had admitted in the plaint the factum of an absolute sale in favour of the defendant it was

makes solemn admissions against his interest in a pleading, they should be treated as admitted facts, and he will not be heard to question the correctness statements

the pleading On this point the case of *Mc Gowan* v *Smith*, 26 L J C the other referred to, seem conclusive. A Court, in general, has to try the

qsestions on which the parties are at issue, not those on which they are agreed, **S.**
and admissions which have been deliberately
suit, whether in pleading or by agreement,
mission of any evidence contradicting them
that is by reference incorporated
Evidence, 457) The point is n
ments of the parties a plea or
does not directly put in issue

st object of
what is the
In App at
the cause
the plaint
or in the written statements tendered in the suit which here contain a full assertion and admission of the execution of the document A by the defendant *Muncherji* But the issues, as they stand, were suggested by the defendant's counsel They waive controversy as to the actual execution of the document, assume it to have been executed, and raise questions only that depend for their
plaintiff is not,
or to put it in evi-
for some purpose

on conside
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allowed to
But an ad
exists and
that fact subsequent to the date of the admission *Lawson's Presumptive Ev* *2nd Ed* 237, *McLeod* v *Wakeley*, 3 C *Lord* *Tenterden C J* said 'I do not think, can be extended to a publication after its goes down to its date, but not further"

Distinction between evidentiary admissions and admissions by pleadings. There is a distinction between evidentiary admissions and admissions by the pleadings This section governs admissions by pleadings *Sadhu* v *Naa Sigyi*, U B R
sing with proof
evidence, the forn

the fullest sense of the term, is another thing,

and involves a totally d
the necessity of offer
item in the mass of evi
with which this sectio
need of any evidence
course of judicial proce
evidence by conceding
alleged by the opponent is true *Wigmore* § 1058

s of husband or wife lose, as a
they are to be used in divorce
establishes a form of fraudulent
her contracts, the contract of
and argument of, the parties,
and in actions for dissolution of this contract, that is for divorce, admissions are closely scrutinized Although the husband and wife are the parties to the

8. consent of and in the manner pre cribed by the State It necessarily follows that no admissions by either party to the contract, however collusive upon such party, can be conclusive upon the State in a suit for the dissolution of the contract and that such dissolution cannot safely be deemed unless the admission be corroborated by strong proofs *Burr Jones* § 262 In *Williams* v *Williams*, 1 Hagg 299, *Lord Stowell* says that a confession is a species of evidence which though not inadmissible, is to be regarded with great distrust, while in *Mortimer* v *Mortimer*, 2 Hagg 310, the same learned Judge announces that a confession

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upport a charge
rris, 2 Hagg
ession perfectly
s and conduct

ranks among the highest species of evidence The suit for divorce has been called a triangular proceeding *sui generis*, in which the government occupies the

allow of an accused admittin

In India

there is nothing to prev
Criminal Procedure o
admissions on matters
seems to be no reason
his presence at the trial so as to dispense with the attendance of witnesses for the
Rat
case

by consent. *Per Patteson J* in *ibid*, contra, *Phips* 11. When the attorneys on both sides had agreed that the formal proofs in perjury should be dispensed with, and that part of the prosecutor's evidence admitted, *L Abinger C B* said. 'In a criminal case tried on the crown side of the assizes, I can not allow any admission to be made on the part of the defendant unless it is made at the
nhill, 8 C & P 575 (1838),
Queen v *Kazim Mundle*,
Cr 80; *Jeremiah* v *Vas*, 36
ia v *Queen Emperor* 26

difference Furthermore, I am not convinced that s 58 Evidence Act does not apply to justify the action of the Sessions Judge No doubt in England

an admission by an accused, which falls short of his pleading guilty, is not taken into account and is not binding against him But section 58 makes no exception in regard to criminal proceedings and while I do not say that it can be availed of to cure a clear contravention of any directions of the Criminal Procedure Code as to the course of a trial yet I think it can apply in a case like this, which relates only to proceedings of an appellate Court" *Bansilal* v *Emperor*, A I R 1928 Bom 241 (24?)=112 Ind Cas 1?0=52 B 686=30 Bom L R 646 But admissions made by a pleader appointed to help the accused in his defence are not binding on him to his prejudice *Per Mirza J* in *ibid* This above rule is especially applicable in murder cases *Sheo Narain* v *Emperor*, 21 Cr L J 777=58 Ind Cas 457 It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence would be a sentence of death *Hasaruddin* v *Emperor*, A I R 1928 Cal 775, see also *Emperor* v *Bhadu*, 19 A 119, *Laxmaya* v *Emperor*, 19 Bom L R 356, *Emperor* v *China* 8 Bom L R 240 The rule is the same in America *Vide State* v *Max* 78 Conn 18, where *Hamersley J said* "It is true that in the trial of capital offences the Court will and should exercise care and discretion in respect to admissions made by the accused or by his Counsel in open Court, and so even a plea of guilty will not ordinarily be accepted" *Wigmore* § 259?.

Proviso This proviso corresponds to proviso to rule 5 of Order VIII of the Civil Procedure Code Both under section 58 of the Evidence Act and under Order VIII, rule 5 of the Code of Civil Procedure the trial Court has a discretion to require proof of the due attestation of
withstanding an admission by the defendant
bond had been duly executed *Munappa* v
L W 5=25 M L T 19=19 Ind Cas 278
as the proviso to rule 5 of Order VIII of the Civil Procedure indicates the
ht not to be construed
Order 19 of the English
rder VIII of the Civil
Procedure Code does not contain the proviso There the rule of pleading is very stringent According to that rule a defendant who omits to traverse in his defence any allegation of fact in the statement of claim is not allowed to traverse

supported by s 58, proviso of the Evidence Act. *Bhagwan Das* v. *Sheoraj*, A. I R 1931 Oudh 321=14 O L J 462

59. namely, the case in judgment, without injury to the general administration of justice *Gresley on Evid in Equity* pp 349, 358, *Greenl Ev* § 206, *Chamberlayne s Ev* § 1210

Future of the Doctrine of Judicial Admissions "The doctrine of Judicial Admissions" says *Prof Wigmore* "has a large future before it, if Judges will but use it adequately In the first place the Judge should apply it to all informal as well as formal admissions by counsel during trial. In the next place the Judge should freely call upon counsel to state whether a fact is in good faith disputed, i e should require admissions to be made, where it seems probable that the fact is not actually disputed By this method, the presentation of evidence will be confined to the
dispute It is easy to see how large a m
be eliminated how much time would
jury would be avoided And this would
an existing principle Already in Eng
scale in the modern practice of settling issues before masters But it can also be used by the Judge at the trial *Wigmore* § 2597

Formal Judicial Admissions, conclusive The formal judicial admission

party, even in an appellate Court or even on a subsequent trial of the same case, unless formal judicial admission shall have been made for a temporary purpose *Chamberlayne's Ev* § 1264

CHAPTER IV.

OF ORAL EVIDENCE

Proof of facts by oral evidence

59. All facts, except the contents of documents, may be proved by oral evidence

Oral evidence Oral evidence is evidence which is confined to words spoken by the mouth *Per Petheram C J* in *Queen-Empress* v *Abdulla*, 7 A 385 (397) F B It includes all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry *Vide* s 3 It is what the English lawyers call "testimonial evidence" Testimony is a species of evidence by means of witnesses The broader term 'evidence' includes that which is given by witnesses or offered by documents *Vide* s 3 In *People* v *Kenyon*, 5 Park Cr (N Y) 254, 288, *Mr Justice Campbell* said 'It may be well to bear in mind that there is marked difference between testimony and evidence The latter is much more comprehensive than the former—
evidence bei
whether by t

produced to a jury from the finding of any issue joined between parties.

S.

"Testimony in legal as well as in common usage, signifies a statement of facts by witnesses, and to disprove the testimony of a witness is to disprove the "facts testified to by him" *Burr Jones* § 11

Wordings of the section This section is not very happily worded. Contents of documents may be proved by oral evidence under certain circumstances that is to say, when such evidence of their contents is admissible as secondary evidence *See section 63 cl 5, section 32, cl 8, Nort Ev* 239

Contents of a document cannot be proved by oral evidence It is a cardinal rule of evidence—not one of technicality, but of substance, that, where written documents exist, they shall be produced as being the best evidence of their own contents *Pmomoye v Roy Luchmeput* 6 C L R 101=7 I A 8 This section is based on the "best eviden . . . *enleaf* "A fourth rule, which gover . . . which requires the best evidence of . . . This rule does not demand the greatest amount of evidence, which can possibly be given of any fact but its design is to prevent the introduction of any, which, from the nature of the case supposes that better evidence is in the possession of the party It is adopted for the prevention of fraud; for when it is apparent, that the better evidence is withheld it is fair to presume, that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated The rule thus becomes essential to the pure administration of justice In requiring the production of the best evidence applicable to each particular fact it is meant, that no evidence shall be received, which is merely substitutionary in its nature so long as the original evidence, can be had The rule excludes only that evidence which itself indicates the existence of moral original sources of information But where there is no substitution of evidence, but only a selection of the weaker, instead of stronger proofs, or an omission to supply all the proofs capable of . . . Thus a title by deed must be . . . is within the power of the party, . . . is susceptible, and its non prod . . . tained some matter of apparent de . . . of the deed itself may be prov . . . though the other also is at hand And even the previous examination of a deceased subscribing witness, if admissible on other grounds, may supersede the necessity of calling the survivor. So in proof or disproof of handwriting, it is not necessary to call the supposed writer himself And, even where it is necessary to prove negatively, that an act was done without . . . eneral necessary to call . . . *Ev* § 82 In the case of . . . held it very dangerous . . . s proved by the testimony of witnesses, the con . . . he Court . . . Similarly in *Vincent* . . . "I have always (perhaps more . . . rule that what is in writing sl . . . My experience has . . . n of witnesses, how- . . . : they may be so easily . . . strict enforcement of . . . C B 942, *Sheridan's* . . . *st Imam* v *Hargobind,* . . . W R 2 (P C)=2 . . . 1 M I. A 19 (42, 43);

. . . Oral evidence may suffice to pro . . . W R 155; *Shee Sahayee* v *Go* . . . 79 Oral evidence, if . . . cription. *Meharban* v. . . . without documentary . . . v *Alima*, 8 W R 366. . . . ased relatives will be admitted in the absence of any registers of births and deaths *Moheedeen* v. *Mahomed,* 1 Ind Jur O S 132=1 M H C R. 92. It is not valid reason to

9. disbelieve the evidence of a witne

. Rajendur Kishore, 9 W R 125, but see Goluck Chandra v Raja Sreemud Buddhadhar, W R (1864) 136 Oral evidence greement; and, if sufficient, will justify . Nund Mohun, 12 W. R 391 A Judge value, without a pattah and kobuliyat to prove the quantu misdirects himself in Dinoo Singh v Doorg sible to prove an adj Ram, 1 M H of document may adduce oral n v Gueadhur, 20 W R 181 d in ruling that, in the absen is not sufficient to

rabji, 1 B H C writing is admissible

Oral evidence, conflicting and whic decisive conclusion, in the case, and w both sides about the truth of which there can be no doubt. This alone can be the true method of arriving at a correct conclusion Abdul Halim v Rajah Sadat Ali, 108 Ind Cas 817=A I R. 1928 Oudh 155 Statements made by a witness at the trial should be altogether rejected when it is in hopeless conflict with his previous statements P L R. 659=A I R 1925 uncorroborated statement of a 12 years ago and which wa

credit This precaution is nowhere more necessary than in this country It is true that there is no precaution of perjury against oral testimony, but it has, I believe been sufficiently confirmed by a long course of experience that anything can be more dangerous than to act upon such testimony, without testing its

credibility both intrinsically and extrinsically '. Where there is contradiction of **S.**
, in order to see
I. A. 103 (107);

of the Judicial
facts tending

stan-iction to which they depose, or weakened by the mode in which their
speak, it may on,
to an extrem it
is oral, and un clearly
found to exist. It would be very dangerous to exercise the judicial function,
as if no credit could necessarily be given to witnesses, deposing viva voce
how necessary however it may be always to sift such evidence with great
minuteness and care This case was cited with approval in the case of *Emperor* v *Balgangadhar Tilak*, 6 Bom L R 324 (330)=28 B 479, see also *Wise* v. *Sandulooniss*, 11 M I A 187 (183); *Queen* v *Elahi Bux*, B L R (F B) 482. *Sittaji* v *Chinna*, 10 M I A. 162, *Edu* v. *Behan* 11 W R 345 'But
it would be indeed, most dangerous to say that where the probabilities are in
favour of the transaction, we conclude against it, solely because of the general
fallibility of native evidence. Such an argument would go to an extent which
can never be maintained in this or any other Court, for it tends to establish
a rule that all oral evidence must be discarded; and it is most manifest that
however fallible such evidence may be, however carefully to be watched justice

evidence sub-
st be given to
not be rejected
puted without
v *Kalanthai*,
Nachear, 14 M I A 354, 355 Such rejection if sanctioned, would virtually

Bunwari v *Hitnaram* 4 W R 128 (P C) In the words of *Baron Parke* in *Mir Assabullah* v *Bibi Imaman*, 1 M I A 19=5 W R P C 26, 'there is no
flicting
r, than
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870=A I R 1927 Sind 20
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of
wou consideration that which he
ought to have entered into it
consideration, where the evidence
but a case should not be decided u
which the parties have submitte

9. W. R 438 Evidence of witnesses though not independent, but not shaken in cross-examination and accepted by the Judge who heard them and saw their
told by
. 91 (P. C)

test for
estimony
to the same transaction, and concur in their statement of a series of particular circumstances, and the order in which they occurred, such coincidence exclude all apprehension of mere chance and accident, and can be accounted for only by one or other of two suppositions, either the testimony is true, or the coincidences are the result of concert and conspiracy If, therefore, the independence of the

limited,
will be c

witnesses or
Starkie on E

cited in *Nort* 53.

Test of probability—Sir James F
That
probab lity is the guide of life is an obvio

it is probable to whatever
extent it generally resembles the common course of human conduct and of physical nature, that it is improbable
deviation therefrom, and that it is impossil
upon which all language and thought
could be in two places at once and that tw
four; that it is nonesense unless it can be in some way represented to the mind

of this disease or that, and yet to treat with contempt the notion that no one

of witchcraft, and to reject all evidence tendered to prove it? Probably no more difficult question can be asked, and I doubt whether there is any which, if fully solved, would be of great practical importance." *Stephen's General View of Criminal Law of England* pp. 192, 193

Other tests of Probability "Evidence to be believed" said *Vice-Chancellor Van Fleet of New Jersey*, "must not only proceed from the mouth of a credible witness, but it must be credible in itself—such as the common experience and observation of mankind can approve as probable under the circumstances. We have no test of the truth of human [illegible]
knowledge, observation and experience. [illegible]
to the miraculous, and is outside judicial [illegible]
37 N J Eq 130, 132 But *improb* [illegible]
impossibilities. "A case how unlikely and suspicious so ever, in itself, may be irresistibly proved by the force of testimony," said *Sir John Nichol*, "Evidence may be such as to substantiate a transaction, however improbable; for it may be such that the falsehood of the evidence would be still more improbable than the fact which it seeks to establish" *Saph v Atkinson*, 1 Add Eccl 162, 182. In another case the same learned Judge said "It seems hardly possible, on the mere improbability of a statement, to discredit the evidence of a witness of good

59. 213; *Maharajah Rajender* v *Sheopursun*, 10 M. I A. 438 So the doctrine *"falsus in uno falsus in omnibus"* in this country affords a test of little or no value, ...
a story
at p 29

... if the evidence adduced on both ... the matters in issue The parties using such evidence may have brought himself within the penalties of the criminal law, but the Court should no ...

... by that party, or at least against such portion of that evidence as tends to the same ... It may perhaps also have the further ... ission for the evidence of his opponents ... pressed too far, especially in this country where it happens, not uncommonly, that falsehood and fabrication are employed to support a just cause *Goribulla Kazee* v *Goorodas Roy*, 2 W. R (Act X) 99, see also *Ramesuar* v *Bharat*, 4 C W N 18 P C, *Casperz* v *Kedarnath*, 5 C W N 858 (861)

Uncontradicted testimony. I ...
"he who tells nothing exceeding the
that they should believe him who ...
Johnson "If witnesses come unimpeached in point of general integrity," said *Lord Stowell*, "if any depose with character of fairness in their particular narrations the facts must be received, or *there is an end of all judicial inquiry* Human prudence has done its utmost, has done all that it is capable of doing, in giving every ...
1 Hag Cons 269,
judicial proceedin ...

... have no safeguard, and the ... dress of wrongs, if the unim- ... can be overthrown without ... *City R Co* 50 Misc (N Y) 535. So "if the tribunal is permitted to discredit or disregard such testimony ...

... performed, if it would obtain your ... ve no right arbitrarily, and without ... *Harbison*, 13 Int Rev 118.

Disinterested witness "A witness of depraved and abandoned character ...

rule that when a disinterested , testifies to
in conflict
be taken as
not be disregarded by Court or jury." *Kavanogh* v. *Wilson*, 70 N Y. 177, 179 (Am)

testi-
Starkie
part or

of view of the same thing,
a single incident, Courts expect
minutiæ of their testimonies,
basis for discrediting their united testimony to
rather to enhance the credit of the witnesses
Harenand v *Ramgopal*, 27 C 639 (P C) = 4 C W
"No two witnesses" said Mr *Justice Van Buren*
in *In re Lylly* 5 N Y Supp 636
nating in the execution of a p
agreed in their description of t
agreement is all that is required *Nana Narain* v *Huree Pantee*, Marshall 436
(P C) It is to be expected that what was
will be differently stated by different
conversation hear or remember all that wa
impressions from what they heard, and
of dates or of th
Moore on Fact
to testify is s
contrariety of
v *Maule*, 4 Hag
The Louther C
is taken *de recenti facto* may very well speak with greater certainty and specifica-
tion as to the facts than other witnesses who testify at a much later time *The*

untruthful nature of the
presumption in England
here the presumption is,
observations of the Privy
Indian Courts in *Ramar*
But however true this may
are more untrustworthy
the fact is to be lamented,
score of this difficulty" *Nort Ev* p 55. Differences are commonly reconciled

without resorting to strained and unnatural inferences in aid of either party.

60. *Moore on Facts* § 839 In a *New Jersey Divorce Case, Chief Justice Beasley* said "To those who know from experience and reflection the laws which regulate the human memory, it does not seem singular that several persons, in speaking of a past transaction, do not each reproduce it in description with the same fulness of detail; but such is not the vulgar notion. Among the ignorant the strongest proof of the truth of testimony derived from several witnesses is the fact that the statement of each is merely identical with that of others Hence, the exact similarity which we often see in the deposition of corrupt witnesses, whose evidence has been prearranged But in the testimony of these two persons now before me, there are none of the usual marks of collusion No two narrations ... unlike It certainly has every ... currence, observed from different ... 324 (335) (Am); see also Nana v

... *Court of New Burns* ... pre-concert between ... proves nothing of the ... as manufactured, it ... witness should vary the account in order to avoid suspicion" *Corny* v *Caraquet, R Co*, 29 N Burns 425, 436

Sometimes, however, discrepancies are so startling as to make it impossible ... more ... be detected upon some broad collateral fact, than upon the transaction itself *Brydges* v. *King*, 1 Hag Ecc 256

Oral evidence must be direct.

60. Oral evidence must, in all cases whatever, be direct; that is to say—

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence of S. condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Principle The first degree of moral evidence, and that which is most satisfactory to the mind, is afforded by our own senses; this being the direct evidence of the highest nature Where this cannot be had, as is generally the case in the proof of facts by oral testimony, the law requires the next best evidence; namely, the testimony of those who can speak from their own personal knowledge It is not requisite that the witness should have personal knowledge of the main fact in controversy, for this may not be provable by direct testimony, but only by inference from other facts shown to exist But it is requisite that, whatever facts the witness may speak to, he should be confined to those lying in his own knowledge, whether they be things said or done, and should not testify from information given by others, however worthy of credit they may be For it is found indispensable, as a test of truth and to the proper administration of justice, that every living witness should, if possible, be subjected to the ordeal of cross examination, that it may appear what were his

known, cannot be subjected to this test, nor is it often possible to ascertain through whom, or how many persons the narrative has been transmitted from original witness of the fact *Greenl Ev* § 98 "The administration of an oath furnishes some guarantee for the sincerity of the opinion, and the power of

value

F 689.

not a

party to the suit is not admissible; because such person was not under oath and the opposite party had no opportunity to cross examine" *Swift C J.* in *Chapman* v *Chapman,* 2 Conn 348 *Gresham Hotel Co* v *Manning,* Ir. R. 1 C L 125, *Vide* notes under § 32 pp 464—467 supra.

of any one of ust
have received wise
received some ent
may be given a
recollection of called
Recollection, or Memory *Thirdly,* he must communicate this recollection to the tribunal; that is, there must be communication, or Narration, or Relation (for there is no single term entirely appropriate) Now the very notion of taking a human utterance as the basis of belief in the truth of the fact asserted impliedly attributes these three processes to the witness, Perception, Recollection, Narration Whatever principles, therefore, affect the inference from testimonial assertions must have reference to some one or more of these elements

Moreover, in the function fulfilled by each of three elements or processes are to be found in
its probative value
has in some way o
reproduced to us in C
perception, or whatever it be called) should adequately represent, or correspond to the fact itself as it objectively existed or exists The strength of the inference depends on the probability of a fairly accurate perception on the part of the witness Again, the function of Recollection is to retain or recall impressions of observation; and the necessary condition of our trust is that Recollection fairly corresponds with or reproduces the original knowledge or Perception Finally, the function of Narration (or, communication) is to reproduce and express, for the apprehension of the tribunal the Recollected results—themselves already retained from Perception Thus, the common aim in the varied

60 problems under this head is to determine whether the story as told represents with fair accuracy the object which the witness once observed and now recollects —*Wigmore's Principle of Judicial Proof* § 147.

Generic Human Traits affecting Testimony But the individual witness' testimony is affected, not merely by the conditions inherent in these three elements of testimony, but also by certain general traits, common to humanity, on which experience has enabled us to generalize These generalizations affect traits common to large groups of individuals, or to a large classes of situations in which any individual may at times find himself. Hence the conditions ... be studied under two ... Testimonial Capacity ... The principle generic ... ice; (2) Age, (3) Sex; ... erament, (7) Emotion ... *ciples of Judicial Proof* § 148

Race "In respect to the three elements of testimony, *Perception*, ... observation have thus ...

... in many sense perceptions than literate peoples having a more compl... of life ...

"(2) *Recollection* An occasional ... particular race or people is all that ha... the truism that primitive peoples, defe... develop an extra ordinary mnemonic ... sagas, laws, and revelations by the early Greeks, Hebrews, ... and others

"(3) *Narration* (A) As to relative racial differences in the capacity of expression in words, little or no occasion arises for examining this subject in judicial proceedings (B) As to veracity of aliens in general, and of particular races, considerable knowledge has been made available for us (a) The alien in general, by r... ...round... ings, his racial sentiments, and ... tation both to save himself by ... falsifying in their favour But ... (b) ...

... *Basheroonissa*, ... *...peror* v. *Balgangadhar*, 28 B. ... *...en* v *Elahi Bux*, B L R (F B) 482, *Sitiaji* v *Chinna*, 10 M I A 162, *Edu* v. *Behan*, 11 W R 345 But ... the enquiry and ... knowledge of ... luction of his ... *...ma*, 4 M. I A ...

Evidence ...

... he may safe... box During ... fruit, and one of its best fruits has been an increasing regard ...

them as the same classes in
...rct their existence among their
h El pp XXXI, XXXII.
"Few people, I think, realize

are the
others
Wigmo
that an
a particular race of people, is likely to be, in the first place, absolutely incorrect as not founded on facts, in the second place, relatively unjust, as assuming a superiority of honesty which can only be hypothetical; and in the third place, unwise, as tending merely to perpetuate ill feeling and misunderstanding." *Wigmore's Principle of Judicial Proof* § 155

testimony,
We possess
become less
keen, and that for recollection the recollection of earlier events becomes more active and that of recent events less active (2) Youthful age, it would seem, is
others In recollec-
...n that children below
imagination, partly
cause of untrained

of Judicial Proof § 156 Certain broad rules

fined situation I
such cases,
f age Love and
hatred, ambition and hypocrisy considerations of religion and rank, of social position and fortune, are as yet unknown to them, it is impossible that preconceived opinions, nervous irritation, or long experience, should lead them to form erroneous impressions, the mind of the child is but a miror that reflects accurately and clearly what is found before it These are great advantages accompanied by certain corresponding draw backs The greatest is that we can-
, it uses indeed the same
ent ideas Further the
...ple The conception of
...uty and ugliness, of dis-
from in ours, still more
so when facts are in question There is yet another difficulty, the horizon of the child being much narrower than ours, a large number of our perceptions are outside the frame within which alone the child can perceive We are as a rule, too distrustful of the capacity of a child We have rarely found too

60 problems under this head is to determine whether the story as told represents with fair accuracy the object which the witness once observed and now recollects — *Wigmore's Principle of Judicial Proof* § 147.

Generic .. testimony is

separate heads (1) Generic Human in General, (2) The Testimonial Eleme traits can be taken up under the follov (4) Mental Derangement, (5) Moral cl (Bias); (8) Experience (acquired skill § 148.

of life

"(2) *Recollection* An occasional study of the memory-capacity of a particular race or people is all that has been thus far vouchsafed to us, except the truism that primitive peoples, defending largely upon unaided memory, develop an extra ordinary mnemonic capacity,—as in the oral transmission of sagas, laws, and revelations by the early Greeks, Hebrews, Scandanavians, and others

"(3) *Narration* (A) As to relative racial differences in the capacity of expression in words, little or no occasion arises for examining this subject in judicial proceedings (B) As to veracity of aliens in general, and of particular races, considerable knowledge has been made available for us (a) The alien in general, by reason of his strangeness to the surroundings, his racial sentiments, and his special dilemmas, has often a temptation both to save himself by falsifying and to save his fellow racials by falsifying in their favour. But this

v *Elahi Bux* B L R ... *Behan*, 11 W. R 345 But ... any scientific enquiry and ... are and whose knowledge of ... his

Indian ch
Evidence
106, as reg
sufficient
predicate o,
on the ot
he may sa
box Dur
fruit, and one of its best fruits has been an increasing regard for truth

on mere differences of error which is relatively untruthfulness But this All of us know persons probative to us. But we, as knowers of this, must ourselves come before the Court as ordinary witnesses, and how can the tribunal ever be made to believe us and to appreciate the fact as keenly as we do? Moreover, taking as a proved fact this specific trait of veracity or unveracity, is it not the crude abstraction of the layman? Are there not varieties of veracity or unveracity? Can those varieties be discriminated and defined? Can they perhaps be identified in particular persons? If modern psychoanalysis can furnish such data, they will be useful in valuing testimony. *Wigmore's Principles of Judicial Proof* § 159

Temperament But the elements of Recollection and Narration may be affected by other fixed traits than merely that of mendacity or its opposite vera-

also is concerned in tracing the variety of temperaments and their influence in impeding correct narration *Wigmore's Principle of Judicial Proof* § 160

three testimonial elements—Perse some aberration from correct- meant, not merely strong feeling, perception and conscious reasoning *Wigmore's Principles of Judicial Proof.* § 161. The physical basis for this effect of emotion or testimony is explained in the following passage "The effect of *desire on bel* we are to come to a con

towards this end on' As to the way count 'This influence of Desire on Belief often operates by simply diverting the attention from counter evidence The mind is so absolutely preoccupied by certain tendencies, that whatever at all, or, if it does, is imme resistance offered by a me dissolve it But the more often they (*i e*, such beliefs) are acted upon, the more completely they become incorporated with the original conation so as to become an integral part of it, hence the support they receive from it is increased' With l influences Belief that is to say, is by giving pret ideational train sely long for, or especially dread, and by determining the order of ideation to follow, not that of experience, but that which answers to and tends to sustain and prolong the feeling, that its force serves to warp belief, causing it to deviate from the intellectual or reasonable type' Feeling, then, acts in part by warping the intellectual element in Belief

"Emotion is a great source of illusion, because it disturbs intellectual operations It gives a preternatural vividness and persistence to the ideas answering to it, *i e* the ideas which are its excitants or which are otherwise associated with it; hence when the mind is under the temporary sway of any feelings as, *e g*, fear, there will be a readiness to interpret objects by help of images r the control of fear will be apt to ever there is any resemblance to " *Arnold's Psychology Applied*

60. What (2)

Emotion are in general the same as described already in dealing with evidence of human traits generally viz, external circumstances pointing to the simulation of an emotion, conduct or words revealing it interior existence, and a prior or subsequent existence of the emotion The *external circumstances* are of a great variety—interest in the cause as a party or beneficiary, relationship to a party, occupation, such as banker But no had any rds of the too, no known recepts emotion on a particular witness' testimony (whether in perception recollection or narration) remains also as a problem for the future But under both these heads the books abound with recorded observations of the marked effect of emotion on testimony, and of the various data from which that emotion has been inferred' *Wigmore's Principles of Judicial Proof* § 161

Experience By experience is here meant that succession of mental processes which result in expertness It signifies the frequent repetition of sensations, perceptions, and recognitions of a particular subject so that by concentration the capacity to recognize grows in completeness and accuracy The growth of this experience may take place casually, through one's habit of life, or by deliberate purpose to acquire skill, as in devotion to an occupation, or still further by systematic education in an organised body of knowledge, as with a scientist or an artist Now the influence of experience on capacity to make correct testimonial assertions is double and opposite *It* may increase the range and accuracy of his perception and narration and it may decrease them *Wigmore's Principles of Judicial Proof* § 162

(1) It may and usually does, increase them because it enables them *to* perceive details and relations of fact not cognizable without such experience There is literally no limit to the possibilities of enlarging and precisioning the data of judicial proof

topics, to develop a bias or fixed idea affecting the perception on certain topics and to induce in narration an obstinate adherence to conclusions already reached on the particular facts This tendency of course varies with *the* individual and the topic but it is always a latent possibility *Wigmore's Principles* of *Judicial Proof* § 162

Perception—General Th ception i e, the direct exercis must purport to have existed life and in historical inquiri M because Y told him or a book Z asserted *fact*

M But in suc assertion by Y or by Z Ir assertion of Y of inference separate the two assertions, i e that of X (testifying to the assertion by Y or by Z, and that of Y or Z (testif ... Hence the element of sense perception by X is ass as entering into all testimony basis of judicial action If in a book the assertion by Y th ...

make the assertion, and our further examination is required for Y's assertion
M Y's assertion is hearsay (in both the
ut we give testimonial consideration to it
is X's —*Wigmore's Principles of Judicial Proof* § 163

Senses – General considerations "The sensation brought to the brain by means of the optic nerve becomes the condition of the representation in consciousness of certain objects distributed in space We make use of the sensation which the light stimulates in the mechanism of the optic nerve to construct representations concerning the existence, form and condition of

of the individual The narrowest, smallest, most particular issuing glance is that of the most foolish; and the broadest, most comprehensive and comparing glance, that of the most wise This is particularly noticeable when the time of observation is short

visual sensations are the most numerous and the most important Anybody who has been pushed or beaten, and has felt the blows, will if other circumstances permit and the impulse be strong enough, be convinced that he has seen his assaulter and the manner of the assault Sometimes people who are shot at will claim to have seen the flight of the ball It is fortunate that, as a rule such people try to be just in answering to questions which concern this substitution of one sense perception for another.

"Still more s
derable importance,
It consists in the
noticeable interruption, when the stimulus does not, as a rule, give rise to that perception . In a case in Court, there was a shooting in some house and an old peasant woman, who was busy sewing in the room, asserted that she had just before the
have come
the person i
preceding ones But I am convinced that the witness told the truth The steps of the new arrival were perceived subconsciously, the further disturbance of the perception hindered her occupation and finally, when she was frightened by the shot, *the upper levels of conscions were illuminated* and the noises which had already reached the subconsciousness passed over the threshold and were consciously perceived

Criminal Psychology, 1911 § 35 p 187

Mistakes of senses, Illusions "As sensation is the basis of knowledge, the sensory process must be the basis of the correctness of legal procedure. The

they heard, no harm would be done, but they tell us only what they suppose to be the meaning, and hence we get a good many mistakes. It does seem as if [illegible] are able to shut their ears to all things [illegible] ly sensory perception is organized according [illegible]

"The determination of auditory power is, however, insufficient, for this power varies with the degree any individual can distinguish a single definite tone among many, hear it alone, and retain it. And this varies not only with the individual but also with the time the place, the voice, etc. It is repeatedly asserted, e g by [illegible] ple do not hear high tones [illegible] hearing of such people is not [illegible] distinguish them with difficu [illegible]

[illegible] These data, which are for us q [illegible] to many tests Wundt's statement has [illegible] which have shown that sounds to the right [illegible] and sounds in the front and below, in front to the right and to the left, and [illegible] least easily distinguished Among the [illegible] Kries, Munsterberg All these experiments [illegible] definite mistakes Sounds in front are often mistaken for sounds behind and felt to be higher than their natural head level [illegible] hearing is of great importance [illegible] With one ear this recognition is [illegible] may be verified by the fact that we turn our heads here and there as though to compare directions whenever we want to make sure of the direction of sound In this regard, too, a number of effective [illegible] determine whether the [illegible], it is best to get the [illegible] h ears, and whether he [illegible] who hear excellently [illegible] sound Others again [illegible] skill from practice, sense of locality, etc But in any case, certainty can be obtained only by experimentation

"The differences that age makes in hearing are of importance Bezold has examined a large number of human ears of different ages and indicates that after the fiftieth year there is not only a successive decrease in the number of the approximately normal hearing, but there is a successively growing increase in the degree of auditory limitation which the ear experiences with increasing age The results are more surprising than is supposed . Old women can hear better than old men" *Hans Gross Criminal Psychology, Wigmore's Principles of Judicial Proof* § 168

[illegible] he sense of taste is rarely of [illegible] ince it is regularly very significant [illegible] poisoning. *At the same* time, it is necessary, when tests are made, to depend upon general, and rarely constant impressions, since very few people mean the same thing by stinging, prickly, metallic, and burning tastes, even though the ordinary terms sweet, sour, bitter, and salty, may be accepted as approximately constant"—*Hans Gross Criminal Psychology, Wigmore's Principles of Judicial Proof* § 170.

[illegible]

know, and that they may learn more by means of them than by means of the [illegible]

60. associations are awakened, they are not ascribed to the sense of smell, but are said to be accidental *Ibid*; *Ibid* § 172.

The sense of Touch. "I combine, for the sake of simplicity, the senses of location, pressure, temperature, etc, under the general expression sense of touch The problem this sense raises is no easy one, because many witnesses tell of perceptions made in the dark or when they were otherwise unable to see, and because much is perceived by means of this sense in assaults, wounds, and other contracts In most cases such witnesses have been unable to observe the touched parts of their bodies, so that we have to depend upon this touch sense alone Full certainty is possible only when sight and touch have worked together and rectified one another" *Ibid*; *Wigmore's Principles of Judicial Proof* § 174

General Theory of Memory and ...
here be used to mean the initial proc ...

... *Wigmore's Principles of Judicial Proof* ...
... association of ideas is our recollection and memory which are only next to perception in legal importance in the knowledge of the witness Whether the witness wants to tell the truth is, of course, a question which depends upon other matters; but whether he can tell

... variously organized function ... d much more so when every-

... gation. We find little instruction ... vell as our mistakes are thereby in- ... *Wigmore's Principles of Judicial Proof* § 192

Differenc ...
men exhibit ...
known, this ...
promptness o ...
ment of rapid ...
forgetfulness, ...
but approxima ...
the field of greatest memory As a rule, it may be presupposed that a memory which has developed with special vigour in one direction has generally done this ...

unreliable . . .
memory and can
alarming, and
people have bare

al people do, and which
the important point they
e to describe important

Children

witness in the world We hav
the child's mind to wipe out
has made a systematic study
conclusion that the scope of memory is measured by the child's capacity of concentrating its attention

"That aged persons have, as is well known, a good memory for what is long past, and a poor one for recent occurrence, is not remarkable It is to be explained by the fact that age seems to be accompanied with a decrease of energy in the brain, so that it no longer assimilates influences, and the imagination becomes dark and the judgment of facts incorrect . .

as pointed
out i within the
limits take in a
matter and partly mechanical, and the educated rarely have the latter kind because they have developed the former at its expense; high mental power is seldom combined with good mechanical memory" *Hans Gross Criminal Psychology*, *Wigmore's Principles of Judicial Proof* § 193.

Narration—General Principles of. The third element forming an essential part of all testimony is the process of laying before the tribunal the witness's results of his Perception and his Recollection, i e the prosess of Narration or communication In this element, as in the other two, there are many opportunities for errors fatal to testimonial trustworthiness As with the elements of Perception and of Recollection so here also, experience has shown that certain dangers are to be looked for What these dangers and defects are depends upon the specific virtue which this
possess Its office is to
recollection of the witness,
useful or trivial Its pri
reproducing and expressing
the witness's Recollection
then, if his Narration or communication fairly represents and corresponds to his Recollection, and is intelligible by
value are complete, but not otherwise
in either of these respects, namely, in
or in intelligibility, then its value d
defects occur in the former respect, i e an absence, actual or probable, of this correspondence between the witness's uttered statement and his conscious recollection which he ought to be stating In the other respect, i e intelligibility to the tribunal of the witness's utterance, comparatively few questions arise *Wigmore* § 210

). Hearsay evidence, meaning of—and why it is discarded The term "hearsay" is used with reference to that which is written, as well as that which is spoken; and, in its legal sense, i
derive its value solely from the
rests also in part on the competen

and seeming exceptions, the general rule of law rejects all hearsay reports of transactions
witnesses
given to a
tests enjoined by the law for ascertaining the correctness and completeness of his testimony, namely, that oral testimony should be delivered in the presence

heard, or was misunderstood, or is not accurately remembered, or has been perverted It is also to be observed, that the persons communicating such evidence are not exposed to the danger of a prosecution for perjury, in which something more than the testimony of one witness is necessary, in order to a conviction, for where the declaration or statement is sworn to have been made
son who is since dead, it is hardly
imony is an entire fabrication
6 To these may be added consi-

incur in order to rebut or explain it, the
occasioned, the multiplication of collateral issues for decision by the jury, and the danger of losing sight of the main question and of the justice of the case if this sort of proof were admitted, are considerations of too grave a character to be overlooked by the Court or the Legislature, in determining the question of changing the rule *Mima Queen* v, *Hepburn*, 7 Cranch 290, 296, per *Marshall C J*; *Greenl Ev* § 99(a)

Oath One of the objections against Hearsay evidence is that it is not given on oath by the person who has got personal knowledge of a fact. But the utility of oaths in any shape has been strongly questioned *Benth Jud Ev* Bk 2 ch 6 The good man, it is sometimes said, will speak the truth without an oath, while th T the following
answer has bee
without an oath,
of mankind are
cases of importar
more solemn en
boldly say what
which they mak

they promise, and careful what they assert, puts them upon exactness in every circumstances, and circumstances are often very material things Even the good might be too negligent, and the bad would frequently have no concern at all, about their words, if it were not for the solemnity of this religious act.

Archbishop Secker, as cited in *Ram on Facts*, *Best Ev* § 59 'Of the two main facts which impair the probative force of an unsworn statement used as hearsay, lack of oath and the absence of cross examination, probably the latter is, at the present time, Indeed the importance of the oath is n cross ex mination than as a valuab *Chamberlayne's Ev* § 2712

Cross examination and confrontation Another essential requirement of the Hearsay rule, as just examined, is that statements offered testimonially must be subjected to cross-examination But a process commonly spoken of as confrontation is also often referred to as an additional and accompanying test or as the sole test The main purpose of confrontation is for facilitating cross-examination But it also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the demeanour of the witness on the stand, as a minor means of judging the value of his testimony But this minor advantage is not regarded as essential i e it may be dispensed with when it is however the essential object of confrontation, gh to note here that, so far as confrontation is Hearsay Rule, it is merely another name for tion *Wigmore* § 1365 The policy of the Anglo-Indian system of cross examination as a vita for testing the value of no statements (unless by special it has been proved and supplemented lengthening experience Not even peculiarities which are so often found associated with cross examination have availed to nullify its value It is beyond any doubt the greatest legal engine ever invented for the discovery of truth A lawyer can do anything with a cross examination,—If he is skilful enough not to impale his own cause upon it *Wigmore* § 1367

Scope of the section The expression "it must be evidence" in paras 2 3 and 4 of the section means "the oral evidence must be evidence" *Whitely Stokes Vol II p 889* So also the word "it" after the words 'saw" 'heard' or 'perceived' in paras 2, 3 and 4 to' *Neelkanto* v *Juggobandhu*, 12 B L R l *II p 889* The first four paragraphs have

not direct whether the party against whom it is tendered objects or not *Whitely Stokes* Vol II p 889 But it was never intended by this section to exclude circumstantial evidence of a thing which could be seen, heard or felt *Karali* v *East India Co* 48 C L J 32=111 Ind Cas 792—A I R 1928 Cal 498 So where a crowd has dispersed without taking any action the intention and common object of circumstances and

section 45 or of

which they are allowed to express their opinion *See ante* The cogency of this section as to t of the only to which the immediate the exploded technical language hearsay A who saw, heard etc, must be produced The fact cannot be proved through the medium of B who did not see himself etc, but is prepared to swear that A told him that he had seen, heard, etc So with respect to the fourth case, opinion evidence, when such is

60. admissible, this section necessitates the production of the witness who holds the opinion, it excludes the evidence of any witness who can merely say that he has heard another express such opinion. *Nort. Ev.* p 210. This section says that oral evidence must be direct. *Kalmther* v. *Ma Mi*, 3 Bur. L. J. 172=2 Rang. 400. An act of deposing is a physical act which can always be proved by any one who has heard the statement being made, the fact of deposing might be proved by any one who has seen and heard the witness. *Ganapathi* v. *Sakharayappa*, A. I. R. 1929 Mad. 187=115 Ind. Cas. 147. Hearsay evidence is inadmissible

Sarup v. *Emperor*, 7 Lah L J 264=88 Ind. Cas. 22=26 Cr. L. J. 1078=26 P. L R. 566=A. I. R. 1925 Lah. 299.

Evidence of a person who saw it or heard it. "The witness must say what he had 'seen and heard; he was an '*oyant et voyant*.'" *Thayer. Pre Ev.* 524. Thus a favourite passage, found in several works in the last century, is: "It seems agreed that what another has been heard to say, is no evidence, because

said . . . . Hearsay testimony is from the very nature of it attended with all such

Hearsay

rule, and stands or falls according to such other evidential rules as may affect

it. *Greenl. Ev* § 100 But ... S.
facts except the contents
must, in all cases be dire ...
witness that he perceived by his own senses the fact to which he testified" *Steph Intro* p 141 If therefore, A, a witness, had been told something by B, and A were asked what B had told him, the evidence of A would refer to a fact which could be heard, and A is a witness who says he heard it, this section, therefore would not exclude it. *Markby Ev* p 52 A statement made by an accused person immediately after a murder of what the deceased told him is relevant as

Act says that oral evidence must in all cases be direct If a person by merely

about it, he is giving hearsay evidence The man who reads out the document to him would certainly be entitled to give evidence of its contents But another person who repeats what is read out to him is giving hearsay evidence, of what would be legitimate secondary evidence were it before the Court *Kalenther Ammal* v *Ma Mi*, 81 Ind Cas 175=3 Bur L J 17?=A I R 1924 Rang 363
earsay evidence,
Nga v *Crown*,
Queen v *Kali*,
7 W R Cr 2; *Rajoni* v *Asan*, 2 ... 7 W. R.
Cr 25, *Aman Ali* v *King Emperor*, 1 Cr L
J 631; *Queen Empress* v *Nga Ta*, ... *Empress* v
Viju Bhai, 1 Bom L R 433, *In re Vaithilinga*, 2 Weir 762 In order to
that the com-
it is necessary
ordance with
s 60 of the Evidence Act *Empress* v *Arshed Ali*, 13 C L R 125

It is admissible evidence for a witness to
...e of a family custom, and to state as grounds
... from deceased persons But, it must be
the expression o...
tion of hearsay
P C A person
that except the pe...
Ev p 53 So ...
opinion must be produced A witness cannot be allowed to say that he has heard another express such an opinion *Nort Ev* 240.

this novel section, however, makes any book of science published for sale evidence, if the author be dead, or under any of the circumstances specified in section 32, which render his production impossible or impracticable *Nort Ev* 240 It must be remembered in regard to foreign law that by s 38, certain books are always admissible. *Markby Ev* 53 Under the provisions of the penultimate paragraph of s 57 and of the first proviso of s 60 of the Evidence Act, *Taylor's Medical Jurisprudence* may be referred to *Hatim* v *Empress*, 12 C L R 86, *Hurry Churn* v *Empress* 10 C 143, see also *Howe* v *Howe*, 25 M L J 594 (F B), *Granade* v *Com of Calcutta* 29 C W N 745=28 C L J 32=46 Ind Cas 593 But in all c...
Purno, 28 C W N 579

delay or expense *Cun Ev* 215.

Proviso II. Proviso 2 relates to those cases in which secondary evidence is permitted to be given on account of the great inconvenience or impracticability

60.

ons on walls, monuments, surveyors s or oral testimony *Mortimer* v *Bolton*, 2 Camp 108, *R* v *Fursay artholomew* v *Stephens*, 8 C & P *ones* v *Turlton*, 9 M & W 65 But written characters exist on some ts removal for production would be

removable it ought to be pr *Wills Cir Ev* 212. In *Jo* production was required fas . l down the law thus "T the case of things fixed in break up his free-hold So power is given to tl not a physical impossibility *Nort Ev* 240.

the interpreter must be called to testify to what B aid to him If, however, B is a party, when admissions egarded as B's agent, and the ag nguage understood by the witness)

Telephone communications Evidence as to what a person holding a conversation over the telephone told the witness was said by the person at the

In any case, the doctrine of admissions may be invoked where one of the If B had sent

of the requirement of personal knowledge is here out of place, and leads to unpractical quibbles" *Wigmore* § 669

Market value Testimony as to market value on information derived from daily communications is not objectionable as being based upon hearsay Testimony of witnesses based upon such reports may be received *Chamberlayne's Ev* § 2708

CHAPTER V.

OF DOCUMENTARY EVIDENCE

Documentary evidence There is practically no controversy as to the meaning of the word document, because a definition of the term is given in this Act (*vide s 3 supra*) Stephen defines documentary evidence as "documents produced for the inspection of the Court or the Judge". *Steph on Ev, Art* 1

S.

Documents being inanimate things, necessarily come to the cognizance of the tribunals through the medium of human testimony; for which reason some old authors have denominated them dead proofs (*probatio mortua*), in contradistinction to witnesses, who are said to be living proofs (*probatio viva*). *Best Ev* §
, and in many respects in trustworthiness,
been noticed from the earliest times,
The false relations of what never took

consequenc attainment. *Best Ev.* § 60 "I er" says *Lumpkin J. of Georgia* in h than the strongest and most retentive memory ever bestowed on mortal man" "The memory of men as to facts is not satisfying to the mind as a writing, in an investigation involving p
Bunwarilal
ton observed
oral eviden

cases cast upon it, but where the defence is rested upon a written document as a relea e, there is an essential difference, for its genuineness, on the contrary may be shewn by many facts and circumstances very different from mere oral evidence; and, moreover, the witnes

Rep 705, 706 (*Am*)

Three distinct questions with regard to documentary evidence There are three distinct questions which are dealt with in the Act in regard to that kind of evidence which is called documentary First, there is the question how the

s 59 with ss 61 and 64, the result document must, in general, be , 'primary evidence,' but there are otherwise Evidence used to prove the contents of a document which is not 'primary' is called 'secondary' *Markby Ev* pp 56, 57

Proof of contents of documents

61. The contents of documents may be proved either by primary or by secondary evidence.

63 Primary evidence

62. Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original

Illustration.

A person printed at one evidence of the co the contents of the original

Secondary evidence.

63. Secondary evidence means and includes—

(1) certified copies given under the provisions hereinafter contained,*

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them ;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

vidence of its contents that the thing photo

by a copying machine t is shown that the copy

evidence of the original, although the compared with the original

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original.

Scope of the section 61. "This section lays down that the contents of documents may be proved either by primary or by secondary evidence, and I understand the rule to mean that there is no other method allowed by law for

* *See* s 76, *infra.*

proving the contents of documents Section 72 defines the meaning of primary evidence; s 63 describes what constitutes secondary evidence within the meaning [illegible] ghunandan Prosad, 7 A 738 [illegible] rule which exacts original [illegible] no evidence shall be received [illegible] from some other which is withheld *Per Parke B* in *Doe d. Welsh v Langfield*, 16 M & W 127; *Doe d Gilbert v. Ross*, 7 M & W 102, 106; *Macdonell v. Evans*, 11 C. B 930, 942, *per Maule J; Best Ev* § 89 *Melius (or Satius) est petere fontes quam sectari* [illegible]

hearsay evidence. *Best* § 89 All private documents must be produced, and the execution of them generally be proved, or their absence must be duly accounted for, and their loss supplied by secondary evidence *Greenl Ev.* 558.

[illegible] instrument is to be proved, the primary evidence is the testimony of the subscribing witness, if there be one Until it is shown that the production of the primary evidence is out of the party's power, no other proof of the fact is in general admitted All evidence falling short of this in its degree is termed secondary The question, whether evidence is primary or secondary, has reference to the nature of the case in the abstract, and not to the peculiar circumstances under which the party in the particular cause or trial may be placed It is a distinction of law, and not of fact; referring only to the quality, [illegible] arries on its face no [illegible] out primary And [illegible], yet if there are [illegible] it is not ordinarily [illegible] secondary evidence can be resorted to *Greenl Ev* § 84 According to the Indian Evidence Act, primary evidence means the document produced for the inspection of the Court (s 62) Where a document is executed in counterpart, each counterpart, being executed by one or [illegible] primary evidence as against [illegible] as against the other parties [illegible] *Vol II p 290* The follov[illegible] given by *Lord Esher M R* [illegible] "'Primary' and 'secondary' [illegible] which the law requires to be given first, [illegible] may be given in the absence of better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better evidence"

is that the rule requiring the prod
evidence, but a rule preferring the thin
which if produced is not primary e
term tends to conceal the true nature of the rule's effect The other objection is that, so far the term is understood to group together all rules exacting a certain quality of evidence when it is available, it groups rules which are in
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united On
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independent

Scope of section 62 Primary evidence means the document itself produced for the inspection of the Court The fundamental notion of producing the primary evidence is that the terms of a writing must be proved by producing it and not by offering testimony about them *Wigmore* § 1232. Where the writing constituting a bilateral transaction is executed by the parties in duplicate or multiplicate, each of these parts is the writing, because by act of the parties each is as much the legal act as another It can make no difference that one party has signed only the document taken
red tc
re, 2 Camp.
the counterparts of each other, one of
which is delivered to the oppc
both be considered as originals,
one which is preserved may
the one which was delivered" See also *Doe* v *Putman*, (1842) 3 Q B
Colling v *Frewick*, 6 B & C 398; *Roe* v *Davis*, 7 East 363 'The earlier practice seems to have been to treat the counterpart of a deed as a copy or secondary as may be inferred from utterances of *Best C J.* in *Munn* v *Godbold*, 3 Bing 292 There the learned Judge said "Where there are two instruments executed as parts of a deed, one of these parts is more authentic and satisfactory evidence of the contents of the other part than any other draft or copy It is prepared with more care than the other copy, and the party who produces it, and against whom it is used, by taking and keeping it as a part of the deed, admits its accuracy The Courts have therefore always required that if one part of a deed be lost, and another part be in existence, it must be produced, but merely as secondary evidence of the part that was lost" *Wigmore* § 1233; see also *Doe* v *Wainwright*, 1 New & P 8 *Burchell* v *Clarke*, 2 C P. D 88, *Mathews* v *Smallwood*, (1910) 1 Ch 777 Formerly a deed was written on parchment commencing from the middle, the other part was written in a similar way, up

primary evidence of the original document. Thus probate of a will of personalty

v *Hunt*, 6 Ch D
2 Ch 330, and wl
contained in a will,
only *Pl n Ev 7th*

, in writing
latterie v. *Pooley*,
e applies where
155 *R* v *Hunt*,

3 B & Ald 566, *Phip Ev 7th Ed* 518.

Explanation I The expressions executed "in parts' and in "counterpart', in section 62, refer to the mode in which documents are sometimes executed It is convenient sometimes that each party to a transaction should have a complete document in his own possession. To effect this, the document is written out as many times over as there are parties, and each document is executed, i e. signed or sealed as the case may be, by all the parties. No one of these is more the original than the other, and any one of them may be produced as primary

Where there are by each party both 3 K B 706, 721; *Phip Ev 7th Ed.* 516

paper does not differ from a an alike, therefore, only be under such circumstances as e, if the original is shown , notice d copy *Watson*, r better bine at nber of

in a newspaper, primary evidenc *Chandra* v *Emp* But if it were

y, but only secondary evidence conditions which render the *Ev* 242 Where the accused caused 500 placards to be printed and carried away 25 of them for posting, one of the remainder can be admitted to prove the contents of those posted because every one of those worked off are originals, in the nature of duplicate originals The reason me press, they must all be the same *R* v *Ellenborough L C J* said, "An order 1 *Watson* fetched away 25, by

the ld be great weight in the obj originals, the manuscript is the same press, they must all

carbon copy is no more better signed or executed than a letter-press copy—as a fact, the signature is not always reproduced on the carbon as it is in the press-copy letter which is usually copied after signature But where a document is executed in counterpart, each party signing only the part by which he is bound,

each counterpart, is the best evidence against the party signing it and his privies As to the other party it is only secondary evidence. *Roe* v. *Davis*, 7 East. 362,

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Hrishikesh, 49 C L. J 546=A I. I

abstracted in a judgment is not even

cannot be made use of in lieu of

29 Ind Cas 463=60 M L J. 13=A

evidence of a document which is otherwise

ument is lost *Ma Ague* v. *Maung San Yank*,

A I R 1929 Rang 181 A register containing copies and copied directly from the originals is legally admissible in evidence in proof of them *Chandram* v *Sheonath*, A I R 1931 Oudh 1

document, which is not prove

ever existed A defamatory l

was prosecuted as being the

deposed to such a letter ever having been written by the accused

copy of the newspaper was not secondary evidence of the original letter *Ramlal* v *King*

Ind Cas 852 The

question

admitted depends

largely o

conclusion should

not be overruled by the Court of appeal except in a very clear case of miscarriage *Visvanatha* v *Bahibai*, A I R 1931 Bom 105=55 B 103

s 76 Copies

sworn copies

examined copy,

in the sense that the original and the copy have been examined or compared together by the witness, either in his own act of transcription or by taking some

Evidence Act, and are used chiefly to prove

corporations and companies, by laws and th

copy of a Will is admissible in evidence

is proved. *Theli Kicherla* v

Mad 345 47 M L J. 906; *Bo*

certified copy of a document

conditions and contents of it, b

Koeri, 82 Ind Cas 306. A

ment, in which there may be references to it, is not the secondary evidence

of the contents of the document, especially when it appears that it is itself based on secondary evidence of the document given by a party who had this original with him *Hira Lal* v *Ganesh Prasad*, 1 A. 106 P. C = 9 I A 61 = 11 C L R. 109.

Clause (2). ... evidence *In re* ... *Re Stephens*, L. R ... *ton* 30 Ir L T. ... secondary evidence, ... wish to prove w... to the first portion of this clause ... So under this clause a copy ...

13. This clause is applicable to blue prints ...e, 212 Ill 89), as well as to carbon copies as it ...d of copy than that taken in the copying press *Burr Jones* § 209 All that is required under this clause is that the copies must be made by some mechanical processes which would ensure the accuracy of the ...

Clause (3) A copy merely as a piece of paper, has no standing as evidence ... qualified ...e § 1277 ... ne is not ...mparison, or as sometimes, two witnesses, one of whom read the original, while the other read the copy, or the reverse But it will save trouble to have the comparison made by one and the same perso... *Ev* 96, *Maung Po* v *Ma Shu* ... *Kim*, 9 C 939 A copy in short, ... of a witness The witness, therefore, must be qualified, and thus the general principle of witness's qualifications have here certain applications A general principle for witness's qualification is that he must speak from personal ... it therefore in ... own personal ... others Upon ...

... copy, is rather in the nature of a rule of preference, requiring first the use of an immediate copy, if one is available *Wigmore* § 1274 This view was adopted by *Justice Story* in *Winn* v *Patterson*, 9 Pet 663, 677 where he observed "The ...

with it, for then it is second remove from the original; or where it is copy of a copy of a record, the record being still in existence by law deemed as high as the original, for then also it is a second remove from the record But it is quite a different question whether it applies to cases of secondary evidence where the original is lost, or the record of it is not in law deemed as high evidence as the original, or where the copy of a copy is the highest proof in existence. On these points we give no opinion; because this is not in our judgment the case of a mere copy of a copy verified as such, but it is the case of a second copy verified as a true copy of the original" Under section 57 of the Indian Registration Act, (XVI of 1908), all copies of copies given under that section and signed and
dmissible for the purpose of proving the
r *Bhanrao,* 78 Ind Cas 865=A I R
2 W R 303, *Smart* v *Williams,* Comb
ch evidence is thus stated in *Stetson* v *Gulliver,* 2 Cush 494, 499 "When the book of the register would be evidence, a certified copy is entitled to have the same effect; there being very little ground to apprehend any mistake from that cause, and upon consideration of the great public inconvenience which would result from having the books of record removed from their proper custody and place of security," *Wigmore* § 1275

According to the orthodox English rule a copy of a copy is not admissible in evidence in as much as in the words of *Alderson B* "there would be no limit to the reception of secondary evidence if that were so This is but the shadow of the shade" *Everingham* v *Roundell,* 2 Moo & Rob 138; see also *Tillard* v
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practice
the printing of the High Court paper, that before giving the final order for striking off, it would
A I R 1929 Mad 18
Sanloki v *Rameswar,*
compared with the ori
with the original depo
Pat 61=5 Pat 777

Clause (4) Execution in counterpart is a method of execution which is

in itself but supplements the other. *Baidya Nath* v. *Kamini Kant*, 6 C. L. J. 572; *Andrews* v. *Wirral*, R. C. (1916) 1 K. B. 863.

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Clause (5). The oral account of the contents of a document given by some person who has merely seen it with his own eyes but is unable to read it is not secondary evidence of the document: the word "seen" in section 63(5) of the

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Ghore and others v *Chatrapal Singh*, 12 A. L. J. 239=23 Ind Cas. 11 So where in order to prove a mortgage the only witness called was an illiterate person he cannot be deemed to
within section 63(5) of the Evid
557=A I R 1922 All 232
that under this clause only a witness who has seen the document and who could have read the document in its original state is entitled to give oral evidence of it. *Ramji Das* v *Mohan Lal*, 71 Ind Cas 651=1923 A 411 But in *Pudai Singh* v. *Brij Mangal*, 73 Ind Cas. 651 it was held that as regards the letting in of secondary evidence the word "seen" in section 63(5) includes also "read over" in the case of a witness who is illiterate and as such cannot himself read it If it is read over to him it will satisfy the requirements of the section. *In Mohan Lal* v *Ramji Das*, 80 Ind Cas. 939=22 A L J 861, which was an appeal from

v *Chatrapal Singh*, *supra* After hearing the matter very fully argued we have come to the conclusion with great respect to these two Judges, and we are unable to agree The critical words in the section are 'seen it' The result of the decision would be, for example, that a highly educated person knowing
noal document in
contents and had
person who knew
that the English
nemory, could not
although, he had

exists The first three sub sections of s 63 refer to copies made from or compared

that if a person has only seen a copy of a document, there are two chances altogether, and therefore evidence given by him could be of a different category to the secondary evidence allowed by law and a person who has seen a copy

evidence of the contents of the L J 172=84 Ind Cas 175=A I

3.

Kalender Ammal, 31 C W N 621 (P C)=54 I 18=100 Ind Cas 1=29 Bom L R 800 Allahabad High Court reported in 22 A L 13 and 73 Ind Cas 651 are no longer good law the contents of a document by some person clause means oral evidence by some person who has seen those contents, that is who had read the document Evidence that the witness only saw the document and heard it read contents are concerned an oral evidence generally, *viz*, evidence of a witness who sa fact which can be seen on *Raghubir*, 112 Ind Cas 310. Statements of persons wh sible in evidence What is required is an oral judgment or decree by some one who had read

to a document which is document. *Rati Pal* v *Udai Bhan*, 53 Ind Cas 667 A translation of a document is not secondary evidence *Ambalavana* v *Kuppachi*, 4 L W. 330=35 Ind Cas 20; 26 Ind Cas 618; see also 70 Ind Cas 107 Where in prior proceedings between the parties one of them admitted the existence and contents of a mortgage deed, such admission constituted a good secondary evidence within the meaning of this clause *Bahadur* v *Madho*, 36 Ind Cas 696 An objection to the admission of secondary evidence, if not raised at the time it is admitted, cannot be allowed to be raised in special appeal Where the plaintiff attempted to prove the contents of certain documents by oral evidence, but the evidence fell short of what is requir witness was not properly q the penalty of the dismi of the legal adviser who 24 W R 232 Survey

y evidence of the contents of the 63 or under any other section of the

Evidence Act *Sale* Oral evidence canno of which are dispute is not merely the asked whether certa *O Connell*, Arm & his account books; the best evidence, must be 24 Bom L R P C 565 have been reduced to wr 66 Ind. Cas 360

evidence "Another gener luction of secondary evide the law recognises no degrees in the various kinds of such evidence. *Doe* v *Ross*, 7 M & W. 102; *Hall* v *Ball*, 10 L J, C P. 285; *Brown* v *Woodman*, 6 C & P 206, *Jeans Wheedon*, 2 M & Rob 486" *Taylor Ev* § 550 In *Doe* v *Ross*, 7 M & W 102, the question was whether an attested copy of a deed was preferred tion in the

to the jury, from whic . . . S
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the nature of the evidence itself If you produce a copy which shows that there was an original or if you give parol evidence of the contents of deed the evidence itself discloses the existence of the deed But reverse the case, the existence of an original does not show the existence of any copy nor does parol evidence of the contents of a deed show the existence of anything except the deed itself If one species of secondary evidence is to exclude another a party tendering parol evidence of a deed must account for all the secondary evidence that has existed He may know nothing but the origin and the other side at any trial may defeat him by showing a copy the existence of which he had no means of ascertaining Fifty copies may be in existence unknown to him, and he would be bound to account for them all Wigmore § 1268 Similarly in *Brown* v *Woolman* 6 C & P 206 *Parke J* said There are no degrees of secondary evidence" See also *Sugden v Lord St Leonards* L R 1 P D 154, *Brown* v *Brown* 27 L J Q B 173, *Doe* v *Cole*, 6 C & P 359, *Fisher* v *Samuda* 1 Camp 193, *Kensington* v *Inglish* 8 East 273 279 But in some of the old English cases the rule laid down was otherwise In *Ludlam's Will* Loft 362, *Lord Mansfield C J* said If you cannot prove a deed by producing it, you may produce the counterpart if you cannot produce the counterpart, you may produce a copy, even if you cannot prove it to be true copy if a copy cannot be produced you may go into the parol evidence of the deed" This rule was also adopted by *Lord Hardwicke L C* in *Omichund* v *Barker*, 1 Atk 21 (49) and in *Villiers* v *Villiers* 2 Atk 27 The English

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m *Prof Leaf's*
er the law recog

nizes any degrees in the various kinds of secondary evidence and requires the party offering that which is deemed less certain and satisfactory first to show that nothing better is in his power, is a question which is not perfectly settled On the one hand the affirmative is urged as an equitable extension of the principle which postpones all secondary evidence until the primary is accounted for, and it is said that the same reason which requires the production of a writing if within the power of a party also requires that if the writing is lost, its contents shall be proved by a copy if in existence rather than the memory of a witness who has read it, and that the secondary proof of a lost deed ought to be marshalled into first the counterpart secondly a copy, thirdly the abstract, etc, and, last of all the memory of a witness On the other hand it is said ounds all distinc
tion betwee that the rule is
founded u on its strength or
weakness, and that to carry it to the length of establishing degrees in secondary evidence as fixed rules of law, would often tend to the subversion of justice and always be productive of inconvenience If for example proof of the existence of an abstract of a deed will exclude oral evidence of its contents this proof may be withheld by the adverse party until the moment of trial and the other side be defeated or the cause be greatly delayed, and the same mischief may be repeated through all the different degrees of evidence It is therefore insisted that the rule of exclusion ought to be restricted to such evidence only as upon its face discloses the existence of better proof and where the evidence is not of this nature it is to be received notwithstanding it may be shown from other sources that the party might have offered that which was more satisfactory
y the jury under all the circum
(9) The American doctrine
this that if from the nature

believed that the rule laid down in *Doe* v *Ross*, 7 M & W 102, is more

S. 63.

of a document is not ... the contents of the original *Kalenther* ... Ind Cas 175=A I R. 1924 Rang 363 ... ouncil in *Ma Mi* v *Kalender Ammal*, 31 C W N 621 (P C)=54 I A. 61=25 A L J 65=5 Rang 18=100 Ind Cas 1=29 Bom L R 800 So the two later decisions of the Allahabad High Court reported in 22 A. L J 864=80 Ind Cas. 937=47 A 13 and 73 Ind Cas 654 are no longer good law The phrase "oral accounts of the contents of a document by some person who has himself seen it" in this clause means oral evidence by some person who has seen those contents, that is who had read the document Evidence that the witness only saw the ...

fact which can ... *Raghubir*, 112 I ... Statements of ... sible in evidence ... judgment or decree by some ... v *Maung Tha*, A I R ... authorized agent in a previo ... against his interest is sec ... *Bhan*, 53 Ind Cas 667 A translation of a document is not secondary evidence *Ambalavana* v *Kuppachi*, 4 L W 330=35 Ind Cas 20; 26 Ind Cas 618; see also 70 Ind Cas 107 Where in prior proceedings between the parties one of them admitted the existence and contents of a mortgage deed, such admission constituted a good secondary evidence within the meaning of this clause *Bahadur* v *Madho*, 36 Ind Cas 696 An objection to the admission of secondary evidence, if not ... annot be allowed to be raised in spec...

the penalty of the dismissal ... gh v *Hit* ... was based on a ... was not exhibited ... of the contents of the ...

is not merely the memorandum of some other fact Thus a witness cannot be asked whether certain reso... ... papers (*R.* v. *O Connell*, Arm & T 16 ... his account books; but in ... the best evidence, must be ... 24 Bom L R P C 565 ... have been reduced to wr... 66 Ind Cas 360

No pref... ce "Another general rule' ... of secondary evidence, wh... law recognises no degrees in the various kinds of such evidence. *Doe* v *Ross*, 7 M & W 102; *Hall* v *Ball*, 10 L J C P. 285, *Brown* v *Woodman* 6 C & P 206, *Jeans* v *Wheedon*, 2 M & Rob 486" *Taylor Ev.* § 550 In *Doe* v *Ross*, 7 M & W 102, the question was whether an attested copy of a deed was preferred ... question in the

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Leyfield's Case, 10 Co Rep
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r Coleridge J in R v Francis,
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be proved by the paper itself and by that
The rule was so stated by the Judges on
Caroline, 2 Brod & B 286 (1820) The only
the following classes (each of which is dealt
document is lost or destroyed, (2) Where it is

Cr Ev 15th Ed. p. 3.

S 64. philosophical and harmonizes better
jurisprudence of the age on the subject
to curtail and limit the objections
to go to the jury to judge of its weight
party kept back a more satisfactory
have produced and within his knowledg
as he had offered, of less certainty, with the jury" *Lewis* v *St Antonio*, 7 Tex 288 (315) (*Am*) *Wigmore* § 1268

Proof of documents by primary evidence.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Principle A writing is the best evidence of its own contents and must be introduced unless it has been lost or destroyed or its absence is otherwise satis
' The reasons are simple
long experience They
posed literal copy and the
the copyist, whether by
wilfulness or by inadvertence this contingency wholly disappears when the original is produced M[illegible] d the copy will
lack, such features of may afford the
opponent valuable means
the document" *Wigmore* § 1179 In
C J said that though an original may be [illegible]
is liable to the mistake of the transcriber
recollection, and the original, the added risk, almost the certainty, exists, of errors of recollection due to the difficulty of carrying in the memory literally the tenor of the document *Wigmore* § 1179; see also *Slatterie* v *Pooly* 6 M & W 664; *Doe* v *Ross*, 7 M & W 102, *Taylor* v *Riggs*, 1 Pet 591, 596, *Vincent* v *Cole*, M & M 257; *Macdonnell* v *Evans*, 11 C B 942

were the beginnings, in the endeavour to give consistency to the system of evidence before juries They were never literally enforced,—they were principles and not exact rules, but for a long time they afforded a valuable test As rules

Bliss, 21 N Y p 218, that ' it is a universal rule founded in necessity, that the best evidence of which the nature of the case admits is always receivable '
ciple was the rule about
the rule was older than the
have been a generalization
from the rule, which appears itself, to be traceable to the doctrine of profert That
ent which was set up in
the jury, that a jury
t had been exhibited to
hear testimony from
o speak to the contents
of a deed without the production of the deed itself" *Thayer Cas Ev 2nd Ev* 778, 779

Scope of the section "The rule is that the best evidence must be used that can be had, first the original; if that cannot be had, you may be let in to prove it any way, and by any circumstances the nature of the case will admit. *This* extends not only to deeds, but to records, so far I mean as they may be given in evidence to a jury, for in point of profert it is another thing. *But for this*

the law requires a proper foundation to be l u l , and two things are necessary **S.** First, to prove that such a deed once existed, and there is sufficient evidence that such a deed, to a certain intent, did once exist, by the answer that has been read, which I do not rely on as evidence of all the uses of the deed, but as an admission that such a deed and uses something of that nature once existed. The next step is to show some ground that the deed is lost or being in his adversary's hands cannot be come at." *Per Lord Chancellor* in *Whitfield* v *Fausset* 1 Ves 387 In *Grant* v *Gould* 2 H Bl p 101, *Lord Loughborough* said 'That all Common
namely, the best evidence .
agree' The rule, as to th)
rules of common law, but modified to some extent by the registry system established here by Statute The theory is this that an original deed in its
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Gray 30 (1on) 'The general rule was, that the contents of a writing of any document or portable article could not be proved without its production or without showing it to be in the possession or power of the prisoner or opposite party, and on notice to him to produce it' *Per Channell B* in *Regina* v *Farr* 4 F & F 336 So the contents of every written paper are according to the well established rules of evidence, to be proved by the paper itself, and by that alone if the paper be in existence *The Queen's Case (per Abbott C J)* 2 B & 284 The reason of the rule is thus stated in *Dr Leyfield's Case* 10 Co Rep 92 (a) And therefore every deed ought to approve itself and to be proved by others—approve itself upon its showing forth to the Court in two manners (1) As to the composition of the words be sufficient in law and the Court shall judge that, (2) that it be not razed or interlined in material points or places, (3) that it may appear to the Court and to the party if it was upon conditional limitation or power of a revocation in the deed And these are the reasons of the law that deeds pleaded in Court shall be showed forth to the Court" So when the question is as to the effect of a written instrument the instrument itself is primary evidence of its contents *Per Coleridge J* in *R* v *Francis* L R 1 C C R 128 (132) But this rule should not be applied so broadly as to require the production of any thing which is not a document The rule is

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well established rules of evidence to be proved by the paper itself and by that alone if the paper be in existence The rule was so stated by the Judges on the occasion of the trial of *Queen* v *Caroline* 2 Brod & B 256 (18?) The only
exception to
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reasons of convenience *Roscoe Cr Ev 15th Ed* p 3

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Cases in which secondary evidence relating to documents may be given

65 Secondary evidence may be given of the existence, condition or contents of a document in the following cases —

(a) when the original is shown or appears to be in the possession or power—

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it

and when, after the notice mentioned in section 66, such person does not produce it,

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his *representative in interest*,

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect, produce it in reasonable time,

(d) when the original is of such a nature as not to be easily moveable,

(e) when the original is a public document within the meaning of section 74,

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India to be given in evidence,

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d) any secondary evidence of the contents of the document is admissible

In case (b), the written admission is admissible

In case (e) or (f), a certified copy of the document but no other kind of secondary evidence, is admissible

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents

Principle The contents of a document must in general be proved by a special kind of evidence, called 'primary evidence but there are exceptional cases in which it may be proved otherwise *Markby Ev* 57 *The exceptional cases in which secondary evidence is admissible are contained in this section*,

Ibid. "That rule which is the most universal, namely, that the best evidence the nature of the case will admit, shall be produced, decides this objection, for ... expression for the idea that when you lose ... best in your power The case admits of ... you possess, if the superior proof has been ... not mean that men's rights are to be sacrificed and their property lost because they cannot guard against events beyond their control; it only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it" *Per Porter J* in *Thomas* v *Thomas*, 1 La 166, 168; *Wigmore* § 1192 The various classes of cases with which the following sections d[...] the writin[...] feasible [...] person, pl[...] or otherwi[...] on the gen[...]

Scope of the section Secondary evidence of the contents of a document is inadmissible unless the non production of the original is first accounted for so ... *Krishna* ... of the ... ounting for of the non production of the original *Bhubaneswari* v *Harisaran* 6 C 720 = 8 C L R 337 (P C), *Rakhaldas* v *Indra Monee* 1 C L R 155, *Imeerunissa* v *Abedoonissa*, 23 W R 208, 209 (P C) = 2 I A 87, *Wazeer Ali* v *Kalee Kumar* 11 W R 228, *Gour* v *Huree Kishore*, 10 W R 338, *Ishan* v *Bhyrab*, 5 W R 21, *Ustoorun* v *Mohun* 21 W R 333, *Roopmunnoori* v, *Ramlal* 1 W R 145; *Mafee Zoodeen* v *Meher Ali*, 1 W R 213, *Sheoram* v *Ramlal* 1 W R 248, *Muhammad Abdul* v *Ibrahim*, 3 B H C R A C J 160 A writing is the best evid[...] or destroyed [...] *Clarke* 3 Sall[...] to little more [...] by the intro[...] accounted for [...] entirely differ[...] ing, rather than a narrowing rule It meant that the best evidence of which the nature of the case would permit was receivable It has been pointed out by *Prof Thayer* that this rule has been the subject of a very peculiar development (*Vide the origin of the rule* [...] relating to writings only [...] to those which relate to [...] *Ev* § 272 This section [...] and thus is a relaxation [...] requires stricter proof in criminal than in ci[...] it was decided that, in the former, the original registers of births, deaths marriages, etc, must be produced and that copies will not be sufficient *Field's Ev 7th Ed* p 218; *Whitley Stokes*, Vol II p 92 The exceptional cases in which secondary evidence ... opy of a document ... have been used to ... he possession of the ... provides for his ... Where an original *pattah* relied on cannot be produced, secondary evidence is admissible, but the Court oug[...] the contents of the document [...] *Sookram Sookul* v *Ramlal*, [...] document from [...] record must be satisfactorily accounted for before a copy can be looked at and ... before it can be used *Rohceelal* v ... *mbanlal* v *Nandlal*, 2 W R Act X. ... 241, *Asman* v *Doorga*, 21 W R 262.

According to this section the loss of the original must be proved not only in a case where the document is being enforced in a suit but also where it is produced

5. merely as a piece of evidence *Maqbul* v. *Brijdeo*, 122 Ind Cas 751=1930 A L J 765=A I R 1930 All 539 Where a party relies upon the certified copy of a document before any presumption as to genuineness of the original can be made under s 90 it is incumbent on the party trying to rely upon the document to lay the foundation by leading secondary evidence under s 65 *Gaya Prosad* v *Jaswanti*, 1930 A L J 1003=A I. R 1930 All 550=125 Ind Cas 460

A copy of a disputed document can not be taken as evidence without proof that the original is out of the power of the person producing the copy Admitting the ex … the correctness of the copy *Mussamat* … *tbundee* cannot be admitted as secondary … absence of … had … *stoorun* v *Mohunlal*, 21 W R 33 … of a letter (neither produced nor called … involves the giving of secondary evidenc … satisfying the conditions required to … *Pershad* v *Amanulla* 26 C 53=2 C … rents where sought to be proved by entries made by *Patwari* in his list as the result of his enquiry and inspection of receipts *Held* that the list would merely … ents of the receipts and that it was inadmissible …

… made out *Baduna Ram* v *Akbar Ali*, 103 Ind Cas 752=9 Lah L … executed in Englan … gagee instituted a … only *Held* that the secondary evidence of the mortgage deed was admissible *Herbert Francis* v *Mahomed Akbar*, 105 Ind Cas 532 This section provides an alternative to the bond holder in cases where for various reasons production of the original is impossible, but if a bond is in existence production is not dispensed with by … Ind Ca … tions in … a statem … guardian … to a case … but it … have to … facts n … J 264= … prov d … ondary evidence of a document … vidence cannot, for any reason not …

… should not be overruled except in a clear case of miscarriage of justice Production of secondary evidence does not dispense with proof of the execution of the original document *Chuha Mal* v *Rahem Bakhsh*, 71 Ind Cas 568 Where in a suit on bond, loss of bond was alleged and the defendant denied execution …

When no reas ... S.
mortgage, a suit on ...
(1922) *Nag* 119=67 ...
... have been
... *Maung Po*

... o has been
... however is
... le when the
Lower Court has rejected it. *Rameswar Lal* v. *Raj Kumar*, 5 Pat. L. W. 316=45 Ind. Cas. 888=(1918) Pat. 156.

When a party in possession of an unregistered deed of sale of property less ... roduce it before the Court and was unable to ... *Held*, that secondary evidence of the contents ... *Domai Bari Medhi* v. *Kenil Kolita*, 62 Ind. Cas. ... a sale proclamation as to the rate ... rtised for sale at his instance in ... the sale proclamation is not forth ... be accepted as secondary evidence ... ation as the rate of rent payable ... 60. But secondary evidence of ... *Ilami* v. *Nambiar* 28 M. L. J. 206=28 Ind. Cas. 69, *Nataraja* v. *Ramabhadra*, 28 Ind. Cas. 853; *Emperor* v. *Khetal* 45 A. 300.

... ans a document admissible in evidence," ... is section deals with the proof of the contents ... *Khetter Chunder* v. *Khetter Paul*, 5 C. 886 ... it is inadmissible in consequence of ... stamped, secondary evidence cannot ... , Vol. II p. 892.

Time for objecting to the admission of the secondary evidence. A Court copy of a title deed was filed without objection on behalf of the plaintiff, but objection was taken during the argument that the plaintiff had not shown any of the statutory grounds for the admission of such secondary evidence. It was ... be marked without objection ... The copy should not have ... made it receivable. *Kistna* ... evidence must be made before ... *ulor*, 70 P. R. 1866; *Uppera* v. ... ihed that no objection ... the admissibility of a ... e Court below without any objection. *Jiwan* v. *Jiwan* 88 Ind. Cas. 511=29 P. L. R. 455=A. I. R. 1925 Lah. 347. *Ma The Nh* v. *Mg Ni Pa* 3 Bur. L. ... *awa* v. *Ramappa* 5 B. L. R. 798=28 B. 91; *Raj* ... Vol. II 382; *Akbar Ali* v. *Bhyenlal* 6 C. 666; ... T. 397=67 Ind. Cas. 628; *Surat* v. *Ram*, 53 Ind. ... 14 Ind. Cas. 539=216 P. W. R. 912; *Madhabi* v. ... *Chimnaji* v. *Dinkar*, 11 B. 320; *Kishori* v. *Rak* ... *sanna*, 28 C. 143; *Sahazadi* v. *Secy. of State* 34 ... *Hasmatulla* v. *Hurimohan*, 31 ... *Lalla Rai* 1 W. R. 1? ... *Gour* v. *Kanhya* 2 W. R. 23 ... v. *Mahesh* 25 W. R. 166; ... P. L. R. 696. When the C ... certain letters which were no ... sibility was taken subsequently *held* that the objection could be entertained. *Prafulla* v. *Emperor*, 57 C. 1071=50 C. L. J. 593.

Unstamped documents—secondary evidence of. Secondary evidence of the contents of a document which was liable to stamp duty but unstamped, cannot be admitted on payment of a penalty. *Kopaswa* v. *Shanmu*, 7 M. 440; *Baldeo* v. *Jairam*, A. W. N. 1893, 210; *Mathoora* v. *Peary Mohun* 1 C. 253=2 C. L. R. 409; *Ma Kin U* v. *Maung Aung Hmine*, U. B. R. (1897—1901) Vol. II 365; *Sheikh Akbar* v. *Sheikh Khan*, 7 C. 256=8 C. L. R. 528; *Maung Net* v.

65. *Maung Hmo*, U B R (1897—1901) Vol II, 367, *Sudar Kuar* v *Chandrauati*, 4 A 330 = A W N 1882, 55 *Hiralal* v *Shankar*, 45 B 1170 *Sumni* v *Sundard*, (1911) 2 M W N 166, *Dorasami* v *D* 87 Ind Cas 382, *Maung Po* v *Maung Gui*, 101 Ind Cas 198 = A I R 1927 R 109 The provisions made by the Stamp Act for the case of deeds, either unstamped or insufficiently stamped, have no application, when the original deed, which ought to have been stamped has not been produced It is not permissible to pay qenalty or require endorsement by Collector on a copy of unstamped or insufficiently stamped document and to offer the same as secondary evidence of the terms of the original *Venkata* v *Sri Junganti*, 4 C W N 117; *Aruna Chellum* v. *Olagappah*, 4 M H C R 312, *Raghavachai* v *Rangachai*, 4 Mys L J 145 A distinction must be drawn between the admissibility of the evidence and the manner of proof

Section 65 and Registration Act, s 49 The admitted existence of an unregistered written deed of relinquishment of one's interest requiring registration precludes the proof of the fact of the relinquishment by any secondary evidence as the primary evidence is itself inadmissible under s 49 *Janardhan* v *Janardhan* 101 Ind Cas 839 = A I R 1927 Nag 214 Where a party comes into Court resting his claim on a written title which the law requires to be

to register, and is, in consequence and say, 'I can prove my title by) have a compulsory Registration ors" *Monmohinee* v *Bishen Moyee*, *Sheikh Shurutoolah*, 1 B L R 58 = 10 W R 51 (F B); *Gongabisan* v *Tukaram*, 5 N L R 70 = 3 Ind Cas 224; *Mahomed* v *Allah Ditta*, 95 Ind Cas 444 = 27 P L R 268, *Kallam* v *Nambiar*, 28 M L J 226 Secondary evidence of a document which is not produced but which in a previous suit was found to be inadmissible as being not registered cannot be given in evidence *Nataraja* v *Ramabhadra*, 28 Ind Cas 853, see also *Kanduru* v *Adam Saheb*, 25 Ind Cas 661

Section 19, Limitation Act—Wheth acknowledgments lost or destroyed Se. to section 20 of the Limitation Act of 1871, writing containing the promise or acknov may be given of the time when it was signe of her *R*

which secondary evidence that amongst the ground ice was the loss or destruc to is the evidence thing was opposite

871 The language of the was necessarily in direct g to the Evidence Act, locument generally, if the f 1871 oral evidence of the ble in such a case. The words used are 'When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed, but oral evidence of its contents shall not be received" One branch of the law of Evidence is that already referred to It is contained in 64 and the following section of the Evidence Act and it

S

determines the cases in which secondary
a document not produced. Another bran
the following sections. It deals with tl
evidence of oral communications, may
effect of a document. The first part of the paragraph before us clearly belongs
to the latter branch of the law. And, it would seem the object was to remove
any question which might otherwise have arisen whether the rules generally
excluding oral ... the effect of documents might not exclude oral
document, where the date is an essential
...nt oral evidence of the date of the document
proceeds 'but oral evidence of its contents
shall not be received' These words were introduced with a 'but', and they
speak not of secondary evidence but of oral evidence. We do not think they
ought to be understood as dealing with an entirely different branch of the law
of evidence from the earlier part of the sentence, and as repealing s 65 of the
Evidence Act, so far as it relates to acknowledgments. We think the words
in question are of the nature of a saving clause, guarding against the supposition
...idence further
...owledgment is
Wajibun v
Kadir, 13 C 192; see also *Chathu* v *Virarayan*, 15 M 191; but see *Ziaulnissa* v
Moludev, 12 B 268 This controversy has been set at rest by Act IX of 1908,

detailed record
of records, an ent
f that statement to be
sufficient secondary
Nowroz, 5 P. W. R.
1914 = 16 P L R 1915.

CLAUSE (A).

Original in the possession or power of the Adversary When a document
is in the possession of the adverse party or of some one bound to give up
possession thereof to him (e g his solicitor (*Irwin* v *Lever*, 2 F & F 269 *R* v.
Hunter, 4 C
(*Taplin* v *Att*,
Sinclair v *Ste*
but not a stake
Gow R 1(31)

in this section ar

up possession to hi
the personal custody of the opponent himself, ...
third person on the opponent's behalf and subject to the opponent's demand.
Wigmore § 1200 So wherever it is in the
party and he refuses to produce it after n
R v *Watson*, 2 T R 201, *Makbul Ali* v
Greesh Chunder v *Ramlal*, 1 W R C ...
cases equally with civil *R* v *Elworthy*, 10 Cox Cr 579 582 The reason why
secondary evidence is admissible in such a case is thus given by *Buller J.* in *Att.*

65. *Gen* v *Le Merchant*, 2 T R. 201 *note*. "It was likewise said, in support of the motion, that the reason why copies are permitted to be evidence in common

does not produce them is in no fault at all, and for that reason a copy is not admitted. But I do not take that to be the rule; it is not produced upon any

sion of the opponent. It is enough if it is in his power to produce it *Parry* v *May*, 1 Moo & Rob 280 So "the possession of the plaintiff's attorney is the possession of the plaintiff, though they might perhaps be subpoenaed, it is

is a party to the suit, it

J in *Irwin* v *Lever*

of the jurisdiction of

d When a document

of the opponent, very recently, the

R v *Hunter*, 4 C & P. 128.

before notice served be an excuse,

ent, at the time of notice, that he had transferred it *Wigmore* § 1200 *contra*, *Wright* v *Bunyard*, 2 F. & F 193, 194 Before a secondary evidence is admissible under this section, the opponent's possession of the document in question must be shown somehow, *Knight* v *Martin*, Gow 103, *Whitford* v *Tutin*, 10 Bing 395, *Shape* v *Laul*, 11 A & E 805 Of this fact very slight evidence will raise a sufficient presumption when the documents exclusively belong to him, or regularly ought to be in his custody according to the course of business *Taylor* § 440; see also *Ajoodha* v. *Esharee Dyal*, 10 W. R. 219; *Bhubanesuari* v. *Harisaran*, 6 C 720=8 C L R 337 P C; *Henry* v. *Leigh*, 3 Camp 502. So where a bankruptcy certificate was proved to have been obtained for the defendant, the Court presumed that it had come into his possession *Henry* v. *Leigh*, 3 Camp 502; *Robb* v *Starkey*, 2 C & Kir 143. If papers were last seen in the hands of the defendant, it lies upon him to trace them out of his possession *R.* v. *Thistlewood*, 33 How St Tr 757 The rule is the same in criminal cases *Perry* v *May*, 1 M & R 276; *Langton* v *Reynolds* 18 *Jur.* 963 The Adversary's possession may also be proved by the admission of his counsel. *Duncombe* v *Duncombe*, 8 C & P. 222. A party served with notice cannot evade its effect by subsequently parting with the document. *Knight* v. *Martin*, Gow. R. 104; *Nort* 246 It would seem that when a party has notice to

f the evidence is a

Rob, 366

is sufficient proof

possession of the opposite party *Mt. Salman* v. *Hakim Mukdam*, A. I R 1928 All 304. This section lays down that secondary evidence may be given, of the contents of a document when the original is shown or appears to be in the possession or power of the person

against whom the document is sought to be proved This section does not require that in all cases it must be definitely proved that the document is in possession of the other side against whom it is sought to be proved ...

its contents can be given *Dwarka Singh* v. *Ramanand*, 41 A. 592 = 17 A L. J. 711 = 51 Ind. Cas 275; see also *Mussamat Saleha Bibi* v *Oudh Commercial Bank*, ...

of a notice to produce, unless the original is shown or appears to be in the possession of the person against whom the presumption is drawn. *Per Walsh J.* in *Mongra* v *Debi Ram*, 35 Ind. Cas. 328.

Of any person out of the reach of, or not subject to, etc This clause ... who is out of ... secondary ... ing notice ... *Wiseman*, ... L J P. & M 109.

According to English law the mere fact of the non-amenability of the possessor to legal ... process cannot ... possible forms of ... by a Court before excusing for non production If the precise whereabouts of the document is unknown, search may be made; if the possessor be ascertained, he may be requested to appear with the document, or he may be requested to deliver the document for the use at the trial, or his deposition may be taken with a copy furnished by him annexed to it No one or more of these efforts ... to make any such ... In the first group, ... a nature depending more or less on the circumstances of the case *Boyle* v *Wiseman*, 10 Exch. 647, *Ward* v *Murray*, 1905, Times, Mar 5, cited Phip p 548 In the second ...

v *Gan Kim* 9 C 939 So also secondary evidence of a document can be admitted without notice to the adverse party, when the person in possession of the document is out of the reach of or not subject to the process of the Court *Haranand* v *Ramgopal*, 27 C 639 (P C) = 27 I A. 1 = 4 C W N 429 Section 86, of the Evidence Act, lays down that if a copy of a foreign judicial record ... presume it to be genuine ... other proof, for under ... may be given of public ... person is out of reach

5. of, or not subject to the process of the Court. *Haranand* v. *Ram Gopal,* 2 Bom L R 562 A notarial copy of a foreign will is admissible on proof by experts that the original is not allowed to be removed, and that the local Courts regard such copies as equivalent to originals *Phip Ev 7th Ed* 527; *Re Von Lieund,* (1896) P 148; *Re Lemme,* (1892) P 89, *Enohin* v *Wylie* 10 H L C 1, but see *Re Broun,* 80 L T. 360, *Permanent Trustee* v *Fels,* (1918) A C 879

As regards the meaning of the expression of "any person not subject to the process of the Court" there is some conflict of opinion According to *Mr. Stokes* these words are intended to inclu bound to produce the document on accou produce it. *Stokes Anglo Indian Code,* V C & P 737, *Morston* v *Dawney,* 1 H & 31 this clause includes that rule of English s subject is thus briefly "Secondary evidence is a stranger to the proceed- here lawfully refuses to im either in his own right or as agent acting on the of the party who seeks attendance in Court of the of *subpoena duces tecum*, and should lawfully refu admissible *Doe* v *Clifford,* 2 C & K 448, *Dwyer* v *Collins* (1852) 7 Ex 632. If on the other hand he attends, but without the document, and a *subpoena duces tecum* has not been served on him or not been duly served, this is a fatal objection to the admission of secondary evidence as the party has not done all that lay in his power to procure the production of the original (*Hibberd* v *Knight* 2 Ex 11) If the person so refusing is merely agent for another by whos principal does so the Court upon a

the reach of, or not subject to, the process of the Court" So it cannot be said that this clause includes the English rule just mentioned

209; *Huntingdon* v. *Mildman,* Cro Jack 217; *Wigmore* § 1211 So "where a person is an utter stranger to a deed, there in pleading he is not compelled to shew it" *Buller Nisi Prius,* 252 So if the person possessing the document is by reason of privilege not compellable to produce, there is the same reason for admitting other evidence of its contents as if its production were physically impossible, because the party who stands in need of the evidence which that document affords is not to suffer from its absence at the trial *Per Pollock C B* in *Sayer* v *Glossop,* 2 Exch. 409, 410. Mere disobedience to a notice to produce

what is called a *subpoena duces tecum* i e, a summons to attend the trial as a witness and bring the documents with him (Vide Order 16, rule 1 of Act V of 1908 = s 159 of the Old Code) The person on whom such a *subpoena duces*

tion, penalty, or forfeiture (*Vide* s 130 *infra*) So a party will not be required to produce the muniments of title to his estates (*Taylor* § *158, 1164, section 130 infra*), nor will his solicitor, to whose care they have been entrusted (*Hibberd* v *Knight*, 2 Exch 11; *Doe de Gilbert* v *Ross*, 7 M & W. 102; *Volant* v *Soyer*, 13 C B 231); and in either case independent secondary evidence of their contents may be given *Per Hill J* in *R.* v *Leatham*, 3 E & E 658, 668; *Best Ev* § 216 So it is "a well established rule of law" that the productions of a privileged document is excused *Per Hill J* in *R* v *Leatham* 3 E & E 658, 668. The principal may of course waive his privilege (*Merle* v *More*, Ry & M 390),

is apprehended that no secondary evidence is admissible under the Indian Evidence Act, if the party in possession of the document withholds it under §§ 130 and 131 of the Act

regards this clause *Mr.* words 'of any person they stand, there is no of the document, as an hardly believe that this is what was intended I think it probable that the word 'not' has been here omitted by mistake, and that the case intended to be dealt with here is the

911 "We are not entitled" said *Lord Loreburn* "to read words into an Act

65. Under rules of strict interpretation it appears that this clause intends to make a departure from the English rule, which does not allow secondary evidence of any document improperly withheld It may be that the party calling for the document which has been improperly withheld, has its remedy against the party so withholding the document in separate suit for damage or he may be punished for contempt of Court but such remedy may give very inadequate relief where the party withholding is a pauper and the loss to be suffered for the non production of the document is considerable Moreover that will give rise to multiplicity of suits It is also not desirable to deprive a party to produce secondary evidence of a document, simply because a third person refuses to produce the original of the document wilfully or perhaps fraudulently There may be in addition the dan
the party withholding such do
some legal right to the doc

according to *Prof Wigmore*, the rules of law laid down by *Alderson B.* in *Jesus College* v. *Gibbs*, 1 Y & C 145 156, where he said "You could not have proved it by secondary evidence unless the document had been in the possession of a party not bound to produce it (The third person refuses) it is true, at his

to cover a contigency for which no provison has been made in the Act itself.

Wher
have been
secondary
203, *Lord*
a false copy" But the giving
inst the contemplated danger. The
the opponent does not produce the
Hall, 14 East. 274, 276, *Le Blanc J*
on previous notice to be
given . that he may not be taken
Dudley 62, 64 "The answer to this is, fi
to guard against surprising his opponent by warning

S.

secondly, that if here the purpose were, to give the opponent time to discover evidence impeaching or confirming the document, the notice should allow time for such an investigation, yet the law is clear that only time enough to produce the document need be allowed; and thirdly, that if, in fact he is not surprised, it is in law still no excuse for not giving notice.' *Wigmore* § 1202 'The true reason is" says *Prof. Wigmore* "that which is naturally deducible from the proponent's situation He is required to produce the document if he can; he says that he
will not bring

with the request If we translate
ly appreciate the significance of the
future production by the opponent;
and this notice of demand is necessary, in *Baron Parke's* words, (in *Dwyer* v *Collins*, 7 Exch 639) 'merely to exclude the argument that the party has not

shown that by giving notice to that adversary to produce it, he has used every exertion in his power that the best evidence might be given" So where a document of title which is in possession of a party is not produced by him after notice to produce the same, the party giving notice is entitled to give secondary evidence of the document under s 65(b) and section 66 proviso 2 *Narsidas* v *Ravi Sankar*, A I R 1931 Bom 33; see also *Abdul* v *Kishan*, 11 Lah L J 401, *Makhan Lal* v *Gavinda*, 13 R D 718; *Subbayulu* v. *Vengama*, A. I. R 1930 Mad 742 = 123 Ind Cas 197; *Wigmore* § 1202, see also *Maungsan*

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ought to be, denies that he has it, secondary evidence is admissible *Teju Mal* v *Zulphakar Sha*, 49 P R 1882 The word "produce' only means "procure the production or give it in evidence" *Gaya Prosad* v *Jaswant*, 1930 A L J. 1003 = 125 Ind Cas 460 = A I R 1930 All. 550

CLAUSE B

Written admission as to the contents of an original document Section 22 lays down that oral admissions as to the contents of a document are not

proof of a document even though the original is in existence, and might be but is not produced *Cun Ev* 221 The result seems to be this —The written admission may always be proved The oral admission can only be proved in

65. condition mentioned in cl (b) of section 65, be admitted. *Safar Ali* v *Mohesh*, 23 C L J 122=34 Ind Cas 956 In a suit for redemption of mortgage, the mortgage deed was not produced Secondary evidence consisted of a document addressed to the mortgagors by the alleged agent of the mortgagee, which

proved to liability ortgagee, rting to be his It was It was produced for mortgaged deed under

s 65(*b*), secondly, to save limitation under section 19 of the Limitation Act *Held* that the document was no secondary evidence of the existence of the mortgage as it did not fall within the category of writings described in clause (*b*) of section 65 of the Evidence Act *Gajraj* v *Bakar Ali*, 20 Ind Cas 62 This clause has no application where the original document is inadmissible for not being registered or properly stamped. *Dweltu* v. *Krishnaswami*, 6 M 117; *Sambayya* v *Gangayya*, 3 M 308, *Damodar* v *Atmaram Babaji*, 12 B 443 (446) Where the reocord of the statement of the accused is not admissible, secondary evidence thereof could not be given *Queen Empress* v *Viram*, 9 M 224 In rejecting such evidence, *Parker J* at p 240 observed: "Reference is made by the Sessions Judge to s 65 of the Evidence Act, the words appearing in cl (*b*) in that section being quoted; but for the reasons above stated, I am of opinion that it was n writing—if the affixing be held to constitute a contents of the previous statements"

CLAUSE (C).

lost or destroyed. The loss or destruction of , opens the door for the admission of secondary ley's Ev 274 This rule is a very old one. In 1611, in *Dr Leyfild's Case*, 10 Co Rep 92 (a)=Wig. Cas 235 in admitting secondary evidence in such contingency, the Court observed: "yet in great and notorious extremities, as by casualty to fire, that all his evidences were burnt in his house, there, if that should appear to the Judges, they may, in favour of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses, that affliction be not "The extreme whenever equally y slowly. where

Anon, Jenkins J In th charters have been los

2 Keble 546; *Underhill* 8; *Robinson* v *Davis*, 1 v *Mellmish*, Ambl 24 *Villers*, 2 Atk 71, Lord

foreseen or Now the y unavail- evidence is destroyed

Wuzeer Ali v *Kali Coomar*, 11 W R 228; *Rajendra* v. *Behari*, A. I. R. 1932 Pat 157; *Ablheraj* v. *Gaya*, 8 O. W N 1228 But secondary evidence is admissible where the Court is satisfied that the original is lost or destroyed *Hurrish* v *Prosunna*, 22 W R 303, *Syed* v. *Nuseebun* 10 W. R 24, *Lukhimoni* v. *Koruna*, 3 C L R 509; *Khetter Chunder* v *Khetter Paul*, 5 C 886=6 C L R 199; *Jaffree Khanum* v *Imdad*, 2 N W. P 314; *Woomesh Chunder* v *Sama Sundari*, 7 C. 98=8 C. L. R. 189; *Syed Abbas* v *Yadeem*, 3 M I. A 156;

Amerunnisa v. *Afadoonnisa*, 15 B L R
A. 87; *Sheo Sarun* v *Goolbance* W R
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C J 160
v *Kishori*
Hay 581;
Sugden v. *Lord St Leonards*, 1 P D 154; *Ranee* v *Hardyal*, W R (1864) 301; *Ranjit* v. *Chunilal*, 1 N. W P 178; *Bishambhar* v *Emperor*, 90 Ind Cas 706=2 O

3; *Marakarutti* v *Veerankutti*, 16
M 67
Cas 660; *Gopi* v *Mahanandi*,
12 M
21 L W 227=97 Ind Cas
785=A I R. 1926 Mad 1003; *Tulsi Ram* v *Ram Saran*, 23 A L J 109=

l known and that fact may be recognised
telegrams are destroyed after three months
secondary evidence is admissible *Bishambhar Nath* v *Emperor*, 2 O W. N 760=90 Ind. Cas 706 If it is found that a document has been lost evidence may be given and whether proof is sufficient in a case is a question of fact *Bibi Sugra* v *Angad Gir*, L R 1 A 201. But a mere assertion in an explanation that a document is lost without any

cient ground for admitting secondary
3 A 539 Where the explanation for the
is lost, the regular course is to prove the loss before tendering secondary evidence *Surat Singh* v *Ram*, 59 Ind Cas 461 In ordinary cases if the witness in whose custody a deed was, should depose to its loss, unless there is some motive suggested for his being untruthful, best evidence should be accepted as sufficient to let in secondary evidence of the deed *Chhishan* v *Jamna* 24 O C 272=48 I A 365 P C

of such
s 1006
insist-
power-
Dayal,
Ind Cas 399 But the question whether or not sufficient proof of search for, or loss of, an original document, to lay a ground for admission of secondary evidence has been given, is, a point proper to be decided by the Judge of first instance and is treated as depending very much on his discretion and his conclusion should not be overruled, except in a clear case of miscarriage *Ma Paik*

f filed a suit on
have been lost and
was not lost but
suppressed as there was an
payment of

A L J 265=18 Ind Cas 878

word "destruc-
" merely that it
the two come
moment that the
destruction becomes questionable at all (i e when not proved by eye witnesses of burning or tearing, the inquiry is raised whether the search for it has been

sufficient; and, in the next place, the proof of a loss usually carries the implication that the thing not found has ceased to exist, and thus assimilates the case to one of destruction Thus the great question to which so many Judges have devoted so much pains—the establishment of a test for the sufficiency of proof of loss—includes practically not only the cases, of loss in the narrower

[illegible]

useless paper, [illegible] and important document which the party might have an interest in keeping, and for the *non-production of which no satisfactory reason is assigned* . . . where the loss or destruction of the paper may almost be presumed very slight evidence of its loss or destruction is sufficient" *Per Abott C J* in *Brewster* v *Sewell*, 3 B [illegible] this,

[illegible]

never likely to be required for any purpose whatever In the former case [illegible] reasonable to exact proof of a very careful search, whereas in the latter very slight evidence tending to show loss or destruction will suffice. *Will Ev 2nd Ed* p. 208. What is proper search or enquiry must depend on the particular

[illegible]

surrounding circumstances of the particular matter before the Court [illegible] jury A *paper of considerable importance*, which is not likely to be permitted to perish may call for a much more minute and accurate search than that which may be considered as waste paper, which no body would likely take care of. . What inquiry will do? I think, in cases of this sort [there the loss was of a [illegible] after its [illegible] no [illegible] the [illegible] where it ought to be found" *Per Poll*[illegible] W 319 329 In the same case *Alderson* [illegible] has been a loss, and whether there has [illegible] much on the nature of the instrument searched for . If we were speaking of envelope, in which a letter has been received, and a person said, 'I have searched for it and [illegible] not So with res[illegible] party wh[illegible] to be [illegible] it has been take[illegible] If he had said, [illegible] ought to go to [illegible] away A [illegible] would be satisf[illegible] itself; and the [illegible] contents of this [illegible] document by [illegible] the original *R* v *Morton*, 4 M & S 48, *Gully* v *Exeter*, 4 Bing [illegible] C B N S. 747, 750, *R* v [illegible] W 269; *R* v *Gordon*, 25 [illegible] ully as to exclude every [illegible] The question is hypo[illegible] alwa[illegible] of it[illegible] that [illegible] infor[illegible] suggests and which were [illegible]

st. 278; *R.* v *East Farley,* 392—1896) Vol II, 347. If circumstances tending to ... most rigid enquiry should be made into the reasons for its non production *Johnson* v *Anume, supra.* It follows, properly, that the determination of the sufficiency of the search and in general of the proof of the fact of Court's discretion *Wigmore* § 1191 evidence of the search of the originals, are admitted Whether or not sufficient proof of search for or loss of, an original document, to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the Judge of the first instance, and is treated as depending very much on his discretion His conclusions should not be overruled except in a clear case of miscarriage *Harpria Debi* v. *Rukmini Debi*, 19 C 438=19 I A 79 P C, *Choitram* v *Khem Chand*, A I R 1929 Sind 7 In *R* v *Kenilworth*, 7 Q B 642, 649, *Denman L C J* said "I think that we collect from *R* v *Morton*, the only rule, namely, that no general rule exists The question in every case is, whether there has been evidence enough to satisfy the Court before which the trial is had, that to us the words of *Bayley J* in *R* v *Dento*, 'a 'bonafide" and diligent seach was made for the instrument where it was likely to be found' But this is a question much fitter for the Court which tries than for us They have to determine whether evidence is satisfactory, whether the search has been made *bona fide*' where there has been due diligence, and so on It is mere waste of time on our part to listen to special pleading on the subject" *Wigmore* § 1194, *Ma Nyein* v. *Mayin*, U B R (897

proof was given of search, cannot be received as secondary evidence *Meer Usudoollah* v *Beeby Imaman*, 5 W R P C 26=10 M I A 19, see also *Roopmanjooree* v *Ramlal*, 1 W R 144; *Pandu* v *Bapudas*, A. I R 1929 Nag 288

Non production for any other reason The question whether the non-production is due to any other sufficient reason not arising from his own default or neglect is one of fact and depends mainly on the discretion of the Court. *Gaya Prosad* v *Jaswant*, 125 Ind Cas 460=A I R 1930 All 550 The certified copy of a document which is already filed in another Court and cannot be produced without unnecessarily delaying the trial of the suit is admissible under s 65(*c*) *Jobeda* v *Monabali*, 130 Ind Cas 865=A. I R 1930 Cal 479

CLAUSE (D)

When the c

6 M & W 68

also be proved

be produced in Court *Taylor* § 438, see also *R* v *Forsey* 6 C & P 81 *Cobden* v *Bolton*, 2 Camp 108, *Doe* v *C*

8 C & P 728, *Bruce* v *Nicolopolo* 1

bringing a notice into Court."

A remarkable illustration of this rule was furnished in the case of a man, who wall of the Liverpool goal, on mere *Lord Abinger* in *Martimer* v *M callan,* must show that the writing cannot oduced in Court. *Jones* v *Tarleton,* 9 M & W. 675=11 L J. Ex 267. Evidence has been admitted of the inscription

65. on a wall or a tomb stone giving the date of death *Smith* v *Patterson*, 95 Mo 525=8 S W 567; *Bruce* v. *Nicolpolo, supra*, *R* v *O'connell*, 5 St. Tr N S 241. If there ar ... stone itself may have to be produced ... ; ... *Davidson*, 13 Q B. D 265 There is a ... that the Court may readily as ume that they cannot be produced in Court, and as to which secondary evidence may be allowed, such as inscriptions and addresses on travelling trunks If the producti ... s found is indispensable, it would ... sign were painted on a house, it w ... have to be produced, nor can it be for wagons, boxes, tombstone, and the like, on which one's name may be written *Kansas etc Rail* v *Miller*, 2 Colo 440, *Burrell* v *North*, 2 Car & K 679 While Courts, in the administration of the law of evidence, should be careful not to open the door to falsehoods, they should be equally careful not to shut out truth They should not encumber the law with rules which will involve labour and expense to the parties, and delay the progress ... without giving any additional safe guard ... *ited States*, 3 Wall. (U S), 114; *Burr* ... on a coffin plate, the coffin plate should be produced as it is removeable *R* v *Fine Wills Cir. Ev 5th Am* Ed 212 ... says *Mr. Taylor* "and the ... it its removal, secondary ... that case, as in the case of mural inscriptions, it is not in the power of the party to produce the original" *Alton* v, *Farnual*, 1 C M & R 227, 291, 292; *Boyle* v *Wiseman*, 10 Ex R. 647 ' *Taylor* § 438 *Mr Whitley Stokes* thinks that such a case is not provided for, unless perhaps by the latter part of clause (c) But it can hardly be said that the original cannot be produced in reasonable time when it cannot be produced at all It seems that the case would fall under paragraph (iii) of clause (a), in as much as it is in the power and possession of a person who is out of the reach and not subject to the process of the Court *Woodroffe Ev 8th Ed.* p 519 Secondary evidence, of the abstract which by section 32 of the Factory and Workshop Act, 1901 (*Edw 7 C 22*) must be affixed in the factory, can be given as the original cannot be removed. *Owner* v *Beehive Spinning Co Ltd*, (1914) 1 K B 105=83 L J K B 282, *Mortimer* v *M'Callan*, 6 M & W 58. Under this clause any kind of secondary evidence is admissible

CLAUSE (E)

When the ... ble record under se ... this clause In ... *Lal*, 14 C 491 This excep- ... *Mark Ev* 57 In *Hannel* v. ... "The admission of copies ... practice and besides the documents might be wanted at different places at the ... you cannot remove the document in which the writing is made, you are entitled to the next best evidence" *Per Abinger L C. B* in *Mortimer* v *M'Callan*, 6 M. & W 58, 59, *Wigmore* § 1218.

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public ... which the
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(c) In the matter of Adya, 11 Ind Cas 261.

An entry in a public document such as a settlement record can be proved only by the original ... A I R 1923 Lah 150 ... tenant ...

... chmi Das, ... evidence ... Radha Nath v Empe... L J 659.

It is doubtful whether ... rom some record in the Revenue Court is admissible in evidence *Bhagwati* v *Marjad*, A I R 1931 Oudh 136=129 Ind Cas 331=7 O W N 1079.

CLAUSE (F).

... ndary evidence of the contents ... a document of which a certified ... er law in force in British India ... given in evidence in the first instance without having been introduced by any other evidence *Harish* v *Prosunno*, 22 W R ... of which a certified copy ... in British India to be giver ... Cas 50 *Hazari Lal* v ... Cas 752 Section 57 of the ... under that section shall be admissible for the purpose of proving the contents of the originals, but that clause was not intended to override the provisions of the Evidence ...

... admissible in evidence *Sansa Rao* v *Ghasi*, 13 C P L R 94 The issue of a certified copy of income-tax returns to a person not entitled to inspect is forbidden by s ...

... the deposit thereof ... ys Act, (VII of 1882)

65. This clause only allows certified copies as secondary evidence But when the original is lost or destroyed any secondary evidence is admissible *Kunnath* v *Vayoth*, 6 M 80, *In re Ava and the Brenhildu*, 5 C 588, *Chandresuar* v *Bisheswar* A I R 1927 P 61=101 Ind Cas 289=5 P 777, *Hiranand* v *Ram Gopal* L R 27 I A 1=27 C 639 P C; *Ananda* v. *Secretary of State*, 43 C 973=20 C W. N. 573 Other secondary evidence is also admissible where the document satisfies the condition of the next clause *Ram Sundar* v *Chandresuar*, 34 C 293.

CLAUSE (G).

When the original consists of numerous documents This provision is for the saving of public time If the point to be ascertained were, for instance, the balance in a long series of accounts in a merchant's books evidently great inconvenience would arise, and much public time will be wasted, if a witness were
and to make his examination
Beiling, 3 Camp 310 He is
sworn, and then to give the
1 *Phil Ev* 433 *Taylor* § 462,

where the books and documents are multifarious and voluminous and of a character to render it difficult for the jury to comprehend material facts without the aid of such statements . . In a trial embracing so many details and occupying so great a length of time as the case at bar, during which a great mass of
. t was the only mode of attaining
the jury" *Wigmore* § 1230 The
is principle is that by which the
state of pecuniary accounts or other business transaction is allowed to be shown by a witness's schedule or summary, *Meyer* v *Sefton*, 2 Stark, 274, 276; *Gardner*
rshaw, 1 De G & Sim 260,
of copyright, the material
presented in such a way as
to be conveniently compared *Lewis* v *Fullerton*, 2 Beav 6, 8; *Mawman* v *Tegg*, 2 Russ 385, 398, *Wigmore* § 1230 A witness may speak as to the insolvency of a party at a particular time from an inspection of his books *Meyer* v. *Sefton*, 2 Stark 274 This exception however, will not enable a witness to state the general contents of a number of letters received by him from one of
the parties in the cause,
object of the examination be
they produced on his mind
between the writer and a th
Taylor § 462 'So a witness'
the parties, though he may not
allowed to speak to the general
Lord Kenyon in *Roberts* v [illegible]
Courts" says *Prof Wigmore* 'require, as a condition, that the mass thus summarily testified to, shall, if the occasion seems to require it, be placed at hand in Court, or at least be made accessible to the opposing party, in order that the correctness of the evidence may be tested by inspection if desired, or [illegible] § 1230,

any person who has examined them, and who is skilled in the exami[illegible] of such documents In *Ram Sundar* v *Chandreshuar Prosad*, 11 C W N 501=34 C 293, the Court observed "This objection is founded on the fact [illegible] who had examined

embodied the results of their examination of the records and registers. The objection made by the learned Counsel for the Appellant is that the Collectorate
, under the provi-
e documents are
But the learned Judge has found as a matter of fact that those documents could not be conveniently

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Evidence Act, then the only secondary evidence which could be admitted was the certified copies of the documents in question We do not agree with the
We think the
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documents That being so,
general result of the documen
skilled in the examination of those documents and the general result was given by the Record keeper and the clerks who gave evidence before the learned Judge" Abstract of mutation records is admissible under the section *Sher Mohammed* v
78 Ind Cas 451 Evidence may be
when they consist of numerous
Kanungoes entertained to assist the
ue Records, yet it is an abuse of
their functions to require them to give oral evidence of the contents of a document such as record of a *Muafi* enquiry which ought to be examined in original by the Court itself *Gilani* v *Mussamat Hussan*, 2 Lah L J 714

Rules as to notice to produce.

66 Secondary evidence of the contents of the documents referred to in section 65, clause (*a*), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is *[or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case.

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it —

(1) when the document to be proved is itself a notice;

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it;

*These words in section 66 were inserted by the Indian Evidence Act Amendment Act (18 of 1872) s 6

(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4) when the adverse party or his agent has the original in Court;

(5) when the adverse party or his agent has admitted the loss of the document;

(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

Princi ... quired if production ... rved on the party ... because ... the original

notice to the party in possession ...

in ... *Per Poter J* in *Aoot* ...

9 ... f notice is satisfied, no notice is necessary ...

... embodies the law of notice, which ... can be received under section 65, ... section 34 of Act II of 1855 which ... section 65 (*a*), namely, that where the document was out of the reach of the process of the Court Taking this section with clause (*a*) of section 65, notice must be given where the document is in (*a*) the possession or (*b*) the power of the person against whom it is sought ... e possession of a person legally bound to ... y where a person is out of the jurisdiction of, ... cases arising

order, cases in which the rule of notice is ... rule is satisfied, cases in which, by exception, ...

§ 1202 Where it is in the hands of the a ... order to lay the foundation for secondary evidence is reasonable ... to produce it *Bradford's Case*, Case 24 in Clayton's Rep = Thayer Cas Ev. p 780 In *Salern* v *Mehnish* Ambler 247, *Lord Hardwick* in allowing proof by a copy said · "There ... parol may be given of the contents o ... deed is in the hands of ... and does not ... The rul ... of the

... ay be ... The

proved is itself a notice to quit, ...

(2) where from the nature of the action the defendant has notice that the p... intends to charge him with possession of the instrument, as for example, in trover of a bill of exchange *Jolley* v *Taylor*, 1 Camp. 143; *Scott* v. *Jones*,

P. 113 (3) Where the adverse party ... udulently, as where, after service ... had received paper from the witness in fraud of the *subpoena*. *Leeds* v. *Cook*, 4 Esp 256, *Neally* v *Greenough*, 25 N. H 325. (4) Proof that the adverse party or his attorney has the instrument in Court, renders notice to produce it unnecessary. *Dwyer* v *Collins*, 7 Exch. 639 (5) Similarly no notice is necessary where the adverse party or his agent admits the loss of the original In such a case the party will be admitted to give secondary evidence of its contents (6) Similarly if the writing is in the control of a third person without the jurisdiction of the Court, no resort to legal force is of service *Greenl Ev* § 563(e) The above rules are applicable both in civil and criminal cases It will comparatively seldom happen that documents are required to be produced at a criminal trial, and ... 1 *Nort Ev* 251 Where a letter, which was neither ...

... Each partner should be served with the notice contemplated by s 66 of the Evidence Act to produce such accounts and papers as may be in his custody If he omits to produce the books and the books that are proved to be at the time in his custody or under his control the presumption recognized in illustration (8) to s 114 of the Evidence Act may be applied. *Pulin Bihary* ... y document can ... *ung Po* v *Ma* ... contents of a ... section though ... no subsequent dispensing with the notice can operate to make it admissible *Prafulla* v. *Emperor*, A I R 1930 Cal 209 = 50 C. L J 598

Secondary evidence of the Contents 'Secondary evidence of the contents" means apparently "not of the existence or condition of the documents" *Whitley Stokes*, Vol II p 893

Party—Meaning of The word 'party' means not only adversary in the cause, but also a stranger 'legally bound to produce' the document *Whitley Stokes*, Vol II p 893

Such notice to produce as is prescribed by Law According to English practice an adversay in the cause is given a notice to produce the document in question ... be served with a ... 14 The notice ... on either *Att* ... C & P 394 But ... *Alfalo* v *Fourdrinier*, M & M 334, *Byrne* v *Harvey*, 2 Mo & Rob 89 But as to the time and place of the service no precise rule can be laid down, except that it must be such ...

party desiring to use it, until he has by *subpoena duces tecum* resorted to the

S. 66.

hold that in an action of trover for bonds or notes no notice to produce the ...
soug
the
the e
instrument These principles apply directly in this case. The form of ...
pleading, we must
had in his possession,
found then to co
(N. Y.) 293; see
Cr. 579 (582)
of papers, (*Jolley* v *Taylor* 1 Camp. 143); in an action to recover the amount of a forged bank note which has been returned to the defendant. [*Luckett* v *Clark*, ...

D 446) In an action in contract it is held that the pleadings imply notice to the orders and letters constituting the contract. *Zipp* v. *Colchester*, 12 S D 211 (*Am*). So the rule is the same where the writing is a proper matter of defence and the adverse party must understand that it will come in question (*Kelnor* v S ... written contract in possession ... *Dana* v *Conat*, 30 V. ... forging, passing, or delivery is of the same kind with the others which he has disposed of or retained in his possession, he had notice in effect that if practicable to procure it, evidence will be given of their counterfeit character and of having passed them as true. It is notice in law, by which a party is as much bound both in civil and in criminal cases as by notice in effect. Notice in fact is notice in form; notice in law is notice in effect, and either is sufficient," *Per Baldwin J* in *U S* v *Doebler*, 1 Bald W 519, 524 (*Am*). It seems settled therefore, that on a charge of larceny or of forgery no express notice is necessary; and the principle would also extend to other charges; but the nature of the charge will determine the application of the principle *Wigmore* § *1205 R.* v. *Haworth*, 4 C & P 254, 256 But in an action for arson with intent to defraud the insurer, notice to produce the policy was required. *R.* v. *Kitson*, 6 Cox Cr 159, see also *R* v *Elworthy* 10 Cox Cr. 579 (582). If the maker of a note or cheque or the acceptor ... an action, deny by his ...

4 Taunt. 865; *Bucher* v. *Jarrat*, 3 B & P. 143. (3) Where the adverse party has obtained possession of the document fraudulently, as where, after service of a *subpoena duces tecum*, the adverse party had received paper from the witness in fraud of the *subpoena*. *Leeds* v *Cook*, 4 Esp 256; *Neally* v *Greenough*, 25 N. H 325 (4) Proof that the adverse party or his attorney, has the instrument in Court, renders notice to produce it unnecessary. *Dwyer* v *Collins*, 7 Exch. 639 (5) Similarly no notice is necessary where the adverse party or his agent admits the loss of the original. In such a case the party will be admitted to give secondary evidence of its contents (6) Similarly if the writing is in the control of a third person without the jurisdiction of the Court, no resort to legal force is of service *Greenl Ev* § 563(e) The above rules are applicable both in civil and criminal cases It will comparatively seldom happen that documents are required to be produced at a criminal trial, and notice will consequently have but seldom to be ...

section 65 of the Evidence although no objection was ... *la*, 26 C 53=2 C W N 649 Each partner should be served with the notice contemplated by s 66 of the Evider... papers as may be in his custody ... books that are proved to be at the ... the presumption recognized in illustration (8) to s 114 of the Evidence Act may be applied *Pulin Bihary* v *Mohendra*, 34 C L J 405 Before secondary evidence of any document can be given, a notice to ... v *Ma Shwe*, 2 Rang 397= ... of a letter neither called ... hough no objection may be taken to the giving of that evidence, and no subsequent dispensing with the notice can operate to make it admissible *Prafulla* v. *Emperor*, A I R 1930 Cal 209=50 C. L J 598

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... ding to English ... he document in ... be served with a ... 14 The notice ... l on either *Att* ... C & P 394 But ... *Alfalo* v *Four-* ... s to the time and ... t it must be such as to enable the party, ... with the call *Rogers* ...

... is ... & P. ... v ... use ... ney ... on ... ally ... owl ... *Bat* ...

party desiring to use it, until he has by *subpoena duces tecum* resorted

S. 66. power of the law to obtain it; so that the mere fact of the third person's possession, or of notice to him, or

In India the procedure for [illegible] riminal Procedure Codes (*Vide Civil Pro Code*, Order XI rules, 15, 16, 17, 18 and Order XVI, rules, 5, 6, 7, 8, 9, 10, 18, *Criminal Procedure Code*, ss 94 to 98, 485) In the original side of the High Court where the English practice is followed, a *subpoena duces tecum* [illegible] *offe Ev 8th Ed* 523 [illegible] ll be served as the Court

"It may be defficult to lay down any general rule as to what the notice

[illegible] be dangerous to do so since if any material errors were to creep into the parti-

Lawrence v *Clark*, 14 M & W. 250 Notice to produce 'all letters written to and received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person on their behalf; and also all b [illegible] (*Morris* v. [illegible] defendant, [illegible] & Rob 33); and also "all accounts relating to the matters in question in this cause" (*Rogers* v *Constance*, 2 M & Rob 179) have been held sufficient notice to [illegible] 679 *Bes*. ent *sup* thi bo at of wh *An* [illegible]

Where a [illegible] him instead of on the woman herself would constitute notice as is required by this section *Durgawati* v *Jagannath*, A. I R. 1929 All 680

[illegible] the jury [illegible] *Doe d Bridges* v [illegible] declines to use the [illegible] will not make them [illegible] 10), though it is other- [illegible] g them *Wilson* v [illegible] 5 Notice to produce [illegible] ine a witness as to their contents. *Graham* v. *Dyster*, 2 Stark 23. If a party refuses he cannot

o contradict the secondary proof (*Doe d.* S.
135) or to show that there are attesting
...ckson v *Allen*, 3 Stark 71; *Edmonds* v.
Challias, 7 C B 413); or to refresh the memory of a witness (*Fill* v *Ainsworth*, Bristol, 1847); or it seems, for any purpose (*Collins* v *Garbon*, 2 F. & F. 47. *Doe* v. *Hodgson*, 12 A & E 135) He is in effect bound by any legal and satisfactory evidence produced on the other side. *Shookram* v. *Ramlal*, 9 W. R. 248; *Nort Ev* 252

roved is itself a notice.
a copy The reason
Slaymaker, 14 S & R
Pa 153, 156 (*Am*) "Every written

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ing" *Wigmore* § 1206, see also *Phillipson* v *Chase*, 2 Camp 111 But this consideration can well be made in th
the notice to produce In England,

quit *Ibid* There also this exception
in regard to notices to produce, for the

aracter of
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red for a
ature of a
to be a
mere notice". *Grove* v *Ware*, 2 Stark 174 A notice of a bill's dishonour was held to be a notice *Ackland* v *Pearce*, 2 Camp 599 But in case of a
ice was re-
& R 261,
See also
iso notice
n America
produce),
most Courts from time to time recognize that the case of a notice—notice to quit, notice of dishonour, notice of suit, and the like—is to be governed merely by the general principle namely, where the pleadings by implication give notice to produce the notice, no express notice to produce it is necessary; but otherwise it is required *Wigmore* § 1209

Proviso—para (2)—
required to produce it
the form of the pleadings,
the possession of an in
produce need be served upon him *Calling* v *Frewcek*, 6 B & C 398, 399 "Where the nature of the action gives the defendant notice that the plaintiff means to charge him with the possession of such an instrument, there can be no necessity for giving him any other notice" *Per Le Blanc J* in *How* v *Hall*, 14 East, 274, 277 This principle is accepted in a variety of cases *Wigmore* § 1205 It naturally suggests itself that there are cases in which formal notice to produce would be idle, as in the case of an action for wrongful detention of a document belonging to the plaintiff, although, strictly speaking, such an action would be for the material on which the written character appeared, and it is account that the general

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may at once produce

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form of action gives
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(*Kelnor* v *Savage*, 20 Me 199), or the action is brought on a written contract in possession of the defendant which is fully described in the complaint *Dana* v *Conat*, 30 Vt 246; *Burr Jones* § 223 'If the note, he is charged with forging, passing, or delivery is of the same kind with the others which he has disposed of or retained in his possession, he had notice in effect that if practicable to procure it, evidence will be given of their counterfeit character and of having passed them as true It is notice in law, by which a party is as much bound both in civil and in criminal cases as by notice in effect Notice in fact is notice in form, notice in law is notice in effect, and either is sufficient," *Per Baldwin J in U S* v *Doebler*, 1 Bold W 519, 524 (*Am*) It seems settled therefore, that on a charge of larceny or of forgery no express notice is necessary; and the principle would also extend to other charges; but the nature of the charge will determine the application of the principle *Wigmore* § *1205 R* v *Haworthy*, 4 C & P 254, 256 But in an action for arson with intent to defraud the

of id
Armo

is giv
Maung Po v *Ma Shwe*, 84 Ind Cas 373 = A. I. R. 1925 Rang. 7; *M Le* v *Shwe* U B R. 1907, 4th Qr Ev 13, but see *Dinonath* v *Rama Rai*, 6 P. 102 = 97 Ind Cas 318 = 1926 P. 512 In another case it is held that in a suit for redemption when the mortgagee is in possession of the mortgage deed, and fails

to produce it, oral evidence is admissible under s 65 (a) read with proviso (2) to section 66 of the Evidence Act *Mt Amin* v. *Mt Gaih*, 9 Bur L T. 52 = 31 Ind. Cas. 892; see also *Bahadur Singh* v. *Mahadeo Singh*, 36 Ind. Cas 696; *Sahai* v. *Sheo*, A. W N. 1888, 117, *Dwarka* v. *Ramanand*, 11 A 592 = 51 Ind. Cas 275 = 17 A. L J. 711.

No notice to defendants to produce the original was necessary to render secondary evidence admissible, where the defendants, from the nature of the ... be required to produce the original *Syed* ... 0 It is doubtful if a *pro forma* defendant ... in suit property or in the decision of the case is not an adverse paty within the meaning of proviso (2) *Durgabati* v *Jagannath*, A. I R 1929 All 680.

... ined fraudulent possession of a document in his ... third person (who thus ... t from the requirement ...

object of a notice is ... amounts to a refusal ...

Thus in *odium spoliatoris*, a notice need not be given to the adverse party to produce a paper, of which he has fraudulently or forcibly obtained possession, ... aud of a ... he same ... te party ... as once ... counsel ... r party ... by the adverse ... means of any ... taining a deed ... Mass 284) or ... *ly* v *People*, 49 ... A defendant ... signed by the ... he received at ... the plaintiff, ... paper produced did not contain the whole of the letter as written, and that something material had been cut off from the top It was not necessary for the plaintiff to give notice to produce the other letters *Robinson* v *Cutter*, 163 Mass 377, *Burr Jones* § 223.

Proviso,—para (4)—When the adverse party has the original in Court A not ... proof that the adverse party, or ... for the object of the notice ... 1 C M & R 38, *Cook* v ... *Patridge*, *ibid*) ... testimony to ... to produce it ...

it he likes, at the trial, and this to secure th ... *Taylor* § 456 In *Dwyer* v *Collins*, 7 Ex Ch ... indorsee against the acceptor of a bill of ... pleaded, *inter alia*, that the bill was given ... before the *Lord Ch. of Ba* ... the defendant proceeded to prove his plea, and ...

Lord Chief Baron, after consulting the Judges ruled ...

66 In that case *Lord Chief Baron Parle* said "The next que tion is whether, the bill being admitted to be in Court, parol evidence was admissible on its non-production, or whether a previous notice to produce was necessary On principle the answer must depend on the reason why notice to produce is required If it be to give his opponent notice that such a document will be used by a party to the cause, so that he may be enabled to prepare evidence to expl un or confirm it, then no doubt a notice at the trial though the doc ment C t a too late

he must do before he can be permitted to make use of secondary evidence the demand for the productor

he true reason, the measure of time necessary to procure the time necessary to procure evidence to explain or support it,—a very complicated one, depending on the nature of the plaintiff's case and the document itself and its bearing on the cause, and in practice such matters have never been inquired into but only the time with reference to the custody of the document and the residence and convenience of the party to whom notice has been given and the like We think the plaintiff's alleged principle is not the true one on which notice to produce is required but that it is merely to give a sufficient opportunity to the opposite party to produce it and thereby secure if he pleases the best evidence of its contents, and a request to produce immediately is quite sufficient for that purpose, if it be in the Court It would be some scandal to the administration of the law if the plaintiff's objection had prevailed" *Wigmore Cas Ev* 227

Proviso para (5)—When the adverse party or his pleader has admitted loss of the document The rule requiring notice to the opponent proceeds on the assumption that the opponent has possession of the document the object being to show a demand and refusal to produce So the requirement of notice does

on the theory that the for the document as notice is unnecessary it follows that where the document is admitted by the opponent to have been destroyed or lost, or even out of his possession, no notice is necessary for it is no longer a case of opponent's possession, but of loss *Wigmore* § 1203 In such a case the notice could be nugatory *R* v *Haworth*, 4 C & P 254 *Foster* v *Pointer*, 9 C & P 718, *How* v *Hall* 14 East 276, *Doe* v *Spitty*, 3 B & Ad 182, *Taylor* § 455. A party however cannot under this exception call

tion of a document that has been traced into the

Where by the proponent's ev hands—as by the presumptior receipt of it, then even takin

tice, while if we take the opponent's has in truth received the document, his denial is express refusal to produce, which equally puts the plaintiff in the position of being equally unable to obtain the document so that notice is unnecessary *Wigmore* § 1203

Proviso, para (6)—When the person in possession of the document *is out* of the reach of, or not subject to the process of the Court Section 65 lays down that secondary evidence may be given of the existence, condition or contents of a document, when the original is shown or appears to be *in the* possession or power of any person who is out of the reach of, or not *subject to*, the process of the Court, and when after the notice mentioned in section 66, such person does not produce it "There is therefore a clear legislative enactment that notice or a reasonable notice, must be given, but that is qualified by s. 66, clause (6) which dispenses with notice *Mr Jackson* argues that there *must*

hoc ... at S ... cr ... ie ... y ... ie ... or
him at the last moment at the hearing of the suit, would have been nugatory. *Mellus* v *Vicar Apostolic*, 2 M 295 In *Haranand* v *Ram Gopal*, 27 C 639 (648) = 3 C W N. 129, *Lord Hobhouse* said "His proof of the *Sithun* records ... ions 65 and 66 of the Evidence Act secondary ... documents, which they are under section 74, ... when the person in possession of the document is out of the reach of or not subject to the process of the Court, which is the case here" See also *Harnund* v *Ram Gopal*, 2 Bom L R 562

... will be observed that under ... ich notice is not required, the ... nt." This is a relaxation ... 225 An express waiver of ... 207 ... leed ... n of ... can ... tgee ... as
348 = A I R 1926 Pat 512 = 6 Pat 542 ... letters were in the possession of parties inte... claim, but the plaintiff did not take steps ... *Held* that there being no question of the genuineness of the document these steps should have been waived by the Court and the document admitted in evidence under s 66 of the Evidence Act *Habiram* v *Hemnath*, 19 C. W. N 1068

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting

Proof of signature and handwriting of person alleged to have signed or written document produced

Principle The introduction in evidence of a writing is not accomplished when the document is produced in Court There is still a preliminary matter to be attended to before the writing can be received This is the authentication of the writing or the proof of its genuineness *Mckelvey's Ev* §§ 277 279 Most documents bear a signature, or otherwise purport on their face to be of a certain ...

and must be supplied by evidence But a document purports in itself to indicate its authorship, and the perception that this element is nevertheless missing, and must still be supplied, is likely not to occur There is a natural tendency to forget it Thus it has constantly to be emphasised by the judicial requirement of evidence to that effect Thus it is that in the tradition of the common law a wise emphasis has been placed upon the necessity of supplying the logical element of authenticity for writings. The general principle has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine, merely on the strength of this purport; there must be some evidence of the genuineness or execution of it. *Wigmore* § 2130, *Horne Tooke's Trial*, 25 How St. Tr 78, *Pfaal* v *Vanbatenburg*, 2 Camp 139 "In the ordinary affairs of men, it is very often assumed, without proof, that he whose name has been affixed to a written instrument placed it there himself. But

7. when signing becomes a matter of legal controversy, it must be established by proof" *Per Bronson C. J* in *Willson* v *Betes*, 4 Den 201; 213.

General Principle of Authentication The foundation on which rests the necessity of authentication is not any artificial principle of evidence, but an inherent logical necessity Thus if as a part of some facts asserted, *Doe's* letter is offered, what is involved in the assumption of the offer is (*a*) a *letter* written (*b*) by *Doe*; thus a letter alone, without the fact that it is *Doe's*, is not receivable, simply because it is not the thing offered By one of the many rules of Evidence, *Doe's* letter may be admi
of Evidence may be, the element of
assumed in all This logical eleme
the importance of proving it, exists wherever any personal connection with a corporeal object is assumed in the offer The necessity of authentication, therefore applies equally well to chattels—to a knife, a horse, a coat, etc, whenever it is asserted to be connected with a person This process of authenticating chattels is ordinarily referred to as identifying them, but the two ideas are distinct, and different principles of evidence are applied *Identification* presupposes that two objects, apparently different, have been referred to and the issue is whether they are in fact one and identical, not separate objects

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(1)
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act, i e the presence or absence of M at the time or place (if those are *known*)
when the document was made (b) I
in the document itself These wil
written), the style of handtyping
the ink or other script medium, (3) the paper and other inscribed material,
the seal
contents,
other ma

class of
etc (III) The retros-
, to the making or not
external. (a) *Internal*
found, e g a deed
ged testator's library,
yet the document may have been placed there by a falsifier (2) a postal stamp or post mark or other mark indicating that an official has acted upon the document at some time and place, but this mark may have been *falsely* used.

(3) Sundry marks indicating action by some one subs jn nt to the on᷈in il marking e g burnt elges, indicating an attempt to le troy by fir (b) Extern il evidence will inclu le (1) all sub equent separate con luct by the alleged maker, indic iting a consciousne s of its genuineness or the reverse, (2) All sub equent sep ir ite conduct by thir l persons having a similir import— *Wigmore* § 2131, *Wigmore's Princi les of Judici l Proof* § 52

S.

Scope of the section
of a document, there is
what it purports to be ? I
point is dealt with in s
Evidence Act govern ca e
v *Gudarkoeri* 82 Ind C is 306 The nature of the evidence will dep nd to a large extent on the nature of the document If it is a mere m morandum such as the entry in a diary mentioned in s 32 (b) it must be prove l that the diary was really that of the person whose statements it is said to contain If it is a letter it must be shown who wrote it, or at any rate who signed it for a signature to a document turns the whole document into a statement by the person who

who execute l it *Mul Ev*
necessary under this section
This section does not require
to be produced Nor does
the Act require the writer of a document to be examined as a witness *Abdool Ali* v *Abdoor Rahman* 21 W R 429 The proof of hand writ ng and signature under this section must be by any of the recognised mo les of proof and amongst others by statements admissible under s 32 of the Evidence Act *Abdulla* v *Gunnibai*, 11 B 690 The execution of a document cannot be deemed proved as it is required by the Evidence Act merely because it is proved in the sense of the definition of ' proved That definition of the word proved must be read along with s 67 of the Act until it is proved that the signature purporting to be that of the executant is in the hand writing of the executant the Court cannot procee l to consider whether the execution is proved In other words section 67 makes proof of execution of a document something more difficult than proof of matter other than the execution of a document *Salaik* v *Mt Ta m~ Bano* 107 Ind Cas 564=A I R 1928 A 303 But it was never intended by s 67 of the Evidence Act that direct evidence of hand writing was always necessary but that section merely stated with reference to needs what was the universal rule in all cases th
new rule
either to
or felt
the fact of execution of the document was properly proved *Karali* v *The East Indian Railway* 48 C L J 32=111 Ind Cas 492=A I R 1928 Cal 498, *Bamndia* v *E*, 14 C W N 1209 1210

nd of proof is require l for
it must nevertheless be shown
signature denoting execution
who professed to execute it A
Court is not bound to treat the registra ion endorsement as conclusive proof of the fact of execution If there are suspicious circumstances attending the execu tion of the document such endorsement cannot be resorted to for the purpose of holding that the execution has been proved *Jogannath* v *Dhuraj* 5 O L J 191=46 Ind Cas 279 Under this section a document can be prove l by any
is 390 Where a register
d in or ler to prove that
eting of the a sociation an l
it must be prove l by oral
testimony that the register was in fact a regi t r of atten lance kept for th
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said 'There is no evidence as to who wrote down the names which appear on the page in question It is suggested that the names or signatures were written

S. 67. out by the porsons themselves under the date which appears at the heading of the paper But no witness has been produced to identify these signatures The learned Sessions Judge has considered that the mere fact that a person s name appears on such a document is proof that he signed it It is obvious that when this register was produced it was necessary to show by oral testimony that it was
urpose of recording the names of
th date anp aring over their names.
s gnatures were in fact those of the
nost cases by producing
were the accu ed persons
have been produced who
o was acquainted with
have proved by compar
ry writing proved to the
satisfaction of the Judge to be genuine As no witness was cal ed to testify to this document in any way whatsoever, it is obvious that these essential requ re ments were not attempte l to be fulfilled The document accordingly is not admissible in evidence in the absence of oral proof of its nature and authorship and even if it were admitted it does not prove the presence of the pet tioners at
of the identity of their signatures A
nce if the writer of the certificate is not
witness *Peter* v *Mahomed* 22 Ind Cas
654 The ordinary method of proving handwritings are (1) by calling as a witness a person who wrote the document or saw it written or who is qual fied to express an opinion as to the handwriting by virtue of section 47 of the Evidence Act, (2) by a comparison of the handwriting as provided in section 73 of the Evidence Act, and (3) by admission of the person against whom the document is tendered A document does not prove itself nor is an unproved signature proof of its having been written by the person whose signature it purports to bear *Per Mookerjce J* in *Sarojini* v *Hari Das* 26 C W N 113 at p 119, see also *Gunga Pershad* v *Inderjit* 23 W R 390 P C To prove the execution of a bill of sale executed in their favour by the plaintiff s father the defendant called a *Kazi* who deposed that the vendor came before him accompanied by
was then registered
On special appeal
was suffic ent direct
ary under section 67
a v *Manak Chand*
27 Ind Cas 866, *Lahını* v *Bala*, 77 Ind Cas 798=18 N L R 85

ost universal Some-
and sometimes both
erally mal es a mark
and some other person writes his n me *Mark Ev p 60* All that is required is that the signature must be by a person who is conscious of his act a mere mechanical movement of the hand is not sufficient *Kalee Tara* v *Nobi* 21 W R C R
nl ins v *Gainsford* 3
Sw & Tr 93
ention of execut ng a
document. *Re*
e or initial may be
considerd as
In bonis Redding 2
Roberts 339,
58 Ind Cas 134=7
O L J 406,
930 M 770 A mark
is a mere symbo
who not ces it often
ratmoni 2 C W N 642=25 C
use of pen and ink is not neces-
Tr 93. In that case *Sir Cresswell*
pen or some other instrument
ason make a difference that a
fac simile of the whole name was impressed on the Will instead of a mere mark or cross The mark made by the instrument or stamp was intended to stand for and represent the signature of the testator In the case where it was held that sealing was not signing, the seals were affixed by way of a signature So execution of a document can be made by affixing a mark on it. *Taylor* v *Dem* 3 Nev & P 228, *Baker* v *Denning*, 8 Ad & Ell 24, *Donelly* v *Broughton*,

(1891) A C 435 Where the alleged executant of a deed (who was a marksman) denied execution and all the attesting witnesses are dead or for some other reason not available, proof of the hand writing of the attesting witness and of his identity is sufficient proof of execution This is founded on the rule that on proof of his handwriting every thing must be presumed to have been rightly done, and a fraud must not be imputed without some evidence on that behalf *Ponnu Swami Kalyansundara* A I R, 1930 Mad 770 = 125 Ind Cas 231

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had been furnished But as there can seldom be a sole person knowing the
the case)
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the same facts are often persons hostilely interested who thus have a motive for fabrication ; and if it were once laid down as a general rule of law, that the contents of a letter might be taken as evidencing its authenticity, too many would be found to take fraudulent advantage of this rule Accordingly, it seems generally conceded that the mere contents of a written communication, purporting to be a particular person's are of themselves not sufficient evidence of genuineness Only in special circumstances, where the contents reveal a knowledge or other trait particularly referable to a single person, could the contents alone suffice Il

s of a particular
, (a) an illiterate's
tter *Ibid.*

Illiterate s letter , typewriting It ought to be conceded that where there is no direct testimony to the act of execution or sending by an illiterate, the evidence to be drawn from the contents should in some situations, be allowed to suffice to go to the jury The case of an amanuensis using a type writing machine presents a similar impossibility, whenever the signature (as sometimes happens) is also type written or stamped and it would seem that a similar necessity justifies a resort to evidence from contents If there were a serious possibility of abuse this step would not be advisable But in fact there is also a danger of abuse in the opposite direction for the difficulty of authenticating such a document is sometimes taken advantage of by those who wish to be able to disavow their authorship To day however in view of the scientific development of the study of documents by microscopy and other arts the authorship of type written documents can often be traced with certainty to the specific machine used , so that this mode of authentication does not then in principle differ from that of using the handwriting *Wigmore* § 2149

Printed matter—news paper Vide notes under s 81 *infra*

Proof of execution of document required by law to be attested

68 If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

"Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with, the provisions of the

68. Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied"*

The general notion of
be called before another
of that particular witness
to obtain knowledge of the matter more accurately than any other person His opportunities of knowledge, it must be supposed, have been not only better than those of others, but so much better that it would be a palpable risk of injustice to proceed in the trial without endeavouring to obtain him Moreover, such a rule should be applied only where the class of witnesses thus preferred can be designated wit'
call him mus

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the one thing
can contribute
by the law by
the partisan interests of either side may fail to furnish *Wigmore* § 1286.

History of the rule "As regards the requirement' says *Professor James Bradley Thayer* that the proof of the execution of an attested document must be by the witnesses if they can be had, this, also, has a clear and very old origin Such persons belonged to that very ancient class of transaction or business witnesses, running far back into the old Germanic law who were once the only sort of witnesses that could be compelled to come before Court Their allowing themselves to be called in and set down as attesting witnesses was understood
Proof by witnesses
ly to know the fact
ght be, he could not,
ss, unless he had
It was a part of
witnesses formally
allowed their names to be written into deeds in large numbers When jury trial, or rather proof by jury, as it originally was, came in, the old proof by witnesses was joined with it, when the execution of the deed was denied, and the same process that summoned the twelve, summoned also these witnesses The phrase of the precept to the sheriff was *summone duodecim* (etc, etc,) *cum aliis* The presence of these witnesses was at first as necessary as that of the jury Great delays and embarrassments attended such a requirement where the number of witnesses m
Accordingly
necessary,
After anotl
longer a nec
century, in 1562 63, process against all kinds
them to come in, not with the jury or as

witnesses could not in one way or the ot...
to come in As regards ordinary witnesses to the jury, compulsory process seems not ... Since 1318, the
attendance of
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*This pro
(XXXI of 19...

any that can be stated in a Court of Justice" Thayer Prel Tr Ev pp. 502, 503

Reason and Policy of the old Rule Strictly speaking there is no sufficient
Lord Ellenborough (in R v
and ratiocinative system of
1700 S So on this point
he great Judges Not being
able to make a departure from long tradition, insufficient and inconsistent reasons for enforcing the rule have been laid down in support of it The rule is thus stated by *Lord Ellenborough L C J in R v Harringworth*, 4 M & S. 350 "In as much as they are plighted witnesses the knowledge they have upon the subject is essential, and if it can be procured must be forthcoming" See also *Barnes v Trompowsky*, 7 T R 265 In *Geropulo v Wheeler* 10 C B
because 'he is the witness agreed
v *Garth*, 8 Exch 803 *Pollock C B*
to prove the execution of a deed
for this reason, that by an imperative rule of law the parties are supposed to have agreed *inter se* that the deed shall not be given in evidence without his
s execution' Relying
(of the rule) is not (as is
evidence, but that he
o speak to the circum-
ed for the purpose of
dispensing with proof at the trial, but cannot be broken" But the difficulty about this reason is that no such agreement
attestation is required by law Moreover
not apply between others than the parties
fact Further more this assumes that the opponent charged as obligor or maker is a party to the document —which, if the execution is denied is an assumption of the very point in issue *Wigmore* § 1288, *Transworth v Briggs*, 6 N H 561, 565 *contra Chamberlayne's Ev* § 487 Some of the Judges assigned the reason
attesting witness as
Porlan, 4 Esp 241,
principle that there
of what took place
reason is reiterated by *Le Blanc J* in *Call v Dunning* 4 East 54 where he said 'A fact may be known to the
ledge or recollection of the obligor, and
knowledge of the subscribing witness rel
Ashurst J in *Abbot v Plumbe* 1 Doug
are numerous First it is inconsistent with the rule itself, for the rule applies even where fraud duress and time are not in issue, and even where the maker himself is competent as a witness Again, the attestor is *in practice not usually* a person who knows anything about the circumstances preceding the document's execution, or knows more than any other person who by being present could be a qualified witness Finally if the witness does possess special knowledge about some affirmative issue, the opponent is the proper person *to call the witness*, if he desires him So this rule has *no justification in its* original broad form *Wigmore* § 1288 'Has the rule, then no justification in policy? It certainly has none in its original broad form But in most jurisdictions it has by statute been limited to documents required by law to be attested, and in this shape it seems to be entirely justifiable In the first place the attestation *is in such cases required by law as a special precaution against forgery*, thus the attestation itself must in any case be proved as an element in the validity of the document, and there seems to be no special hardship in obtaining the

86. witness rather than in obtaining evidence of his signature In the next place such documents are, in mo t jurisdictions, wills of deceased persons and deeds of illiterate persents, for such documents the maker himself being either deceased or not acquainted with writings, the attestor's testimony is almost inevitably the most desirable and most trustworthy source of information as to the fact of execution, more over it is in such cases that the defences of fraud and undue influence are most likely to be made and here also the attestator s testimony is likely to be of use and ought to be obtained if possible" *Wigmore* § 1288

Reason of the departure from the old rule and principle underlying the section 'We do not purpose to meddl execution required either by the Legislature, we think it deserving of serious considerat execution of written documents may not in ot

, witness the deed

was executed But it is notorious that in practice the attesting witness in the majority of instances knows nothing of the transaction, the instrument having been prepared a clerk a servant, or a neighbour is called in to attest it A deed to which as parol testimony is not admitted to contradict or vary the terms of a at th

of the document is not the real matter in dispute and where there are no concomitant circumstances to be inquired into is often attended with difficulty and expense and sometimes leads to the defeat of justice Cases have occurred where, in tracing a title, numerous witnes es from distant parts have been rendered necessary to prove the formal execution of deeds though their execution was not really in dis by a single witness, which it was thou party alleging title the adversary's cas it was not supposed

the party signature

received, and the party requiring it of the document is not really in to be limited to any particular witness to prove the execution When genuineness is in dispute, the party producing it will be sure to call the attesting witness as the absence of the latter would throw the greatest discredit on the instrument We therefore recommend that except in cases where the evidence of attestation is requisite to the validity of the instrument an attesting witness need not be called *Common Law Procedure Commission, Second Report* (1853) p 23, *Wigmore Cas Ev* p 246

Attestation of documents—calling of witnesses No document can be used

when the genuineness of the document has to be proved *Markby Ev* 61 sections have no direct bearing on the question as to whether the attestation was according to law *Balkrishna* v *Narain Sha* 13 N L R 21 Section 72 lays down that an attested document not required by law to be attested may be proved as if it was unattested Section 68 is applicable to cases where a document is required by law to be attested *Kunwar* v *Ghugi* 103 Ind Cas 57 To prove wills required by law to be attested an attesting witness and subject attesting witness alive, of giving evidence. *Tuls Singh* v *Judai*, 82 Ind Cas 306 Where all is sufficient to prove the hand writ by other evidence (*Ide* s 69)

But execution of a document will be sufficiently proved when it is admitted by the party himself who has executed the document (*Vide* s 70) So also where document is thirty years old, the Court may in its discretion presume the genuineness and due execution as well as attestation of the document (*Vide* s 90). The Court shall presume also that every document called for and not

does not recollect it, its execution may be proved by other evidence *Vide* s

Scope of section 68 The object of placing more than one attestation upon document whether at any party's voluntary instance or by requirement of law, ordinarily not to demand the combined testimony, of all at the trial, but merely provide by way of caution a number of witnesses, so that the contingencies death, removal of residence and the like, may be guarded against, and one witness at least may be available But a main object in Statutes requiring

execution with
is a secondary
Tindal C J said
look primarily
ty of the testator
t three witnesses

should be in the nature of guards or securities, to protect him in the execution of his Will against force or fraud or undue influence The proof of the Will by the three witnesses supposing it should afterwards come in contest only is an incidental and secondary benefit, derived from the mode of attestation It is well settled that in an action at law it is sufficient to call only one of the subscribing witnesses if he can speak to the observance of all that is required by the statute" *Doe* v *Leves* 7 C & P 574 In *Bullen* v *Michel*, 4 Dow 297, 331, *Lord Eldon* said "They usually call one witness leaving it to the other side, if they think proper, to call the other witnesses" According to English

Wigmore § 1304, see also *Ogle* v *Cook* 1 Ves Sr 177 *Grayson* v *Atkinson*, 2 Ves Sr 454 460, *Binfield* v *Lambert* 1 Dick 337, *Bird* v *Butler*, 1 Dick 337; *Powel* v *Cleaver*, 2 Bro C C 449 501, *Fitzherbest* v *Fitzherbest*, 4 Br C C 231 *Carrington* v *Payne* 5 Ves Jr 404, 411 *Bootle* v *Blundell* 19 Ves Jr 494, *Winchelsea* v *Wanchope* 2 Russ 441, *Tatham* v *Wright*, 2 Russ & Myl 1 8, 16 According to section 68 of the Evidence Act, to prove the execution of a document required by law to
witnesses must be called to prove

in the Punjab which requires *bahi* entry to be attested at all *Kanwar Ram* v *Ghugi* 108 Ind Cas 57 = A I R 1928 Lah 148 A mortgage deed signed by the marksman was attested by three witnesses In a suit on mortgage its execution was not specifically denied but the plaintiff sought to prove the same Two of the attesting witnesses having been dead the third was called, but he deposed that he attested the deed in the absence of the executant It appeared however that
the Sub Regi
also spoken
Held that un
the execution of the mortgage was not specifically denied *Yakub Khan* v *Guljar Khan*, 52 B. 219 = 30 Bom L R 565 = 111 Ind Cas. 257 = A I R. 1928

68. Bom 267 An account book is not a document wich is required by law to be attested and this section has no application to a case in which such account book is produced in evidence *Emperor* v *Narboda Prosad* A I R 1930 All 38 There is no law which requires the attestation of a sale deed so far as the Punjab is concerned This section has therefore no application to sale deed in that province *Maharaja of Faridcot* v *Anath Ram*, A I R 1929 Lah 1 One of the three attesting witnesses being alive the plaintiff called one witness and when he resiled the plaintiff proceeded to prove the document by other evidence *Held* there was a full compliance with the provisions of s 68 and 71 *Hinson Ali* v *Gurudas Kapali*, A I R 1927 Cal 188 = 33 C W N 248 = 49 C J 16 Where no attempt is made to prove a mortgage deed either by calling in an attesting witness or even by putting any question to the scribe of the deed who was examined as a witness, regarding the attesting witnesses or attestation the document cannot be used as evidence *Jiwan* v *Dilip Singh* A I R 1929 All 389 – 27 A L J 588 The amendment by Act 31 of 1926, is a provision relating to procedural law and not a substantive law and therefore must be taken to be retrospective in operation *Thayammal* v *Muthu Kumar Swami* A I R 1929 Mad 81 Where the executant of a mortgage deed, the writer of the deed and the attesting witnesses have all died, having regard to the new definition of attesting in s 3 T P Act, and to the varied mode of proving registered document as amended by s 68 Evidence Act it is sufficient to satisfy the Court that the execution which was not specifically denied was so probable that a prudent man ought under the circumstances of the case to act upon the supposition that it was so executed *Parun* [illegible]
To satisfy the requirement of this secti[illegible]
put his mark in the mortgage deed [illegible]
12 A L J 1114 Sections 68 to 71 of [illegible]
in which the fact of execution may [illegible]
and have no direct bearing on the question as to whether the attestation was according to law The sections proceed on the assumption that the attesting witnesses referred to are attesting witnesses within the meaning of the law requiring the document to be attested If the fact that there are any valid attesting witnesses is denied, it has to be proved like any other disputed fact If the execution is admitted no other proof of mere execution is required, and if the document on its face purports to have been attested by the required number of attesting witnesses and if it is not denied that [illegible]
the question of valid attestation does not [illegible]
arises, then the maxim *omnia praesumen*[illegible]
however it is denied that the attestation [illegible]
relying on the deed as an attested deed must [illegible]
is not admitted Even if due attestation is not denied, but evidence on the subject is given the Court cannot ignore the evidence There can be no due attestation without execution, an [illegible] or disproved
the fact of execution is of no [illegible] the deed as a
mortgage deed is concerned" L [illegible] R 21 By
the terms of this section when [illegible], a document
cannot be used as evidence at all as a document either requiring attestation or in fact attested, but this does not prevent it from being used in evidence as something else or for any other purpose Section 68 is subject to the limitation viz, that if the documents were tendered in some other proceeding for the purpose of proving the handwriting of the scribe, it could not be objected to upon the ground that no attesting witness being called to prove it it could not be used in evidence at all *Moti Chand* v [illegible]
121 = 44 Ind Cas 906 The law as [illegible]
imperative and does not on the face of it [illegible]
cases provided in ss 69 70 and 71 of the Evidence Act [illegible] *Other Chandra Paul* 35 C L J 463 = 27 C W N 134 = 68 Ind Cas 86 Other evidence under s 71 connot be admitted where the provisions of s 61 have not been complied with. *Banwari* v *Gopinath*, A I R 1931 All 411, *Pedu* v *Venkata*, A. I. R 1932 Mad 148 = 34 L W 663 Where a mortgagor admits having signed the mortgage sought to be enforced but couples it with a denial of the presence of the attestors at the time of signing the mortgage the mortgagee must prove the execution of the mortgage by calling at least one attesting witness to prove the attestation *Arjun Chandra* v *Kailash Chandra*, 36 C L J

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373=27 C. W. N. 263=70 Ind Cas 352. Where there is no proof of execution of a Will the identification of the handwriting of the attestors does not prove execution by the testator. *Maya Chand* v. *Mt. Jiwani* A. I. R. 1923 Lah 171. The direction in section 68 of the Evidence Act is mandatory and there is no distinction drawn by the section between documents which are the basis of a suit and those whose production is required for a collateral purpose so far as their admissibility is in question. *Jagath Rai* v. *Mittal*, 79 Ind Cas 725=10 O. L. J. 525=A. I. R. 1924 Oudh 525. Section 68 of the Act applies both to primary and secondary evidence. *Sheikh Amiruddin* v. *Gulzar* L. R. 5 A. 666=A. I. R. 1925 All 96. The provisions of s. 68 are mandatory and it is not controlled by s. 69. The mere fact that the only surviving attesting witness is considered hostile by the party does not relieve him from the duty of examining him as a witness, nor is it enough that summonses and warrants had been issued, upon the witness and the witness had failed to appear but the processes of the Court such as are mentioned in Order XVI, rule, 10, Civil Procedure Code have all got to be exhausted. *Gobinda Chandra Pal* v. *Pulin Behari*, 31 C. W. N. 215=98 Ind Cas 147=A. I. R. 1927 Cal 102. In a mortgage suit the plaintiff may, to rebut the evidence of the only attesting witness who gives evidence, call the writer to prove that the document was executed by the mortgagor and attested by two attesting witnesses. It is not ... ul l also be an attesting witness ... L. R. 1125. This section ... he legality or validity of the ... , if there has been no proper ... v. *Lakshmi*, A. I. R. 1930 All ... ere the executant of a document ... l having put his mark to it, and all the attesting witnesses are either dead, or have turned hostile or are not available, there is no rule of law which prevents a Court from holding the execution proved when the signature of the attesting witnesses are proved to its satisfaction having regard to the circumstances of the case. *Ponnu Sami* v. *Kalyansundara*, A. I. R. 1930 Mad 770.

... no definition of the word "attes... here was also no definition of the te... as been newly added to the Transfer of Property Act by Act XXVII of 1926. That definition has been taken verbatim from section 63 of the Indian Succession Act (XXXIX of 1925) ... an instrument, means and must be deemed ... two or more witnesses each of whom has ... his mark to the instrument, or has seen some ... n the presence, and by the direction of the ...

same time, and no particular form ... *3 of the T. P. Act, Abinash* v. *Dasarath* ... 14 Jur 919=2 Rob Ecc Rep 315, *Dr...* ... persons shall be present and see what passes, and shall when required, bear witness to the facts." So "attest" means merely to act as a witnesses, which might be done without subscription. *Rickets* v. *Loplus*, 4 Y. & C. 919; *Freshfield* v. *Reed*, 9 M. & W. 404, *Burdett* v. *Spilsbury*, 10 Cl. & F. 340; *Hudson* v. *Parker*, 1, Rob 14, *Ford* v. *Kettele*, L. R. 9 B. D. 139. But upon the construction of the Act it is clear that no attestation will satisfy the requirements, except throught the outward mark of subscription. *Per Sir C. Cresswell* in *Charlton* v. *Hindmarsh*, 28 L. J. P. 132. "To attest is to bear witness to a fact. Take an example, a notary public attests a protest, he ... nts in that protest, but to the fact of the ... I conceive, the witness in a Will bears ... equires attesting witnesses to attest, namely ... acknowledged in their presence." *Hudson* v. ... v. *Phillips, Lord Campbell Chief Justice.* ... the word "attested" that the wi...

S. 68. be present as witnesses and see it signed by the testator. And the principle was given effect to in the *House of Lords* in *Burdett* v *Spilsbury*, 10 Cl & F 340. There the *Lord* ... se words "The party who sees the ... subscribes as a witness he is an ... mortgage deeds by two witnesses required by section 59 of the Transfer of Property Act is attestation of the actual fact of the execution *Shamu Patter* v. *Abdul Kadir*, 16 C.W.N. 1009 P C The witnesses must see and be conscious of the act done and be able to prove it by their own evidence, they must be both mentally and bodily present, for if not, they migl ... mind. *Per Dr Lushington* in *Hudson* ... (1864) 3 S & J. 578, *Sir Gorell Barn* ...

In my view, at the end of the tran action

W. 404; see also *Sharp* v ... 44=10 Bom. L R 943; *Da* ... 256; *Sashibhusan* v *Chana* ... 364 (P. C) Again in the ca ... *Phillips*, 4 E & B 450=24 ... ment was not merely to sub ... execution, but included al ... some disinterested person capable of giving evidence as to what took place These cases contemplate as a requisite of a good attestation that the document must have been executed in the presence of an attesting witness, who subscribed his name to the instrument in token of this circumstance *Sarungigar Begam* v. *Borada Kant*, 37 C 526=11 C L J 563=14 C W. N 791; see also *Ganga Parshad* v. *Ishri Pershad*, 45 C 748=27 C L J 548, *Deonarain* v. *Kakur*, 24 A 319 (F. B), *Prankrishna* v *Jadunath*, 2 C W. N 603, *Girindra* v. *Bejoy*, 26 C 246=3 C W N 81; *Dinomoyee* v *Banbehary*, 7 C. W N. 160, *Sashibhusan* v *Chandra Peshkar*, 4 C L J 41=33C 861

tion, ... defeat ... case o ...

... soning appears to be based on good sense, ... of justice, equity and good conscience, according to which the Indian Courts are bound to decide *Per Mookerjee J* in *Surungigur Begum* v *Baroda Kant Mitter*, 11 C. L. J. 563 (572)=37 C 526=14 C. W. N. 974.

Presence, meaning of—Signature of a Purdanashin lady—how to be attested. S. Saeed in his Law D
presence of B, and B
witnessed A's execution
Dictionary defines attes
a written instrument, to
also *Bay* v. *Hale*, (1
instrument be deemed to have been executed in the presence of a witness. It may be generally stated as the result of the decisions, that presence involves two ideas, namely, mental cognition of the act, and physical contiguity; in other words, the person in whose presence the act is done must be able mentally to know what is being done and what is done in the presence of a person, must take place in phys
inflexible rule as to
trated by a referen
to what extent judic
subject, *Casson* v. *Dade*, 1 Bro C C 99, it was held that when the testatrix sat in her carriage, opposite to the window of the attorney's office, in which the Will was attested, the

the room the two witnesses who attested the codicil, the curtains at the foot of the bed were however drawn

Sir Herbert Jen
hold, if necessary
have attested in
that the testator,
The principle deducible from these c
according to the custom of the country,
before male witnesses a document w
sively proved to have been executed b
be deemed to have been attested by
purdah, and who before attestation, satisfied themselves that there was no fraud, and that the document had been actually executed by the lady screened off from their gaze *Sarrurijigur Begum* v *Baroda Kant*, 37 C 526=11 C L J. 563 This view has also been adopted by *Brett J* in the case of *Harmongal* v *Ganour Singh*, 13 C W. N 40 and by *Stephen and Chatterjee JJ* in *Isri Prosad* v. *Gunga Prosad*, 14 C. W N 165 A mortgage deed was taken for execution behind the *purdah* to a *purdanashin* lady Her son came from behind the *purda* and said that it had been signed by her The witnesses thereupon affixed their signatures to the document, though none of them saw her sign it *Held* that there was no valid execution of the document as it was not attested as required by section 59 of the Transfer of Property Act *Rai Ganga Pershad* v *Ishri Pershad*, 22 C W. N. 697=48 C 718=31 M L J 547 P C; see also *Hira Bibi* v *Ram Hari*, 5 Pat 58 (P C)=89 Ind Cas 659=A I R 1925 P C

417=45 Ind Cas 691, *Padarnath* v ... W N
991 P C=37 A 471; *Rai Radh* ... It is
not necessary that the attesting witne ... lady
sign the document. *Kasidanbi* v. *Ga*

Requisites of valid attestation The object of attestation is that some person should verify that the deed was signed voluntarily. *Sarrurijigur* v. *Baroda Kant*, 37 C 526=11 C. L J. 563=11 C W. N. 974. The attesting

68. witnesses must subscribe with the intention, that the subscription made should be a complete attestation of the Will, and evidence is admissible to show whether such was the intention or not *In bonis Wilson*, 1 P. & D. 269, *In bonis Sharman*, 1 P & D 661, *Griffiths* v *Griffiths*, 2 P & D 300, *In bonis Murphy*, I R 8 Eq 300; *Robert* v *Phillips*, 4 E & B 450, *In the goods of Streatley* (1891) P 172 The witnes as an execution of the document nature is to be attested, by which Rob 712; *Ewon* v *Franklin*, D , *Phiffs* v *Hale*, 3 P & D 166; *In bonis Dilles*, 3 P & D 164, *Leonard*, v *Leonard*, (1902) P 243 Where a witness, put in his signature without any intention of attesting, it is not a valid attestation *In bonis Smith*, 15 P D 2, *In bonis Murphy*, I R 8 Eq 300, *In bonis Sharman*, 1 P & D 661 The attesting *Pearson* that the of the s *Dunn*, 1 in any witnesse *Hanman* (1843) 1 Rob 757, *Roberts* v *Phillips*, 4 El & Bl 450, *Savitri* v *F A Savi* 19 C P mu R 6 (11 C L R 359 Generally, any competent witness may attest; thus marksmen, (*Re-Enyon*, 3 P & D 92) and infants if of years of discretion, may be attesting witnesses *Phip Ev 7th Ed* 501 A party to a deed or his agent cannot attest it *Seal* v. *Calridge*, 7 Q B D 516, *Peace* v *Brookes*, (1895) 2 Q B 415

Attest his signatu v. *Krishna*, Ind Cas 145; *Dharr* *Ayyasaime* *Abinash* v 1 attesting witness must be shown or presumed *Badri* v *Abdul* 35 A 254,

r purpose and in whatever manner, is as a

41 M 535, *Dinomoyee* v *Bonbehary*, 48 C 61. Where the name of the under a separate heading styled "scribe" apart from the signature of the only other person who signed as signature of the scribe was not, as as attestation *Abinash* v *Dasa* v *Ajodhya* 20 C W N 699=34

mdas v *Ramoomal*, A I R 1927 Sind 853=A. I R 1925 Oudh. 734 A behalf of the mortgagor cannot be a campetent attesting Cas 720; *Paban* *Sristidhar* v *Ra* case, the scribe of name at the end c *Held*, that such

S.

the meaning of this section *Bakshar* v. *Isachand*, 5 N. L. R. 3=1 Ind Cas. 173; but see *Bari Sahu* v. *Gauri Shankar*, 59 Ind Cas. 153 Where a person who has signed a deed as a scribe subseq [illegible] witness the onus of proving this assertion [illegible] v *Lakhu*, 4 Pat. L. J 511=53 Ind Cas 73 [illegible] in any case a scribe wherever he wrote [illegible] the document as an attesting witness unless he actually said so in the document [illegible]

[illegible]

B. 405=22 Bom L. R. 1-6=55 Ind Cas. 616 A scribe who executes a document for and on behalf of the executant is not a person who sees what passes" or "sees it executed" when he himself does the very thing to which he subsequently signing as a witness he professes to bear witness *Satidhar* v. *Rakshakay*, 63 Ind Cas 507

Attestation by a Sub Registrar The registration of his Will by a testator and his signature to a certificate of admission of execution, testified by the signature of the Sub Registrar, and of a witness is a sufficient attestation to satisfy the requirements of section 63 of the Succession Act. *Amarendra* v *Kashi*, [illegible] admits his [illegible], before him [illegible] names on the Will as witnesses to the admission of the testator, such attestation is sufficient to satisfy the requirements of s 63 of the Succession Act *Nitya* v *Nagendra*, 11 C 429; *Sarada* v *Triguna*, 1 Pat. 300, *Rajendra* v *Menola*, 1 Pat L R 267; *Horrosundari* v *Chanlar*, 6 C 17=6 C L R 303; *In re Roymonee*, 1 C. 150, *Horendra* v *Chandra*, 16 C 19, *Mohammad* v *Ali Haidar* 12 O L J 1= A I R [illegible] *Syed* v *Tayaba*, 1 O L J 591=26 Ind Cas. [illegible] =23 Bom L R 3J9 But a Sub Registrar [illegible] ent was admitted cannot be taken to be a good [illegible] proof that he affixed his seal or signature in the presence of the executant *Abinash* v *Dasarath*, 32 C W N 1228, but see *Radha* v *Nripendra*, 17 C L J 118

Personal acknowledgment "What is the plain meaning" asked *Dr Lushington* in *Hudson* v *Parker*, (1844) 1 Rob 11 at p 25 "of acknowledging [illegible]

[illegible] of *Blake* v. *Blake*, (1882) 7 P & D 102 at p 107 *Jessel M R* observed "What is in law a sufficient acknowledgment under the statute? What I take to be the law is cor[illegible] p 113) in the fo[illegible] the witnesses [illegible] testator should [illegible]

[illegible]

68. them to sign their names, that amounts to an acknowledgment of his signature, if the Court is satisfied that the signature of the testator was on the Will at the time' In *Blake* v *Blake*, (1882) 7 P. & D 110 *Jessel M R* considered the cases of *Gwillim* v *Gwillim*, and *Beckett* v *Howe*, and observed 'I cannot find one word in the judgment of *Gwillim* v *Gwillim*, to show that *Sir C Cresswell* was of opinion that if the witnesses were
saying he had signed would be suffici
out the interpretation put upon it by
new doctrine laid down in that c
Parker, supra The existence of any such doctrine rests entirely upon the state-

ords to that effect,
this is my signature
Daintreege v *Fasalo*,
(1888) 13 P. D 102 at p 103, *Cotton L J* took a similar view Similarly in *Ilott* v *Genge* (1842) 3 Curt 160 at p 172 *Sir H J Fust* said: "The production of a will by the testator, it having his name upon it, and a request to witnesses to attest it would be a sufficient acknowledgment" In *In the Goods of Thompsc*
is produc
have an
the pape
of his signature by the testator". See also *Balmukund* v *Bhagwandas*, 15 Bom L. R 209=19 Ind Cas 401; *Manicbai* v *Hormusji*, 1 B 457; *Harro Sundari* v. *Chunder Kant*, 6 C 17, *Nitya Gopal* v *Nagendra Nath*, 11 C 429, *Amarendra* v *Kashi Nath*, 27 C 169 Attestation in the presence of a testator on acknowledgment of signature or exec
Chand v. *Mohanandi*, 6 C L J 453,
Sobiiri v *Sati*, 19 C W N 1297=29 In
has been added by the Transfer of Pro
Since the passing of that Act attestation
a personal ackowle
passing of that Act,
before the attesting
sufficient, *Vide Sha*
P C, *Saheda* v *Raj*
(P. C)=A. I R 1
263, *Ranu* v *Laxmanrao*, 33 B 44,

Act, the law was the sa
the acknowledgment of
the donor Such attestation was held to be not valid attestation *Vide Amarappa* v. *Raghava*, 44 B 231; *Saheda* v *Rajah Ram*, 11 A L. J. 757=21 Ind. Cas 83, *In re Veluapalatti Peda*, 9 M L T 57=8 Ind Cas 887; *Baijnath* v *Biraja*, 2 Pat. 52(61). These rulings are also no longer good law.

been duly accounted for. *Suamidin Singh* v. *Kaniz Fatima*, 11 Ind. Cas
Where only one attestor proved a mortgage bond attested by more than two witnesses and when its due execution was not denied, *held* that having regard

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to s. 68, the document may be taken as properly proved. *Nand Kishore* v. *Karee Lam*, 29 C 355 = 6 C. W. N 395 It is not correct to apply an Act which was passed subsequent to the trial of a case to the procedure in the case Proviso to s. 68 of the Evidence Act was held inapplicable to a case disposed of before it took effect. *[illegible]* v *[illegible]*, 131 Ind. Cas 557 = 1931 A. L. J 312 = A I R 1931 All 411 A mortgage bond purported to be executed by three persons who were all dead at the time of the suit. The signature of each of them was represented by an irregular scribble such as might be made by an illiterate person, and against each of these marks there was a statement that it was the mark of one of the executants, the name being given in each case. These statements were proved to have been written by a deceased professional bond-writer who wrote the whole document in the ordinary course of his business The two attesting witnesses also were dead and the signature of each of them was satisfactorily proved to be in his handwriting *Held* that there was sufficient proof of the execution of the bond, and that the statement in writing of the deceased bond-writer was relevant under s 32 (2) of the Evidence Act *[illegible]* v. *Manakchand*, 11 N. L. R. 9 = 27 Ind Cas 866 Where the only living witness of a document was illiterate and on being examined denied its execution *Held*, that the document could be proved by other evidence *[illegible] Proshad* v *Gandhar*, 26

So long as there

ocument which is

il one such witness

has been called The fact that, when called, he will prove hostile, does not excuse the plaintiff of his duty *Tal Singh* v *Gopal Singh*, 1 Pat. L J 369 Sections 68 and 69 read together were intended to lay down how a document

it was not the intention of the legislature that an attesting witness or some other witness should have to prove further that the document was in fact signed by the mortgagor in the

Munna Lal, 11 A L J

15 A L J 164 = 39

ignatures of

, and that of

ption of its

gh v *Hukam Singh*, 15 A L J 167 = 39 A 112 = 38 Ind Cas 601 It is not necessary that two attesting witnesses should be called when two are alive nor that even assuming that one only need be called, he should at least be made to prove

Venkata v

Mere proof

f a document

ment is one

that the document was executed in the presence of two attesting witnesses *Perumal Chattiar* v. *Raghava Charriar*, 11 L W. 563. Where evidence of the

S. execution of a deed is available which, if tendered would satisfy the requirements of s 68 of the Evidence Act, the Court is justified in refusing to draw the presumption under s 90 of that Act nor can such presumption be invoked in favour of the deed nor would such presumption be justified in favour of the authority of a person to sign for an illiterate executant *Raghubar* v *Sanual* 8 O L J 23=61 Ind Cas 125 Where the only living attesting witness to a mortgage deed who had to be and was called by the mortgagee to depose to execution and attes [illegible] the mortgage, was got at by the [illegible] ied the clear evidence he gave in [illegible] as attestation *Held* that the sworn evidence given by the witness in examination in chief can be acted upon by the Court *Thannem* v *Bommadeiara*, 11 L W. 344=(1911) M W N 747

The death of attesting witnes [illegible] legal evidence not by hearsay [illegible] found must be proved to the satisf [illegible] diligent and honest search A [illegible] it can be compelled to attend the Court to give his evidence *Asoomeah* v *S R. Chetti*, 13 Bur L T 114=61 Ind Cas 637

To prove a deed of gift the production of a witness who identified the donor and also the attesting witnesses when the deed was being registered and who was known personally to the Sub Registrar together with an *entry in* favour of the donee in the village records in succession to the donor, is sufficient [illegible] *Partab Bahadur* v *Ramdas*, 60 Ind [illegible]

[illegible] ment

it is open to the parties to [illegible] as a matter of fact see the [illegible] v *Mon Mohini*, 67 Ind Cas 87 Tl [illegible] satisfies the requirement of section 68 [illegible]

[illegible] other is, it cannot be inferred that the [illegible] back the other and that there his evidence [illegible] *chminarayan* v *Moulavi Zahirul*, A I R [illegible]

[illegible] f of execution of the document [illegible] =101 Ind Cas 277=A I R 1927 [illegible] a mixed question of law and fact cannot be raised for the first time in second appeal *Erulandi Thevan* v *Subramania Iyer*, 97 Ind Cas 611=1926 M W. N 559 Evidence of attestors to mortgage deed is, indispensable unless it is impossible to produce them *Karimulla* v. *Gudar Koeri*, A I R 1925 All 56.

Required by law to be attested The term "required by law to be attested" means required by law of the country where the property *is situate* *Elizabeth May Toomey* v *Bhupendra Nath Bose*, 7 Pat. 520=111 Ind Cas 57=A I R 1928 Pat. 304 In that case *Dawson Miller C J* said. "*It* was next contended that the indenture of 20th June 1926 was not properly *proved* as neither of the attesting witnesses to M[illegible] signature had been called, nor [illegible]

[illegible] attestation [illegible] in this country. [illegible] signature of [illegible] his signature required [illegible] ited the document in [illegible] Whatever conflicting [illegible] apply to contracts in relation to law where the *lex loci contractus* and the *lex loci rei sitae* or, as Professor Dicey calls it, *lex sitas* differ it seems to be generally agreed by *Story, Dicey Westlake* and other text-writers that in so far as the formalities of aliena tion or conveyances are concerned the law applicable is that of the country where

the land is situated, (see, Dicey, Conflict of Laws, Ch. 21 and Appendix Note 17). S

... been intended to govern. Thus as to conveyances or Wills of land the local nature of the thing requires them to be carried into execution according to the law here." So also in Inglis ... v. ... 5 B & C 451, ... "The rule as to the law of the domicile has never been ... ity that the law of England, ... law of a foreign country." The ... their respects to foreign law, ... oreign country. In Waterhouse ... "When the law of a foreign ... the property of a debtor situate ...

... required to be attested, and s. 68 does not therefore apply. Sanatan v. Dina Nath, 26 C 222=3 C. W. N. 228.

An unattested ... as containing a personal covenant to ... ludes it. Madras Deposit and Benefit Co. ... it is impossible to view the question of the execution with reference to the covenant to pay as severable from the execution of the document in so far as it creates a security. Virappa v. Channa Muthu, 2 M. L. T. 175=17 M. L. J. 213=30 M. 251, but see Venkata v. Venkata, 54 M. 163=A. I. R. 1931 Mad 140=60 M. L. J. 56.

In order to prove a sale deed, it is not necessary, under this section, to examine a marginal ... by law to be attested ... is not a document ... application to a case in which such account book is produced in evidence. Emperor v. Narbada, 51 A. 861=121 Ind. Cas. 819=A. I. R. 1930 All. 38.

This section only applies to cases where a document is required to be attested in the manner provided by law and it can not be admitted in evidence unless one of the attesting witnesses is examined. Mathura Prosad v. Chhedi Lal, 13 A. L. J. 553=29 Ind. Cas. 363.

The provision of this section does not apply to the Will of a Mahomedan, and so an admission by the defendant, in a suit by the testator, was held to be relevant in a later suit to prove the Will. Najban Bibi v. Saiyad Raja, 4 O. C. 468.

Waiver of objection. Where no objection was taken to the admissibility of a mortgage deed in the Court of first instance on the ground that the deed ... at least, as ... considered ... Kaliathira, ... 13 M. L. J. 143.

Effect of document not properly attested. A document which is inoperative ... not being properly attested can not take ... endra ... Kali ... or of ... 164 (F. B.)=11 A. L. J. 141=18 Ind. ... L. J. 133=36 Ind. Cas. 903, Prannath ... undra, 44 C. 388 (P. C.); Official Receiver ... hemchand v. Malloo, 10 N. L. R. 81; ... 18 S. L. R. 282. Narayan v. Lakshmandas, ...

... only one witness is ... amount contained ... Pulaka Veetil v. Thiruthapalli, 32 M. 410 (F. B.) (Madras Deposit and Benefit Co. v. Oonamalai, 18 M. 29, overruled); Sada Kavur v. Tadepally, 30 M. 284, Ram Narain v. ...

8. ; *Sonatun* v. *Dinonath*, 26 C. 222; *Dhand* v *afaladdi* v. *Mohar*, 26 C. 78; *Dullim* v. *Behari*, M., 43 M. L J. 475; *Mathura* v *Cheddi*, 13 A. *err* v. *Clara Ruxton*, 4 C. L. J 510; *Quah Chang*

Transfer of property Amendment Act (XXVII of 1926) whether retrospective The Transfer of Property (Amendment) Act (XXVII of 1926) was

and *Roy JJ*, held, (i) that in view of the definition of the word "attested" in

adequate, but it was held by a Full Bench in the Allahabad High Court in *Ganga Nandan Kaluar* v. *Hanuman Das*, A. I R. 1927 All 1 = 49 A. 25 (F. B) ct and this was followed by a *Sajer Paramanick*, A. I. R 1927 e Bombay High Court in *Matilal* ot decided on the ground that Act decision in that case, made the

alone, there would have been no doubt whatever on the question That amendment was, however, inserted in this Act in the middle of a large number of amendments relating to the military and air force and s 4 of that Act was enacted at the same time which prescribes as follows.—

"This Act shall ... nce of ... lready ... thereof, ... from any debt, penalty, obligation, liability, claim or demand or any indemnity already granted, or the proof of any past act or thing"

... retrospective the legislature determined that that should not affect the validity, invalidity, effect or consequences of anything already done or suffered, or any proceeding in respect thereof It would therefore, ...

Act and under which portions of over 100 Acts are repealed, and amongst these are ss 3 and 4 of Act 10 of 1927 By repealing s 4 of Act 10 of 1927 that Act would have its retrospective effect restored, but in Act 12 of 1927, the saving clause contained in Act 10 of 1927 is repeated almost verbatim . This saving clause, therefore, enacts that the repeal of ss. 3 and 4 of Act 10 of 1927, which would have made that Act retrospective, is not to have that effect, for Act 12 of 1927 cannot rev... therefore, of this legislation ... of 'attested' is not to have retr... rights or any act done in the ... not valid when executed for want of proper attestation the subsequent legislation will not make it valid' But the view expressed by their Lordships in this case ... ion in a subsequent Full ... A I R 1929 Mad 1=55 ... ed to the Full Bench for decision was —

"Whether Acts 27 of 1926, 10 of 1927 and 12 of 1927 are retrospective in their nature so as to apply to documents executed on a date prior to their coming into force?"

Coutts-Trotter C J on behalf of the Full Bench answered the question as follows The Acts are retrospective We should have thought that Acts 27 of 1926 and 10 of 1927 showed a clear intention that they were to be regarded ... of 1927 preclude further discussion" ... 772=109 Ind Cas 469=A I R 1928 ... v *Swami*, 30 L W 677=A I R 1929 Mad 881=57 M L J 588, *Dargawati* v *Jagannath*, 27 A L J 1391=118 Ind Cas 662=A I R 1929 A 680

Proviso So far as any rule of pleading requires that the execution of a document named in the declaration must be expressly traversed, the failure to plead in denial must, under such a rule, be equivalent to a confession of the allegation of execution in the declaration, and thus the execution is not an issue on the trial, and the present rule does not apply *Wigmore* § 1295, Vide also order VIII, r 5, C P Code The words, "specifically denied" mean specifically denied by the party against whom it is sought to be used In *Cook* v *Transuell*, 8 Taunt, 450, *Gibbs C J* said "In cases where '*non est* ...

... part of the deed, he must do it by the attesting witness in the common way" See also *Gillett* v *Abbott*, 7 A. & E 783 Proper reading of the proviso to s. 68

69. is that if
required
deed the
document
the deed
an attesting witness *Radha* v *Deoki*, A I R 1932 All 320=1932 A L J 207; but see *Ramdayal* v *Sulab*, 14 R D 494 If the validity of a mortgage be specifically denied, in the sense that the document did not effect a mortgage in law, then it must be proved by the mortgagee that the mortgage deed was attested at least by two witnesses. *Lachman* v *Surendra*, A I R 1932 All. 527 (F B)=1932 A L J 653

Proof where no attesting witness found

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in the handwriting, of that person.

Principl ... attestation of an attesting or ... when the attestor is unavailable ... tion; and according to the orthodox form of preferred witness rule, the attestation must even be used in preference to other testimony" *Wigmore* § 1505 The reason is that the attestation is in effect the extra-judicial statement of the attestor to the fact of due execution, admitted under the hearsay exception and being admissible so far as concerns the H

instrument relative to its
have subscribed his name in
attestation comes in by w
Lossee v *Lossee*, 2 Hill 609
as a written declaration of
event of his death, or absence, yields a reluctant credit by way of necessary substitute for his oath *Mr. Hill's Note on the case*; *Wigmore* § 1505 So this extra judicial statement, expressed or implied, is always, when the attestor is unavailable, admissible by exception to the Hearsay rule The question there is, not merely whether it is admissible, but whether it is preferred to any other ... attestor is personally ... that extent disposed ... could now be made ... Is it, then further, a part of the rule of preference that, before thus going to other testimony, the attestor'
singular na
signature
over testimony on the stand under cross-examination is an extraordinary measure, assuming for such a statement a value not at all to be attributed ordinarily to such statements. Nevertheless, such a preference unquestionably existed as a part of orthodox common law rule in England *Wigmore* § 1310 But this section requires that the signature of the maker also, as well as that of the attestor must be proved. This contention means in effect that another witness to the maker's signature must be called, for (as has just been noted) the attestation is the attestor's testimony to the fact of execution, i e the placing of the signature by the purporting maker. If, then, it is necessary to call a second witness to the maker's signature, this must be on the supposition that the testimony of the attestation, taken alone, does not go far enough in its implied or expressed statements This is indeed the ground upon which in part the above contention has been rested. It argues first, that the attestation,

while asserting execution by a person of a certain name, does not sufficiently identify that person with the party in the case. It argues further more, from the point of view of policy, that a person might be bribed to make a false

... feasible
... attestor's
... M 520
..., that that proof
... the defendant
with the note what is the effect which, with the greatest degree of latitude
can
whic
deic
utmc
A B
step further and show that the defendant is A B of C in the county of York, or in some manner establish that he is the person by whom the note appears to be executed Now what does the subscribing witness in this particular case attest? Why, that this instrument was duly executed by a person of the name of *Francis Musgrove* There may be many persons of that name and if you do not show
... trument, you
... ve It is not
... e instrument
executed .. why? Because it is an essential part of the issue, which you are bound to prove, that the instrument was executed by the defendant in the suit It seems to me, therefore on principle, that you must give some evidence of the identity of the defendant with the party who has signed the instrument." *Wigmore* § 1513 But "wher
handwriting In this case one
is beyond the reach of the proce
which could be obtained was

... on-residents,
... *lm*)] and in
... instrument

Burr Jones § 529

Attestor's Hearsay Statement—How admissible Upon the general prin-
... statement cannot be used
... ng testimony in person.

he did not see executed by the
to trustworthiness seem to be four (1) The occasion is a formal one, and the statement requires a writing; and there is commonly a radical disinclination to take part in a false transaction of such a sort (2) The concoction of a false document will either fix an innocent party with a false obligation or will divert legitimate heirs of their rights, and there is a natural repugnance to giving assistance in such a wrong (3) The making of a false attestation, whether or not it is in criminal law a forgery or a perjury, is popularly supposed to be such, and the attestor would probably be at least an accomplice in a forgery, so that substantive sanction deterring from a crime would probably operate to prevent a false attestation (4) The attestor knows that he is liable at any time to be called upon in Court to substantiate his attestation, and not only in his falsity likely there to be exposed by the opponent's witnesses, but he will there be obliged either to commit perjury by swearing to the fact of execution or to ... of recanting and confessing his falseness ... of circumstances which easily accounted for ... to the Hearsay rule. *Wigmore* § 1508.

Scope of the section By the strict rule of the common law the primary or best evidence to prove the execution of a deed or other writing required by law to be attested is generally the testimony of subscribing witnesses, if available

or if not, then proof of his handwri ... the rule under discussion was declared by ... ormal and universal as that can be stated ... *gworth*, 4 Maule & S 325) yet it has several qualifications and exceptions The rule does not apply if the subscribing witness is dead (*Adam* v *Kerr*, 1 Bos & P 360), or can not be found (*Falmouth* v *Roberts* 9 M & W. 467=11 L J Ex. 180, *Parker* v *Hoskins*, 2 Taunt 223; *Birt* v *Walker*, 4 Barn & Ald 697), or is without the jurisdiction of the Court (*Prince* v *Blackburn*, 2 East, 250; *Glubb* v *Edward*,

... produced at a tri

dead or cannot b
of being produce
writing; and tha
of the instrumen

it must be proved that "no such attesting witness can be found" In other words, before a party can rely u
exhaust all process of the Court
16, rule 10, C P. C for the arre
property. *Shahzadi Begam* v
Cas 756=A I R 1928 Pat 356
(who was a marks-man) denie
dead or for some other reason no. ... where
attesting wi
one attesting
dispute as
charge the
A. I. R 1
writing of o
A mor
execution.
he denies execution, ...
has been admitted before the Registrar, the Court of fact can consider it *Laxman* v. *Kamalja*, 1924 Nag 367. Sections 68 and 69 of the Evidence Act read together were intended to lay down how a document which was required by law to be attested, ... if the provisions of the sections ... ment, in the absence of evidence to ... not the intention of the legislature that an
should have to prove further that th
mortgagor in the presence of at least
Munna Lal, 14 A. L. J. 1041=39 ...
comes to a finding as to a document having been legally proved within the meaning of this section, it cannot be legally interefred with by the appellate Court, specially when no objection was taken to the admissibility of the document at the time of the hearing *Monch Konda* v. *Mella Appalaswamy*, 32

... witness is ... *Chiranji* ... ference to proving the attestation of at least one attesting witness when all the attesting witnesses are dead, are sufficiently complied with by proof of the handwriting of the scribe and by the fact that some of the attesting witnesses signed by the pen of the scribe *Krishna Jiu* v *Bishnath*, 31 A 615 = 10 A L J 217 All

...

as the document had been admitted by one of the executants in certain other document tendered in evidence and proved *Held*, that the evidence adduced did not comply with the requirements of s 69 of the Evidence Act and the document could not be taken to have been proved *Gobardhan* v *Hari Lal*, 11 A L J. 379 = 19 Ind Cas. 121 = ... A 361 In England, it is recognized that there is a distinction between proof of the handwriting of a person and presumptive and other evidence that a document had been executed The Indian Law does not appear to allow a party to rely on presumptive or other evidence

...

the attesting witnesses had been duly accounted for *Suamudin* v *Kaniz*, 11 Ind Cas 225, see also *Naraperumal* v *Kaphara*, 14 L W 563 This section no doubt requires proof that the signature of the executant is in his handwriting, but this fact may be proved indirectly by a contemporaneous admission of execution made by an executant or by other relevant facts, such as his subsequent conduct, just as well as by the evidence of a witness who directly swears to his signature Such an admission recorded by the Sub-Registrar in his registration endorsement can be accepted in evidence as proof of execution *Ajudhia* v *Jagannath*, 20 O C 18 = 38 Ind Cas 605 In the expression "it must be proved that the attestation of one attesting witness at least is in his handwriting" "handwriting" could probably be held to include, in the case of marksman, his mark *Whitley Stokes*, Vol II p 894, see also *Pran Krishna* v *Jadunath*, 2 C W N 603

...

absence of the witness beyond the jurisdiction of the Court (*Mills* v *Twist*, 8 Johns (N. Y) 121], or his absence in a distant part of the country, are not sufficient *Mclord* v *Johnson*, 4 Bibb (Ky) 531 The absence of the witness is sufficiently accounted for if, after diligent enquiry, he cannot be found *Clark* v *Sanderson*, 3 Binn, Pa (192); *Cunliffe* v *Sefton*, 2 East, 182, *Crosby* v *Percy*, 1 Taunt 364, *Dudley* v *Sumner*, 5 Mass 438, *Morgan* v *Morgan*, 9 Bing 359, *Evans* v *Curtis*, 2 Car & P 296, *Bright* v *Doe*, A & E 22; *Whitelock* v *Musgrove*, 1 C & M 511 What is due diligence must, of course, depend somewhat upon the circumstances of each case The proof should show satisfactorily that a reasonable, honest and diligent inquiry has been made After such proof is given, the decision of the question depends to a considerable extent upon the so ...
Burton 11 Johns (N Y) 64 Such ...
Twist, 3 J ...
witness, if ...
Jackson v ...
treated as p ...
What is sufficient proof of the search for an absent witness, in order to admit secondary evidence of the signature, depends somewhat upon circumstances. Where the witness has a fixed residence within the country the rule should be more strict than where the defendant had no fixed residence, was a labouring ... ment.
... to use
... vs that
... 282
... party,

0. or that suc , the rule will not be enforc es § 529; see al o *Thannesa* attesting witness must be p d Cas. 637.

Witness' name unknown, through loss or Illegibility of Document. 'It is clear that where the very name of the attestor cannot be ascertained, the attestor is unavailable for the purpose of furnishing his testimony. This situation occurs where the document is lost; here the proponet is exempt from producing the attestor [*Keeling* v *Ball*, Peake Add Cas 88; *Re Phibbs* (1917) p 93)]; unless of course the name has otherwise before trial become known to the proponent, for in that case his t the document before him, might document did or did not once exist

exists" *Wigmore* § 1314 The known but the person cannot *Giles*, 1 E & B 642.

Causes of unavaility—Illness—Failure of Memory etc When the attester is at the time of trial so ill or so infirm from age that it is impractic able, without ttendance in Court, his production Taunt. 16, *contra* *Harrison* v *Bh* far as it involves a mental disability organic in its nature, and analogous to insanity, should

tion purely as to the identity *Wigmore* § § 1315, 1316.

If the attestor admissible The interest. *Suire* has since become because it speaks as

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Admission of execution by party to attested document

Principle For the purposes of proof, a judicial admission of the opponent —i e an express agreement for the purposes of the trial—has the same effect as a

name. *Wigmore* § 1290

Scope of the relate to admissio p 891. The term party in the course by the a lmission o *Budha* v. *Sewan*,

S

evidently distinguished from the execution by witnesses, which is known as "attestation." *Jhama* v *Dedtu*, 2 N. L. R 10 (16) "Section 70 of the Indian Evidence Act lays down that the admission of a party to an attested document of its *execution* by *himself* shall be sufficient proof of its execution as against ... Now the question ... as to what is meant ... on' there means the ... assent to the contents ... no this, there he admits ... can be taken to mean ... of assent by him, but ... ent have been complied ... arty admits execution ... be taken to admit that ... 59 of the Transfer of Property ... Bom L 1290 = 17 B 137 = 76 Ind, ... 7 C W N 263 So *section 70* of the Evi... attestation ... Transfer of P... ... *endra* v *Nitai*, 7 C W N. ... *Satishchandra Mitra* v ... *Woodroffe J* said "That ... struct on that even when ... of execution or signing ... his be the meaning of that ...

... ad to the ... so indica- ... law to be ... 441 = 44 Ind Cas 984, *Pabau Khan* v *Badal*, ... *mat* *Nanhi*, 64 Ind Cas 11 = 19 A L J 855 ... *ath*, 3 Pat 317 = 74 Ind Cas 100 = 1923 P ... , 38 C L J 114 = 74 Ind Cas 178, *Aung Kin* v *Ma Aung*, 1 Rang 657, *Nageswar* v *Bachu*, 4 Pat L J 511 = 53 Ind Cas 79; *Priyanath* v *Bissessuar*, 1 C. W N ccxxii, *Dhanua Lal* v *Shambu*, 47 Ind Cas 9 But in a recent case the Judicial Committee of the Privy Council has held that this section ... J *Hira Bibi* v *Ram Hari*, 30 C W ... A L J 815 = 52 I A 362 = 2 O W ... 1144 = 42 C L J 148 = 98 Ind Cas ... R 1925 P C 203 This section applies ... *Ma Po Gin* v *Ma Hin Din* 5 Rang ... *v Diva*, ... an not ... , 45 C ... unless ... *Arjun Chandra* v *Kailash Chandra*, 36 C L J 373 The admission by a mortgagor of the execution of a mortgage deed before the Court does away with the necessity of proving its execution but not with the necessity of such attestation as is required by law *Pandurang* v *Balaji*, 14 C P L R 42 Under this section, ... sufficient proof as against the ... proposition that the document ...

4 Pat L J 511, *Nibaran* v *Ram Chandra*, 22 C W N 445 = 44 Ind Cas 984 ... document cannot be ... ent of its execution ... 178 = 38 C. L J 114,

There was a clear admission of execution in the written statement The attesting witness called stated that the executant did not sign the deed in his presence *Held* that the document must be taken to have been proved. *Ramlal* v. *Mussi, Septi*, 94 Ind Cas 558=A I R 1926 Pat. 295

Admission when to be made The term "admission" in this section relates only to the admission of a party in the course of a trial of a suit *Abdul Karim* v *Salimon*, 27 C 190 Such admission can be made by a party in his pleadings or in his examination *Rajmangal* v *Mathura*, 30 Ind Cas 576=38 A 1=13 A L J. 881; *Musst Sarja* v *Murlidhar*, 13 N L R 197; *Budha* v *Saruan*, 7 N [illegible]

[illegible]

pending before a Court of Justice, cannot be supported on principle or authority If authority were needed to refute such a proposition, I think authority may and can be found in the decision of their Lordships of the Privy Council in *Kunwar* [illegible] C 241, in *Hampleton* v *Wallis*, [illegible] *Gobordhan Das* v *Harilal*, 19 Ind [illegible] my opinion an admission under [illegible] though it be an admission not made [illegible] before a Court of Justice, but

[illegible]

1924 Rang 139 But in a later Patna case it has been held that this section relates to the admission of the party in the course of the proceedings in which the document is produced made either in the proceedings or in the evidence. *Banuari Prosad* v *Bigni Kuar*, 8 Pat L T 7=101 Ind Cas. 277=A I R 1927 Pat 131; see also *Deorao* v. *Dhandirao*, 109 Ind Cas. 576=A I R 1928 Nag 244; *Harilal* v. *Thakur Bag*, 19 O C 23=34 Ind Cas. 281 An admission can be made in a written statement *Ram Lal* v *Septi*, 91 Ind Cas 558=A I R 1926 Pat 295=1926 P H C C 117, *Ayerali* v *Esmail* A I R 1929 Cal 449=49 C L J 347 But an adm[illegible] of a document before a Sub Registrar does not amount [illegible] which is the admiss on referred to in section [illegible] *[illegible]ibkhan*, 93 Ind Cas 660=18 S L R 282= [illegible] *[illegible]uan*, 7 N L R 85.

[illegible]

the document need not in any manner evidence its execution. Since the p[illegible] tion of the attesting witness is required solely for the purpose of evidencing [illegible] *Goodson*,

[illegible]

Wigmore § 1294

Execution not disputable—Because of opponent's claim under the same instrument Where the opponent's claim as expressly set forth in the pleadings [illegible]

[illegible]

attitude, he must relinquish the latter one; so long as the document [illegible]

for his purposes, it is also (so far as he is concerned) genuine for the proponent's purposes. The execution thus not being disputable, the rule requiring the attesting witness to prove it does not apply *Wigmore* § 1297

Proof when attesting witness denies the execution

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Principle The notion of the rule of Preference for the attesting witness is that of the general desirability, in furtherance of truth, of obtaining his knowledge on the subject What may be the tenor of witness's testimony, remains
of the sid[illegible]
i *e* by [illegible]
evidence the execution, the present rule says nothing about the consequences—whatever any other rule may say The present rule's force is absolutely spent when witness is produced for examination So the attestor's positive denial of the facts of execution, contradicting the statements implied or expressed in his attestation leave the proponent still free to prove by other testimony, if he can, the facts of due execution, a permission demanded not only by principle but also by policy in as much as the proponent might otherwise be defeated of his rights by a corrupt attestor *Wigmore* § 1302

Scope of the section The party seeking to prove an instrument may examine his witness as to the acts of execution performed, the date, the place,

[illegible]

15 Pick Mass 534 If a party, who calls a witness to prove a particular fact, be disappointed in the result of the testimony, it is competent for him to prove the fact by other testimony 3 *Stark Ev* 1692 If the subscribing witness fails to establish [illegible]
attestation, [illegible]
of law, not [illegible]
testimony [illegible]
534 In other words, the execution of the instrument, even though it be a Will may be established by competent evidence against the positive testimony of the subscribing witnesses *Matter of Gottrel*, 95 N Y 329 The party who would establish a deed must lay his ground work by the production of the subscribing witnesses if th[illegible] hey fail to establish the execution of it, [illegible] positive rule of the law, is not to be c[illegible] be permitted to establish

attestation or not *Nort Ev* 254 When in a mortgage suit is was found that one of the attestors was dead and the other either denied or did not recollect the execution of the document, the execution of the same can be proved by other evidence *Lakshman* v *Gokhul*, 1 Pat 54=(1922) Pat 415=70 Ind Cas 298 A statement of the attesting witnesses to a mortgage deed that they signed the blank paper and not the completed deed is sufficient to attract the operation of this section and entitles the mortgagee to prove execution by evidence other than that of the attesting witnesses *Dinabandhu* v *Sanatan*, 48 Ind Cas 624 "If one of two or more attesting witnesses being called, denies or does not recollect the execution of the document it is not very clear whether other evidence can be given to prove it, if there be another attesting witness alive, subject to the process of the Court and capable of giving evidence,

71. who is not produced " *Field Ev 7th Ed* 227. It is not intended by enacting this section to depart from the rule of English law that the evidence of the other witnesses should not be introduced unless the absence of the other attesting witness is satisfactorily explained in the case where one of the two attesting witnesses has been called and has denied execution. *Ayenanti v Mahammad,* 49 C L J 347 = A I R 1929 Cal 44. So other evidence under s. 71 cannot be admitted where provision of s 68 have not been complied with. *Banuari v Gopi,* A I R 1931 All 411 = 1931 A L J 312.

given false testimony ... ll which was attested by four witnesses, two of whom had died and the other two deposed practically in favour of the objector, *Mookerjee v. Breachcraft JJ* observed. "This however, does not compel the Court to pronounce against the Will It was ruled in the case of *Nubo Kishore Dass v Joy Doorga Dassee,* 22 W R 189, that the mere fact that attesting witnesses to a Will have repudiated their signatures, does not invalidate the Will, if it can be proved by evidence of a reliable

consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with; in other words, the Court may, (of the case evidence is o' Court and the Will Y also *Re Sweet,* (1891) P 400; *Re Owens,* 29 L R Ir 451 So the fate of a document is not necessarily at the n v. *Anjumanunnissa,* 48 Ind Cas 53 19 Ves. Jr 494, 507, *Lord Eldon* said

namely, that the party did not execute it." *Per Lord Kenyon, C J* in *Ley v Ballord,* 3 Esp 173 note "The attesting witness's testimony is not indeed conclusive for the party may go on to prove him untrustworthy and may call other witnesses to prove th v *Harringworth,* 4 M. & *Glascock,* Skinn 413; *Austin* N P 264, *Richie v Oalfield,* v. *Bradbury,* Buller N P 26. hands, it was objected he if you call one w he prove against yo him to call other *Wigmore* § 1302. absence of recolle evidence *Sheik K* *Balram v Kamal* 347 = A I R 1929 Cal. 141. See also *Coles v Coles,* L. R. 1 P. 70; *Bowma*

S.

v. *Hodgson*, L. R. 1 P. 362; *Dayman v. Dayman*, 71 L. T. 699, *Pilkington v. Gray*, (1899) A. C. 401; *Goodison v. Goodison* (1913) 1 Ir R 218 Where the attestor denies attestation and the other attestors are dead, what is required under s. 71 is only pro[illegible] he presence of attesting witnesses. *Lalla* [illegible] *ari v. Sankar Dayal*, 74 Ind. Cas. 969 [illegible] positive and there is nothing to throw d[illegible] ected. *Wyatt v. Berry*, (1893) P. 5; Phip. Ev. 502. Where the only living attesting witness of a document was illiterate and on being examined denied execution. *Held*, that the document could be proved by other evidence *Babu Prashad v. Gambhir*, 29 Ind. Cas. 500 A [illegible] at the time of its [illegible] *Gouri Shankar*, 39 I [illegible] witness is considered hostile by the party taking his stand on the document, does not relieve him from the duty of examining him as a witness *Gobinda v Pulin* 31 C. W. N 215 · *Tula Singh v Gopal Singh*, 1 P L J 369 If he denies the execution, other oral evidence is admissible to prove execution *Basdeo v. Rasbehari*, 104 Ind Cas 344; *Lakshman v Gokul*, 1 Pat 151; *Sashi Mukhi v. Monmohi* [illegible] *n v Krishna Ji*, 29 Bom. L R. 1425 = 105 [illegible] er is not bound to call a hostile attesting witness [illegible] *Belbin v Skeats*, 1 S & T 148; Phip Ev. 502.

[illegible]

obviously cannot excuse, for it cannot be ascertained except after production to testify.—When it appears after such production, other principles come into play, (a) the witness may adopt his attesting signature as record of past recollection, and upon the faith of it verify the facts of execution as thus known to him [illegible] be otherwise [illegible] of execution; [illegible] ay be proved by other qualified persons *Wigmore* § 1315 The first question is, may not the attestor, though not actually recollecting the circumstances, adopt his [illegible] e his testimony on the faith [illegible] had he not witnessed the [illegible] Recollection *Vide* s *159* [illegible]

circumstances of the execution [illegible] prove the facts of execution by other witnesses Because "it could never have [illegible] xecuted, when- [illegible] attending the [illegible] ill, not because [illegible] e requisites of the law, but because they would most likely prove or disprove them, and [illegible]

said [illegible] since th[illegible] they ar[illegible] are circ[illegible] ation al[illegible] *praesumuntur rite esse acta.* [illegible]

71. *Lindley L*
sion, in a sh
of acting on
reasonably be
when the e consistent with that intention
effect in a p all due formalities
can only b maxim is not wanted
where such such observance is
disproved. The maxim only comes into operation there is no proof one
way or the other, but where it is more probable that what was intended to be
done was done as it ought to have been done to render it valid, rather than that
it was done in some other manner which would defeat the intention proved to
exist, and would render what is proved to have been done of no effect" See
also *Cooper* v *Beckett*, 3 Curt 648 = 4 Moo P C 419, *Wright* v *Sanderson*,
(1884) 9 P & D 149, *Lloyd* v *Roberts* (1858) 12 Moo P C 158 The presump-
tion app more or less force according to the circumstances of each case
Vennicoi (1890) 15 P. & D
170 (184
probate
and if
the Will has been duly executed, probate
Hemangini, 4 C W N 204, *Anna Cholam* v *Ramaswamy*, 30 M L
(P C) = 20 *Blake* v *Blake* (1882) 7 P & D 102
Hotker L J Will has
been in doubt
sign, the fact
the Court to come to the conclusion that they
Blake v *Knight*, 3 Curt 547, *In re*
the recollection
Woolmer v.
Daly, 2 Lah 773 The same other documents
required by law to be attested One of the attesting witnesses A to a mortgage
bond deposed that he was present, saw the execution and became an attesting
witness, the other witness B stated that at the request of the mortgagor, he
became an attesting witness but had no recollection of any other circumstances
in connection the execution of the document On the same day, when
the documen identified, the executant
who, in his
that the infer
laid down in
38 C L J 1
principle applicable to cases of this character
Jogendra Nath v *Nitai Charan*, 7 C W N 384, by the *Allahabad* 162.
in *Ram* v *Munnalal* 39 A 109, *Uttam Singh* v *Hukum Singh* 39 A.
by the Madras High Court in
t might
of the

upon the face of the
signature of the testator at the foot, as also the subscription
It was ruled by *Dr Lushington*, that, in the absence or death of witness
prima facie the presumption is that the testator signed in the joint presence
of the two persons and they This principle was
applied by the Allahabad Hig where
reference was made to *Wright*
followed, as based on sound
mentioned before. Reference may
in *Blake* v *Blake*, 7 P. D. 102; *Harris*
v. *Peverett*, (1902) P 205. No doubt
(1915) 1 P 211, the que
stances, and cases are con
inference by reason of
were not in contemplation of

Proof of document not required by law to be attested.

72. An attested document not required by law to be attested may be proved as if it was unattested.

S. &

Principle and Scope This section embodies section 37 of Act II of 1855. For a long time it was held that when a document was attested, one at least of the attesting witnesses must be produced *Doe* v *Durnford*, 2 M & S 62. In *Warkel* v *Ferriour*, 2 Camp 282, 284, *Lord Ellenborough* said that "it did not depend on the nature of the deed to be proved, it must depend upon the possibility of procuring the attendance of the attesting witness, not upon the testimony he is likely to give" See also *Higgs* v *Dixon*, 2 Stark 180; *Streeter* v. *Barlett*, 5 C B 562 But as this worked great hardships to suitors the Common Law Procedure Act 1854 (17 & 18 Vict C 125, s 26) and the Indian Evidence Act of 1855, introduced the present reform this practice *Nort. Ev.* 255 Those Acts restricted the rule to documents required by law to be attested. *Re Rache*, L R 32 Ch D 35. In England the Common Law Procedure Act, has been replaced by Stat 28 & 29 Vict C, Ss 1, 7 So now in England, an attested document, to the validity of which attestation is not by law necessary may be proved by admission or otherwise as if there were no attesting witnesses. This rule is applicable also to Ireland *R* v *Mallon*, 12 Ir C L R 55 This [illegible]

Identity of Party and document. In order to prove a document the identity of the writer or marksman with the defendant or other person alleged to have signed the document, may have to be given *Phip Ev 7th Ed* 504 In *Neuson* v *Luster* 13 Ill 175, *Trunbell J* said "I have no hesitation in holding that proof of the handwriting of the grantor to a deed furnishes altogether more satisfactory evidence of its execution than would proof of the handwriting of the subscribing witness" The identity of the party may be proved by showing that he had spoken of the [illegible] & P 613) or by proof of similar [illegible] n, especially if the name be unc[illegible] C B 861, *Simpson* v *Dismore*, 9 M & W 47); *Phip Ev 7th Ed* p 504 The identity of the document, whether attested or not, may also have to be shown, *e g.*, when the defendant, pursuant to notice, produced a document which the plaintiff denied to be the contract in question, parol evidence was received to determine the point *Fraude* v *Hobbs*, 1 F & F. 612; *Phip Ed 7th Ev* 504

Comparison of signature, writing or seal with others admitted or proved

73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person, may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

*[This section applies also, with any necessary modifications, to finger impression.]

* *This paragraph was added to s. 73 by the Indian Evidence Act, 1899* (5 of 1899).

73 Principle In proving a document o . evidence offer themselves, first testimony b or some circumstance of the kind of hand second mode there is

tribunal directly
Wigmore § 1996
to afford a fairly trustworthy inference, must of course be genuine, and they also be numerous and representative enough to serve as an adequate basis for inference to the general style *Ibid*

Scope of the Section By section 45, handwriting and signature of a person can be proved by an expert Section 47 admits the opinion of any person, acqu ... is supposed to be writt
In addition
under ss 45 and 47,
with an undisputed one
in dispute it to be co ... by the party to be genuine comparison is the more satisfactory. If it be proved genuine to the satisfaction of the Judge, with whom the
Ridgway, 1 F & F. 270), the comp
Times 223) A party may und
purpose of comparison (*Doe* v *Wil*
be less satisfactory, as a person
writing with the very view of defeating a comparison. *Cobell* v. *Kilminster*,
could only be made between the disputed
the cause But the present

Nort Ev.
doubted in
have decl
admission
comparison with the
standard must be proved
"The difference between letters which have been received in correspondence
... a witness's hand" it was argued in *Mudd* v *Suckermore*, 2 P & D
... a witness

in a condition ...
selected or even ...
Best Ev § 238 ...
in *Mudd v Suckermore*, (1836) 2 P D O 20, the inconvenience of collateral issues already exists where a witness speaks to the genuineness of handwriting from an impression derived from a letter he has received The correctness of this knowledge depends on the genuineness of that letter, and even where he says he saw the party write, his knowledge depends on the issue whether or not he did see the party write As to the second objection *Mr Best* says "It is not always easy to obtain fair specimens, and should such be produced, it would be competent to the opposite party to encounter them with true one" *Best on Ev* § 238. Concerning the third objection, *Mr Best* says "It does not seem satisfactory logic to protect a jury which can read from availing themselves of that means for the investigation of truth because other juries might, from want of education, be disqualified from so doing; if some men are blind, that is no reason why all others should have their eyes put out." *Best on Ev* § 238 This last argument against jurors loses all its force in India in as much as no civil cases are tried here by jurors and a few important criminal cases only are tried with the help of ... are literate ... by compa- ... by juxtaposi- ... mind of the witness on the other, it has been pointed out in the latter case the characteristics of the standard are indistinct, shadowy and uncertain, while in the former they appear in ...

paper in ...
ceived, of ...
disputed ...
made in h...
v *Woolfo*...
held that ...
cause) "has been that the standard writing must be one used in and connected with the case But how can this be held necessary when we look at the object of the standard It is of no consequence what the writing you compare is; all you want is a genuine handwriting, and it is as respects the nature of the evidence not material what instrument it is, nor whether the paper be blank in all except the signature, nor whether the writing be connected with the case or not."

In England the controversy was set at rest by the enactment of Stat 17 & 18 ... which allow comparison of hands ... y laws as well as under this ... ear, first, that any writings, the ... not of the jury, but of the ...

4 F. & F 490), ...
Muk, 4 C & P ...
any one, the J...
Fussell, 3 F & F ...
lay witness is c...
by putting the ...
parison by wit...
merely opinion ...

3. them, the jury may compare them as well as any body else and any two people may think differently" *Per Yates J.* in *Bqookbond* v *Woodley*, Peake N. P 21 Note Similarly in *Doe* v. *Suckermore*, 5 A & E 749, *Denman L C J* said "If the proved document and the controverted are both in Court, and the witnesses speak to their resemblance or difference from immediate observation, they seem to perform a task for the jury which every one of them, even though illiterate, might well perform for himself" So it is clear that on principle, comparison by a lay witness should not be allowed, even in the presence of the tribunal. But this rule does not apply in the case of an expert witness, because "he does what possibly the jury may be incompetent to do" *Ibid*; *Wigmore* § 1997 The question of comparison of signature is distinct from question of admissibility *Khyiruddin* v *Emperor*, 53 C 372=92 Ind. Cas 442=27 Cr. L J 266=A I R 1926 Cal 139 The word "purports" in this section does not limit the scope of the section to such documents only as are signed or contain some intrinsic statements of the identity
by a party to be in the handwriting of
proof be campared with other writing
satisfaction of the Court to have been made or written by that person *Veera Raghava* v. *Souri Aiyanger*, 35 M L J 608=41 Ind. Cas 688=24 M L. T 477. In delivering the judgment in the case the Court observed "This case turns solely on the r
Evidence Act.
Kumar v *Empe*
Batchelor JJ i
are inclined to
the scope of the
statement of th
is necessary to
writing In
used is "allege
the two words
the two must l

ascribed by the prosecution to a particular
person, then the
regard to the adn
disputed writing,
have been written or made by the accused *Emperor* v. *Ganpat Balkrishna*, 14 Bom L R 310=15 Ind Cas 649=13 Cr. L J 505 But in *Barindra Kumar* v *Emperor*, 37 C 467=14 C W N. 1114 at p 1138, *Jenkins C J.* said "In applying the provisions of section 73 of the Evidence Act it is important not to lose sight of its exact terms It does not sanction
the comp ... with
which the
shall be
attributed,
purport to
must stat
specifically
paragraph
of contra
son In
Sessions
with the
submissio
not an irre
learned S
section, ha
out having
think this
times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as

S.

might be derived from the arguments of counsel and the evidence of experts. In *Sreemutty Phoolee Bibee v. Gobind Chunder Roy*, 22 W. R. 272, it was said by the Court that 'a comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution.' In this case no expert has been called to assist the Court, and not because no expert was available; there is, it is well known a Government expert as to handwriting and certain of the documents in this case bear a stamp which shows that they have been submitted to him. It is true that the opinions of experts on handwriting meet with their full share of disparagement at times, but at any rate there is this use in their employment that the appearances on which they rely are disclosed, and can thus be supported or criticised, whereas an opinion formed

And
distin-
C. 548,
See also
30 Nag.
is one
o other
innot be
proof alone.
nd Cas 741;

ne purpose of comparison of handwriting under this section it is his duty, under section 298 of the Criminal Procedure Code to find whether these documents are admitted or proved The record of the case should contain a note of such finding. *Queen-Empress* v. *Tulsaji*, Rat. Un Cr C 491; *Queen Empress* v *Lalsing*, Rat. Un Cr C 152. But in a trial by jury, where the Judge allowed certain documents to go upon the record, which were not proved under the requirements of s 73 of the Evidence Act, *for the purpose of comparison with the disputed* handwriting, *held* that there was no such irregularity of procedure as to warrant an interference in revision Whether the documents were proved or not, it was for the jury to decide *Queen-Empres*

98. The Court has
genuine signature
to come to a conclusion *Gondu* v *Tulsiram*, A I R 1930 Nag 27.

English law and origin of the ru
except when the witness wrote the
its nature comparison ;—it being the
comparing the writing in question
some previous knowledg (*Doe* v *Sukermore*, 5 A & E 731, *per Patteson J*), the law until the year 1854, did not allow the witness, or even the jury except under *certain special circumstances*, actually to compare two writings with each other, in order to ascertain whether both were written by the same person *Taylor*
ule excluding proof of the hand-writing by
The first was the case of a document
tent for the Court and jury to compare the
in the case for other purposes, and which
were admitted or proved to be in the handwriting of the supposed writer *Best. Ev* § 239, *Griffith* v. *Williams*, 1 C & J 47; *Doe d Perry* v *Newton*, 5 A & E 514. The case of *Perry* v *Newton, supra*, decided by the Court of King's Bench in 1836, is always cited as the leading case to support this exception, although the exception did not arise in the case at all On the trial of an

jury, that they might compare them with the signature in the will. The letters were not in evidence for any other purpose. The Judge *refused to allow them* to be put in, and on appeal the full Court sustained the ruling. *Lord Denman*

3. *C. J.* said: "This is a point on which we ought not to raise any doubt... The comparison is unavoidable. There being two documents in the cause, one of which is known to be in the handwriting of a party, the other alleged, but denied to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness; and therefore it is best for the

persons acquainted with the handwriting of the supposed writer, either by having seen him write or by having held correspondence with him, the law, acting on the *maxim lex non cogit impossibilia*, allows other ancient documents, which are proved to have been treated and regularly preserved as authentic, to be compared with the disputed one" *Best on Ev.* § 240; *Roe* v. *Rawlings*, 7 East. 282 (n); *Doe* v *Tarer*, R & M. 141; *Doe* v. *Davies*, 10 Q. B. 314; *Moorewood* v. *Wood*, 14 East. 327; *Barr.* v. *Harpar*, 1 Holt 420; *Brune* v. *Rawlings*, 7 East. 282; *Crauford and Lindsay Peerages*, 2 H. L. C 537; *Solita* v. *Yarrow*, M & R. 133, *Bromage* v *Rice*, 7 C & P. 548. With these exceptions comparison was not allowed in England. *Macpherson* v. *Thoytes*, Peake N. P. 29; *Brookford* v. *Woodby*, 9 Peak. N P 30; *Garrels* v. *Allexander*, 4 Esp. 29; *Brookford* v. *Woodley*, 9 Peak N P. 30, *Gancols* v. *Abuandro*, 1 Esp. 37. In *Engleton* v. *Kingston*, 8 ... I never heard of evidence in ... those who had never seen ... equently received

of the jury to prove comparison of ... metropolis the jury are composed ... conclusions from such evidence. For my part, I have always been inclined to admit it, and shall do so in this case." See also *Rivett* v. *Braham*, 4 Term. R. 497, *King* v *Cator*, 4 Esp 117

The subject at last came before the Court of King's Bench in the well known case of *Mudd* v. *Suckermore*, 5 Ad. & E. 703 In that case the Court ... admissibility ... years after ... dissenting ... "Compari- ... ion of the ... ; and such ... submitted

... whose hand- ... calling on ... reception of ... ch compari-

sons were not allowed in India *Annagurubili* v. *Kristnasawmi*, 1 M. H. S. C. R. 457.

In 1865, Stat. 28 & 29 Vict. C. 18, was passed, section 8 of which runs as follows: "comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of genuineness, or otherwise, of the writing in dispute" Section 1 of the same Act provides that the above enactment, in common with certain other clauses relating to evidence,—shall apply to all Courts of Judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence, whether in England or in Ireland" *Taylor* § 1869 The Indian Evidence Act found place on the Statute Book in 1872.

Comparison of writing etc, meaning of All evidence of handwriting, except where t
comparison of h.
ness entertains,
mind, derived from some previous knowledge of the hand *Woodward J* in *Travis* v *Brown* 43 Pa St 12 (Am) But this is not what is properly known as comparison of handwriting "By comparison is meant," says Starkie "a comparison by the juxtaposition of two writings, in order by such comparison, to ascertain whether both were written by the same person" *Stark Ev Part IV p 654* "Comparison of handwriting is where other witnesses prove a paper to

mind, as an external visible and tangible object is distinct from a mental impression or memory. It is the distinction between what is objective and what is subjective *Woodward J* in *Travis* v *Brown*, 43 Pa St 12

The genuineness of the standard Wherever proof of handwriting by
en that the standard of
is obvious Under the
of a disputed writing
tion of the Court to be
as to the genuineness

out by the
collateral is
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e person write the
s, 13 S W R 330
certainty, should
to a
In a
oversy

record, is presumed to be genuine, and may be used as a standard without further proof *Saute* v *Dawson*, 2 Mart 202 (Am) "When the identity of anything is fully and certainly established, you may compare other things with it which are doubtful, to ascertain whether they belong to the same class or not, but when both are doubtful and uncertain, comparison is not only useless as to any certain result, but clearly dangerous, and more likely to bewilder than to instruct the jury." *Per Coulter J* in *Depue* v *Place*. 7 Pa St. 428 (Am) A document to be admissible against an accused person should be proved to be a document

3. in the handwriting of an accused person by comparison with an admitted or proved specimen of his handwriting, in the light of the testimony of expert witness *Pulinbehari* v *King Emperor*, 16 C. W. N 1105=16 Ind Cas. 257, *Queen-Empress* v. *Tulsaje*, Rat. Un Cr. C. 491.

…tographic copies of … admitted signature … 94 C A. Such copies are secondary evidence *Ibid* But it is held in *Massachusetts* that magnified photographic copies of the signature in dispute and of admitted genuine signatures of the same person are admissible in evidence when accompanied by competent preliminary proof that the copies are accurate in all respects except as … are capable" said *Merrick J.* "of affording some …

glass … mark … not … tion … admi … prop … accuracy of the copies produced by the art of the photographer, we are unable to perceive any valid objection to the use of such proposed representations of original and genuine signatures as evidence competent to be considered and weighed by a jury" *Marcy* v *Barney*, 16 Gray, 160 Letter press copies might under some circumstances be useful as well as the originals, or in default of them *Wigmore* § 2019.

… Any person whose handwriting is in … , may be required by the Judge to write in … may be compared with the document in question *Doed Devine* v *Wilson*, 10 Moo P C 50?, 503; *Cobbett* v. *Kilminster*, 4 F. & F. 490; *Taylor* § 1871 To prove the handwriting of a person in a particular document a party may ask the Court to have the handwriting of that person to be taken in Court for the purpose of comparison The result of the … of an issue arising in the case and is quite … of the question of admissibility or otherwise of … hin the province of the jury and not of the Judge *Khyiruddin* v *Emperor*, 42 C L J 504

J. 79; *Basgit* v *Emperor*, 6 P 304=104 Ind. Cas 626, *Emperor* v. … 46 M. 715=69 Ind Cas 374.

Comparison of handwriting—Value of A comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts. *Sarajini* v. *Hari Das*, 26 C W. N 75, *Balakram* v *Md Said*, 77 Ind Cas. 872. In *Phoode Bibee* v. *Gobind Chunder Roy*, 22 W. R 272, it was said by the Court … the truth which ought … peror, 76 Ind. Cas. 4-5, … comparison of writings has consequently been deemed a mode of ascertaining truth which ought to be

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used with very great caution (*Nalin Krishna* v *Rasik Lal*, 10 C 1047 (1051), and 2)=16 W. R. P C 16), specially comparison. *R* v. *Silverlock*, 516; *Doe* v *Suckermore*, 5 A & 4 M I A 67=7 B L R 216= 1=20 I A 95; *Ambika Charan* *Galstin* v *Sonatun*, 78 Ind. R 529, *Abdulla* v *Ganni*, 11 B *...aran* v *Girish*, 9 W. R 150. ... dissimilarity of signatures, a particular signature is not ... the signature, yet resemblance ... genuine *Sarojini* v *Hari* *Das*, 26 C W. N 113=34 C L J 373, *Balahu* v *Parmesuar*, 64 Ind Cas. ..., there is room for suspicion that ... re. ... tu-*ally written in the* ... The character of a person's signature is generally of uniform appearance, and the ... person is thus ... signature of a ... person is such a facsimile that one is a perfect match to the other in every respect There is generally diversity in the marks of the pen, the size of the letter, the level of the signature and space it occupies, that stands as a guard over the genuine signature and ... *Sarojini* v *Hari Das*, *supra*, see al ... ut as was observed by *Coleridge J* in ... test of genuineness ought to be ... some other specimen or specimens but to the general character of the writing which is impressed on ... or position, as for instance the writer sitting up or reclining or the paper being placed upon a harder or softer substance, or on a place more or less inclined—nay, the material as pen, ink etc, being different at different times are amply sufficient to account for the letters being made variously at the different times by the same individual Independently, however, of anything of this sort few individuals, it is apprehended, write so uniformly that dissimilar formations of particular letters are grounds for concluding them not to have been made by the same person" *Galstaun* v *Sonatun*, 78 Ind Cas 668=A I. R 1925 Cal 485

PUBLIC DOCUMENTS.

Public documents.

74. The following documents are public documents.—

(1) documents forming the acts or records of the acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country,

(2) public records kept in British India of private documents.

74. Scope of the section This
is important because certain m
documents as distinguished from
It is not always easy to deter
private document In *Sturla* v *Freccia*, 5 App Cas. 623, the question arose as regards the meaning of the word 'public documents". In delivering the

in the c 12 Cl & F 641.
Now m which it goes is, that it
should o by a public officer
I do n f meaning of the whole
world. I think an entry in books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporate book concerning a corporate matter, or something in which all the corporation is concerned, would be 'public' within that sense. But it must be a public document, and it must be made by a public officer I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it It is meant to be where there is a judicial or quasi-judicial
case with the Bishop acting under the
be said to be quasi judicial He is
but I think the very object of it m
purpose of being kept public, so th
acce
term
and
the
pape
Mun
Royal proclamations, and all other acts of State *Powell Ev* 248 In this connection it should be borne in mind that the term 'public' as applied to documents is used in English l
the statements contained in
as a form of testimony, eithe
persons, of the facts stated
mean that the document is one of those, originals of which are kept in some

strangers
must be
a register
abduction
document
persons of
Evidence
only in the second sense All descriptions of public documents have characteristic, that they are kept in some special custody and provable by means of a copy without production of the original *Wills Ev. 2nd Ed 407* A public document is one prepared by a public servant in the discharge of his public official duty. The mere fact that it is kept in a office does not lead to the inference that it is a public document *Madhab Din* v. *Karar Singh*, 107 Ind.

Cas 618 = A. I. R. 1928 Lah. 640; see also 105 Ind. Cas. 353 = A. I. R. 1928 Nag. 93. Where a letter received from the Comptroller of the Military Accounts in reply to the warrant of attachment acknowledging the same was relied on to prove knowledge of the judgment-debtor as regards the existence of the decree, held, that the letter was a public document under s. 74 of the Evidence Act and that the same, did not require proof. *Sheikh Elu* v. *Hira Lal*, A. I. R. 1928 Oudh. 488. If the law requires that . . . Revenue record, such pedigree in the Revenue . . . A. I. R. 1928 Lah. 211 = 103 Ind. Cas. 182. Da . . . 98 Ind. Cas. 471 = A. I. R. 1927 All 52. C . . . Deputy Collector under s. 40, Bengal Tenancy . . . 1926 Pat. 436 = 95 Ind. Cas 966. Registers . . . Act, . . . gisters . . . 5 Ind. Cas. 955; 69 Ind. Cas. . . . and death nor porcha slips . . . 22 C. W. N. 822; 17 Ind. Cas 82.

Acts or Records of the Acts In . . .

. . . any other officer furnishes for the information of the Public Prosecutor? It is true that the police officer acts in performance of a statutory duty, but section 74 makes no distinction between such acts and other official acts." When a Civil Surgeon reports to a Magistrate as to the age of a person he is merely giving his expert . . . ct in official capacity for the use . . . onsequently such a document . . . *Saadat Ali* . . . 1 Luck 733 = 108 In . . . mentioned in th . . . om acts of a prep . . . es not make a distinction betw . . . *aiya* v. *Government* . . . L J . . . of Posts and Telegraphs . . . notified that stamps . . . be issued to Post Offices for sale to the public was not an 'act' or 'record of act' of a public officer . . . the meaning of this section. *Velayudam* v *Emperor*, 1929 M. W. N. . . . Ind. Cas 509 = 30 Cr L. J. 483.

Statutes and state papers. Statements and recitals of public . . . contained in public statutes; Royal proclamations [*R.* v. *Sutton*, . . .

74.

Radcliffe v. *Union Ins. Co*, 7 Jones. 38; *Talbot* v. *Seeman*, 1 Cranch. 1, 37, 38); or Parliamentary Journals as to all matters properly before either house are public documents. *Phip. Ev. 7th Ed. 324.*

...ada Mahomed v. *Dame* ... and written statement ... certified copy of the ... ocument whereas the

whether th... clear that ... was improp... been admi... ness, howe... been for a ... Calcutta H...

... nature, that they can be proved by copies to the same extent as records, and are subject generally to the same rule of evidence. Indeed, henceforth, for the sake of convenience, the general term 're... all the documents just mentioned... record of another Court may be pr... *Chief Baron Gilbert*: "Records, ... justice, to which every man has a c... transferred from place to place t...

... or accounted for like any other document *Bayley* v. *Wylie*, 6 Esp. 85. ... although in strictness of records for all Courts ...rary removal was by

S.

Case, 5 C- D
proceedin
Writs of
be proved by actual production, though after their return, they become matters of record, and are consequently provable by copies B N P. 231 With respect to writs of summons under the Rules of the Supreme Court, they may
copies by the
be lost, by
se documents
... they relate.
R. v. *Scott*, L. R 2 Q. B. 415=45 L J. M C. 259. The pleadings in an action

forth; and so much so that a party cannot be admitted to plead that the things
record, as long
solute verity."
by a decision,
m v. *Gooroo*,

the identity of the person who gave the deposition. *Brajaballav* v. *Akhoy*, 30 C W N 254=93 Ind Cas 15 Proceedings of a Court of Justice may be

I R. 1931 All. 487=A.

S. 75-76.

Private documents.

75. All other documents are private.

Private documents ... classed as *Public* i e ... *Private* i e as to their u... document *Phip Ev* ... ments are private docun... contract, memorandum, l... of the private document ... must be produce... *Jones* § 201. An abstract statement prepared by a patwari even though bas... on papers in his possession and filed in a suit is only a private documen... *Sheo Das* v *Sheo Dayal*, A I R 1930 All 712 = 128 Ind Cas 770

Certified copies of public documents

76. Every public officer having the custody of a publi... document, which any person has a right t... inspect, shall give that person on demand ... copy of it on payment of the legal fees therefor, together with ... certificate written at the foot of such copy that it is a true copy o... such document or part thereof, as the case may be, and such certificates shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

Explanation. Any officer who, by the ordinary course of official duty, is authorised to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

... document ... has a right ... There is no ... in British ... ular cases ... *Field Ev 7th Ed* 232. In England, the right to inspect public documents varies ... inspect many ... is section saves ... refuse to show ... *l* 257, *Taylor* ... clude all such ... on the ground of state policy ... Bom L R 236 ... of the judgmen... the document" ... looked from ou... a judgment in a criminal case *Ladli* v *Emperor*, A I R 1931 All ... A L J. 405 As ... right to inspect and take copies, vide the ... the *Criminal* Procedure Code (Act ... *of 1908*), the Administrator Genera... *Act* (VII of 1913), the Oudh Land Revenue Act (XVII of 1867), etc

It might have been supposed that, for the lawful custodian of documents in official custody, an authority could be im... of his office, to furnish copies that should be ... must be the lawful custodian of the particu... of course exist at the time of certifying ... whose office had expired ... no properly certif... authority test ... this custody, however ena...

him to speak, not merely to the correctness of the copy, but also to the existence and genuineness of the original. The great obstacle, to the use of a register as evidence of a record of private deed, was the registrar's inability to speak to the genuineness of the deed, and special means to qualify him in this respect had to be provided. This obstacle does not exist for an official record, for it is originally prepared and thereafter preserved in the office, and although it may

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of Bengal is a public document, within the meaning of s 74 of the Indian Evidence Act. Any person is entitled to inspect the same and to obtain certified copies thereof under this section, interest for the protection of *Bostab,* 8 C. W N. 125 = 31 C R. 38 Ch. D 92; *Rex* v allows certified copies to a p *mar* v *Fazal,* 84 Ind Cas 487; see also *Bank of Bombay* v

inspect public documents is, however, assumed, in s 76 of the Evidence Act It may be inferred that the Legislature intended to recognize the right generally for all persons, who can show that they have an interest for the protection of which it is

Lah 605.

77 Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies

Proof of documents by production of certified copies

ace een as for others to use the would be a constant additional wear and tear upon the document *Wigmore* § 1215 The usual mode of proving the record of another Court is by production of a certified copy But the copy is not produced in such cases because it is better evidence than the original, it is received only on the ground of convenience, as a substitute for the original record The reception of a copy avoids the inconvenience of removing the original record from place to place *Bullow* v *Thomas,* 19 Gratt 14, 18 For reasons similar to those applicable to judicial records, documents belonging to any public office need not be proved, but may be otherwise proved Their removal for production in evidence would delay, and hinder the official use of the files, would make it impossible for other persons to consult

7 the absent documents, would subject them to risk of loss, and would injure them by constant wear and tear. *Wigmore* § 1218; *Per Lord Mansfield* in *Jones* v *Randall*, Cowp 17; *Per Lord Ellenborough* in *Hennel* v *Lyon* 1 B & Ald 182 184, *Per Lord Abinger* in *Mortimer* v *M'callan*, 6 M & W 58, 69; *Per Pollock C B* in *Doe* v *Roberts*, 13 M & W. 523, 530 Now a paper offered as a copy but not supported by any person's testimony in Court is a hearsay—i e., extra-judicial statement—obnoxious to the *Hears*y

be called to the stand to verify the paper

A paper offered anonymously as a copy, or offe

to verify it, is inadmissible But there are exceptions to the Hearsay rule under which copies made by specific classes of persons may be admitted Under the exception for official statements, copies made by officers lawfully authorized to give copies—i e, examplified, certified, attested, or office copies are receivable *Wigmore* § 1281 The reason for the exception is thus stated by *Buller J* "Here a difference is to be taken between

trusted for that purpose, for there that

copy given out by an officer of the Court w

which is not evidence without proving it actually ex

difference any purpose, the

law must *Trial at Nisi Prius*

by Buller stark 8; *Appleton*

v *Braybr* his custody of the

original; ly to the correct-

ness of the genuineness of the original

Wigmore § to the Hearsay rule the

principle of isfied The Necessity prin-

ciple is satisfied by the fact that the certifier cannot be called to testify to the genuineness of the copy without great inconvenience and loss to public departments.

Scope of the section "In this section the term used is 'may' This, then, is one and usually the most convenient, mode of proof of public documents

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Faxel, 84 Ind Cas 487=2

rate It contains particulars of the area and of the land in respect of which the rate is due It is a public document within s 74 of the Evidence Act The *porchas* distributed to the cultivators are also public documents If produced in original the *jamabandis* do not require to be further proved The contents of the *jamabandi* could also be proved by the production of certified copies furnished as provided by ss 76 and 77 of the Evidence Act *Umrao Singh* v *Ram Singh*, L R 3 A 356 (Rev) = 1 U P L R (B R) 26, see also *Ramlal* v, *Ghasiram*, 71 Ind Cas 825

Proof of other official documents

78 The following public documents may be proved as follows —

(1) Acts, orders or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,—

by the records of the departments, certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government

(2) The proceedings of the Legislatures,—

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government

(3) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,—

by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer

(4) The Acts of the Executive or the proceedings of the Legislature of a foreign country,—

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public Act of the Governor-General of India Council

(5) The proceedings of a municipal body in British India —

by a copy of such proceedings certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body

(6) Public documents of any other class in a foreign country,—

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country

78. 1 Official Printed copies. There is no reason why an officer may not be authorised to give printed copies as well as written copies, nor has there been . . . can not be said of an office. An ie; but the official printer's authority though a general one, is express rather than implied. The objections that have been made in connection with the use of printed copies have chiefly had their source, not so much in a doubt of any of those principles, as in the difficulty o
be an official one.
printed copies of
reason for their correctness is thus stated by *Tilgham C. J.* in *Biddis* v. *Jones*, 6 Binn. 326: "Confidential persons have been selected to compare the copies with the original rolls and superintend the printing." The most frequent application of the principle, however is, to the evidencing of the statute law domestic and foreign. Upon the theory of Judicial Notice, no evidence of domestic law need be offered.

P. L. R. 1909.

Clause (1)
because "such th
act of Parliament

far, then, as the proceedings of the Legislature are relevant to be proved, the journal is admissible. If the proceeding, for example, consists in the receipt or acceptance of a report or a petition, the st ... port or petition may be inadmissible; but the fact of its may be relevant, and therefore may be evide 1662. Under this clause, the text of an be taken to be the authorized text of the Act Cas. 316; *Subramania* v. *Shanmugam*, A. I *Bhagat* v. *Rupkishore*, 77 Ind. Cas 409. As regards the value of *Hansad* report, *Vide The Englishman* v *Lajpat Rai*, 37 C. 700 = 14 C. W. N. 713.

authoritative mea... the same case *Buller J.* added: "The gazette, which is published by roy... authority is admissible to prove any thing done by his Majesty in his character of King or which has passed through His Majesty's hands." In the same case also *Lord Kenyon L. C. J.* observed: "That the gazette is evidence of many

acts of State is
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acts of state, a
admitted that the
Cockburn, 5 Esp 234; *Vanoneson* v. *Dorwick*, 2 Camp. 41; *R.* v. *Gardner*, 2 Camp. 513; *Att. Gen* v. *Theakstone*, 8 *Price* 92; *Bradley* v. *Arthur*, 4 B. & C. 301.

Clause (4) Depositions in a foreign Court are public documents *Harand* v. *Ramgopal*, 4 C. W. N. 429=27 C. 639 P. C.; see also *In re Rudolph Stalman*, 15 C. W. N. 1053.

Na . Cas. 643.

Clause (6).
such as was in
ment, is no suffi
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purports to testify. Such evidence can be manufactured without any great difficulty and the Courts must be on their guard against its acceptance unless under proper tests
(1897—1901) Vol
the Native State o
Shamsher v. *Moh*
this clause are ver
is the Political Agent of the Government of India. *Krishnabai*, 28 Bom. L R. 1225=50 B. 716=A. I. R. 1927 Bom. 11.

PRESUMPTIONS AS TO DOCUMENTS.

Presumption as to genuineness of certified copies.

79. The Court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer in British India or by any officer in any Native State in alliance with her Majesty, who is duly authorized thereto by the Governor General in Council, to be genuine:

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

Presumptions as to documents. Section 79 to 90 deal with certain presumptions as to documents All these presumptions are based on the ancient and well known maxim *omnia praesumuntur rite esse acta.* (All acts are presumed to have been done rightly and regularly). *Co. Litt. 6b*: 332. The rule is applicable to public and official acts as well as to ancient deeds and private

9. acts Where the acts are of an official nature or require the concurrence of official persons, a presumption arises in favour of their execution. In these cases the ordinary rule is *omnia præsumuntur rite et solemniter esse acta donec probetur in contrarium* (Co Litt 232· *Van Omeron* v. *Dowick*, 2 Camp 44; *Doe* v *Evans* 1 Cr. & M 46)—everything is presumed to be rightly and duly performed until the contrary is shown. *Per Story J. in Bank of United States* v *Dandridge*, 12 Wheaton (U. S) R 69, 70; *Davies* v. *Pratt*, 17 C B 183; *Broom's Legal Maxim* 723 Upon the same principle proceeds the rule that deeds, wills and other attested documents which are more than thirty years old, and are produced from the proper custody, prove themselves and the testimony of the subscribing witnesses may be dispensed with, although of course it is of the

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6 Bom L R 750, *Raghunath* v *Hoh Lal* 1 A L J 121 (123) The presumption mentioned in this clause is

rebuttal, a *presumptio juris et de jure*

(974)=3 Cr L J 32 The word "

construed in more rigorous of th

Muhammad 110 P L R 1902;

Ramien v *Verappa*, 11 M L T 69

a fact," a presumption is

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evidence if he can Sections 79 to 90 contain the principal presum

regards documents Of course certain presumptions as regards documents may also be raised under section 114 [*Vide* s, 114 (ills i)]

to do it *Harri*

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his duty *Per*

Coleridge J in *R*

ton v *Roberts*,

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the acts until the

to office may be

has acted in an official capacity *Berryman* v *Wise*, 4 T R, 366; *R* v *Gordon*, 1 Leach 515, *R* v *Verelst*, 3 Camp 432, *Marshall* v *Lamb*, 5 Q. B 115, *Plumer* v *Briscoe* 11 Q B 46

suspected that some one personated G, and that his signature is forged

send to Chambers for the original examination, otherwise the copy so attested

and delivered, must be received and relied on" The same rule is applicable to certificates and other documents as well Certificates and other documents

signature and the seal (where a
Field Ev 7th Ed 141 So if a duly
of a lease in official custody, had
have been necessary of the signatures or handwriting of those Commissioners
i officers signing it, such a
wing an official act done by
produced from proper custody

having been made competent eviden
necessarily dispensed with, such
to a copy *Com* v *Richardson*, 142
raising this presumption is that su

ed by law in that behalf The
to prove the certificate of registra
ed under this section *Muhammad* v *Sohara* 71 Ind Cas 805 But this presumption does not arise where sanction under s 196 Cr Pro Code is signed by the Deputy Secretary instead of by the Chief Secretary as required by that section *Md Ozullah* v *Beni*, 36 C L J 180=26 C W N 878=56 C 135 It is doubtful whether this section is applicable to copies given before the passing of the Indian Evidence Act *Jubir Ali* v *Rajchunder*, 10 C L R 469 (476)

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f all peace officers justices
that they acted in these
characters without producing their appointments Similarly in *Mc Gohey* v *Alston* 2 M & W 206 *Baron Parke* said The rule is that all public officers

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been made by the proper officer

80. Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take

Presumption as to documents produced as records of evidence

80. such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

es sanction to the maxim *omnia præ-*

regular. *Lawson Pre. Ev.* Rule 10.
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.. *Ev* 261.

Scope of the section. The statement as to which this section says that certain presumpti
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kind of evidence.
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in a specified proceeding.

106 = 33 C. W. N. 1131 = 119 Ind. Cas. 193 = A. I. R. 1929 Cal. 617 (F. B.)

deposition preclude the presumption that the copy is a true copy. *Soraoju v. Mata Din*, 7 O. L. J. 542 = 60 Ind. Cas. 437.

of recording depositions
P. Code and in criminal
of Order 18, runs as
evidence of each witness
the Court, by or in the
endence of the Judge,
ut in that of a narrative,
e of the Judge to the
same, and shall sign it"
down in a language
different from that in which it is given, and the witness does not understand

S.

the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given." As regards the effect of non compliance of the formalities laid down in these two sections,

5 C 825=
tes to the
the point
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But it is
is not read

over to the witness in the presence of the Judge Upon that it is argued that the deposition is not legally a deposition at all and the Judge was wrong in allowing

the cases
Emperor,
interpreted
he conten-

tion advanced, unless the rule laid

for instance, *Empress* v *Jogendra Nath* 42 C 240=18 C W N 1242 Speaking for myself, however, with great respect I am not sure that I clearly understand the principle of those decisions Under section 80 of the Indian Evidence

malities for these two rules renders the deposition inadmissible in evidence against the deponent on his subsequent trial for perjury Section 91 of the Evidence Act excludes the oral evidence of its contents *Emperor* v *Nawab Ali,* 51 C 236=25 Cr L J 1027=81 Ind Cas 803=A I R 1924 Cal 705, See

32, *Mohendro* v.
461=50 Ind.
91, *Kamatchi* v.
ss understands
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give the witness an opportunity of correcting his statement *Ramdhani* v

R 393
Amrita
v *Sama*
W N.
J 811;
3=27 Cr.
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being that the Magistrate shall sign it only after it has been read over to th

witness in the presence of the accu
and the accused may have an op
Emperor, 12 Bur L. T 167=1(
506; see also *Ngai Sam* v *K. E*, U
the Criminal Pro Code does no
shall be taken and attested by the Magistrate in the presence of the accused What it provides is that the deposition, if so taken and attested, may be put in evidence in the Sessions trial Therefore, that the deposition was taken and

Lah 632=125 Ind Cas 892=31 P L R 472=A. I. R 1930 Lah 714

Confession of accused taken in accordance with law A confession by an accused recorded by a Magistrate is admissible under this section, even though the Magistrate who recorded it, ultimately came to the conclusion that he had no jurisdiction to try the case *Emperor* v *Banko Behary*, 10 C P L R Cr 16 If, when a document is tendered in evidence at a trial purporting to be a confession of the accused, it is found to contain the memorandum required by s 164(3), a presumption arises under this section that all the necessary formalities purporting to have been performed have in fact been performed and the document is admissible in evidence without further proof If, however the memorandum does not appear or is defective the document is inadmissible

such a defect would be curable If the explanation had not in fact been
the statement could not be held to have been duly made and s 533 cannot be
1925

Cas 257=23 Cr. L J 673, *Queen Empress* v *Sundar Singh*, 12 A
R. 261 Confessional state-
Section 80 of the Evidence
nfession
So far
the pre-
respect of the document purporting to be a
confession of the accused. *San Baw* v *Crown*, 1 L B R 340 (*F. B.*), see also
Magistrate during the course
red by s 164, cannot be
made. *Emperor* v *Radhe*,
7 C. W. N. 9
be made under
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A Magistrat
whether a co

Section 80 of the Evidence Act, expressly provides for proof of the document, distinguishing it from a record of evidence as well as s. 533 Criminal Procedure Code. *Lalu* v *Empress*, 2 P. R. 1894 Cr.

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Dying declarations. A dying declration is not admissible in evidence without proof that the deceased actually made the declaration Even if it bears a Magistrate's attestation it is not admissible under s. 80 where the Magistrate was not the committing Magistrate The person who took the statement should be subject to cross-examination as to the dying man's state of mind when he made it, and as to other circumstances. *Reg* v. *Fata Adaji*, 11 B H C 247, see also *Hasim* v. *Empress*, 9 P R 1900 Cr. = P L. R 1900 p. 49 When a dying declaration has appended to it a [illegible] deponent and declared to be [illegible] recorded the statement, s. 80 of [illegible] circumstances under which it is stated to have been taken are true, the investigation by the Magistrate being a judicial proceeding *In re Karrupan Samban*, 16 Cr. L. J. 759 = 31 Ind Cas 359

Previous admission Before a previous admission can be used against a party it must be put to him and an opportunity afforded to him to explain it if it is capable of explanation *Mariyam* v *Nagina*, 12 Lah L J 161

Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents

81. The Court shall presume the genuineness of every document purporting to be the London Gazette or the Gazette of India, or the Government Gazette of any Local Government, or of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

Principle The intolerable inconvenience of having to prove the genuineness of printed matter purporting to be published by the Government has led to [illegible] porting pub- [illegible] constantly [illegible]

[illegible] concerned [illegible]

superintend the printing The object of this provision was to furnish the people with authentic copies; and from their nature, printed copies of this kind, either of public, or private laws, are as much to be depended on as the exemplification verified by an officer who is the keeper of the record I am for admitting the printed copies authorized by the Legislature, either of this or any other state, whether the law be public or private" But the question whether the copy of a Government Gazette or any other publication can be treated as evidence of the contents of the original is not one relating to proof of documents but to the

81. admissibility of the secondary evidence *Jeremiah* v. *Vas,* 36 M 457 = 12 Ind Cas 961.

Gazette s an authoritative m In the same case *B* ority is admissible to g or which has passe *rial,* *burn,* 5 Esp 234; *Att-Gen* v *Theakstone,* 493, *R* v *McCarthey,* (1903) 2 Ir R 146 nce Act, 1868, s. 2 amended by the Documentary Evidence Act, 1882, s 2, the Gazette any proclamation, order, or regulation issued by or any principal department of State See also *L* *Exparte French,* 52 L J Ch 48; *Exparte Learoyd,* 10 Ch D 3; *Exparte Geisel,* 22 Ch D 436; *Boaler* v *Power,* (1910) 2 K B 229 C. A *Van Omeron* v *Dowick,* 2 Camp 44, Stat 31 & 32 Vict C 37, ss 2, 5 But the entire gazette must be produced *Rex* v *Lowe,* 15 Cox 286. Under the provisions of this must be presumed, though it is not *p* v *Emperor,* 7 Lah L J 264 = 88 1078 — A I R 1925 Lah 299 In

Gazette print

v *Emperor,* A I R 1931 Lah 273 = 32 Cr L J 1227.

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copy and the one read by the same press i e. the defen 15 M & W. 319, 336, *A* whether there is reasonable

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Such provi ration of Books Act (XXV of 1 British Ind ment may,

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"It is contended that under section 81 of the Evidence Act, the Court is bound

include a presumption

document purport-

to public documents, but it is very doubtful whether the language of the section supports it. If the punctuation may be taken to throw any light on the . the word 'journal' is against the

'newspaper or journal'
question further, as I am of opinion that the presumption of the genuineness of a newspaper does not inclu
published by the person by w
the English Law According
tion of a d of
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Gathercole v. *Miall*, 15 M & W 319' *Parke B* was of opinion that as the defendant had been proved by t
publisher of the paper,
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statement *Beua Sarup* v *Emperor*, 88 Ind Cas 22=7 Lah L J 264=26 P L R 566=26 Cr L J 1078, but see *Ram Chandra* v *Emperor*, A I R 1930 Lah 371=31 Cr L J 168

Presumption as to document admissible in England without proof of seal or signature

82 When any document is produced before any Court, purporting to be a document which by the law in force for the time being in England and Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature,

2. is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland

Origin of this section. This section consolidates ss 9, 10, 11 of Stat 14 & ... ute runs ... fter to be ... Court of ... signature

extent and for the same purposes in any Cour... any person having in Ireland by law and ... receive and examine evidence, without proof o... authenticating the same, or of the judicial ... appearing to have signed the same." Section 10 runs as follows "Every

shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice in England or Wales or before any person having in ...

in any Court of Justice of any of the *British Colonies*, or before any person having in any such colonies, by law or by consent of parties authority to hear, receive, and examine evi... authenticating the same,

Ibid) So British Colony included British India But section 11 of Lord Brougham's Act was repealed in India by the Indian Evidence Act section 2 and schedule and from the Statute Book by Statute Law Revision Act of 1874 The Indian Evidence Act has repealed section 11 above but has given effect to the object of that section by enacting this section

Scope of the English law There are many instances where records are kept by persons occupying public office, or engaged in occupations of a public nature. These records, though somewhat similar in kind to those of which the Court may take judicial notice, do not usually have a sufficient degree of publicity to bring them within the limits of that class of matters. They are however, deem... admissible if ... a person having ... readily discove... of duty also enters into the case Usually the person keeping the record is under some obligation, official or otherwise to keep them, and this brings them close to those entries in account books which are admitted because made in the regular course of business, pursuant to duty The application of this exception to the hearsay rule in the early cases caused the admission of acknowledgment of deeds made before a Court of record, enrolments of deeds, fines and recoveries, and many records of similar nature *Smart* v *Williams* 1 Salk. 280 *Lynch* v *Clerk*, 3 Salk. 154 It is necessary conditions to the

admissibility of a public record or document that it shall have been intended to

this exception. He says at page 214: "What a public document is within that rule, is of course, the great point which we have now to consider.... I do not think that 'public' is to be taken there as meaning the whole world. I think an entry in the books of a manor is public, in the sense

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it may have access to it afterwards."

nt even by the Common Law of England was by means of examined copy, that is, a copy taken on behalf of the party, generallly by some clerk or other private persons, who produces it in the witness box and proves that he has copied it accurately from, or examined it

parties authority to hear, receive and examine evidence, provided it be proved to

and burials which have been kept in pursuance of canon and statute law answer his description, [*Re Hall's Estate* (1852) 22 L J Ch 177; *Re Porter's Trusts*, (1856) 25 L. J. Ch 688]; but it seems doubtful whether it could be held to

beneficial effect of the enactments was much diminished In order to remove

d that—

ce any certi-

joint stock

or othe. ... of any document, bye law, entry in any reg... proceeding, shall be receivable in evidence of any p... or either house of ... judicial proceeding, ... they respectively ... and signed, as signed, or signed ... without any proof directed by the ... the signature or ... n appearing to have signed the same, and ... every case in which the original record coul... d in evidence." The general result of these two Statutes seer ... and ... tion ... the ... doc ... the ... Ev ... 14 ... L. R 2 C C 85 The re... of parliamentary ... poll books were provable unde ... 75 The bye-laws of a rai ... 8 & 9 Vict. C 20, ss 108-111, ... the secretary of the company in whose custody they are ... Counties, 7 C B N S 58 = 29 L J M C 57 As to proof of bye-laws of a municipal corporation under Stat 45 & 46 Vict C 50, s 24, *vide Robinson* v *Gregory,* (1905) 1 K B 531 For a complete list of Statutes which contain provision making certified copies evidence, *vide Roscoe's Digest of the Law of Evidence, Eighteenth Ed* Vol. I pp 98 100 For an exhaustive list of documents which are provable in England by means of certified copies under particular Acts of Parliament *Vide* §§ 1602-1609 of *Taylor on the Law of Evidence*, *Wills on Evidence, 2nd Ed Appendix A* pp. 422-465.

Scope of the Section The object of this section is to give currency in the Courts of India to the presumptions which, with regard to certain classes of documents, are recognised in the English Courts Such documents are declared by the section to be admissible in India as they would be in England, and it is no more necessary in Indian Court, than it would be in an English Court to prove the seal or signature or to prove that the person signing held the office which he claims *Cun Ev* 11th Ed 175 The chief magistrate of the city of Glasgow being a person lawfully authorized to administer oaths, a declaration as to the execution of a power of attorney taken before him and authenticated by his certificate and the common seal of the city of Glasgow and by a Notorial certificate is sufficient proof of the execution *In the goods of Hend* ... the declarations purport to have been made under ... Will IV C ... 62); se... 67; *In the goods* ... *In the goods* ... *s of William* ... *of Hen*... *nina Hinde,* *Cornell* ... a deceased, *Ibid* ... n appointed ...

application must be refused *In the goods of* ... delivering the judgment *Norris J* said 'Section 85 of the Evidence Act provides that the Court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a Nortary Public or any Court, or Judge, Magistrate, British Consul of Viceconsul, or Representative of Her Majesty or of the Government of India, was so executed and authenticated. This power of attorney is not executed

before or authenticated by any of the persons mentioned in the section, and in order to comply with the provisions of the section, the power of attorney
of those persons Therefore
It is submitted that Norris
Section 85 of the Evidence
acilities to prove powers of
attorne than that allowed by that
section
Court

to have been executed in

been held in Calcutta that, in as much as the execution is not proved in the manner indicated in section 85 of the Evidence Act, the application for letters of administration ought to be refused (*In the goods A J Primorse*, 16 C 776) In arriving at this decision, *Mr Justice Norris* seems to have assumed that the provisions contained in section 85 is of an exhaustive character and no other mode of proving the execution of a power of attorney is admissible That assumption however, is, in my opinion, not w

not to apply to affidavits
prescribed by the statute of
oath I am of opinion that
I am told
to receive
But certi-

and section 35(5)
N 355=13 M L
T 385=24 M L J 517=19 Ind Cas 452

83 The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate, but maps or plans made for the purposes of any cause must be proved to be accurate.

Presumption as to maps or plans made by authority of Government

Principle The general ground of reception is that such documents contain the results of inquiries made under competent public authority and concerning matters in which the public are interested *Phipson*, 313 The very office of a surveyor is to run lines and establish boundaries for the purpose of applying the terms of grants and patents and thus of perpetuating the settlement of boundaries, it is therefore a nat
authority to make a written
maps are admissible in evidence

be so. The fact does not of itself prove any title, but only that the person fills the office."

3. *Per Patteson J* in *Bouley* v. *Barness*, 8 Q B. 1037. The well-known maxim of *omnia præsumuntur rite esse acta* applies

Scope of the section
purporting to be prepared
9 M L T. 415 This section
of a private map If such
depend upon the relevancy of the map in relation to the question in controversy *Shib Charan* v *Nil Kantha Mahato*, 16 Ind Cas. 747=17 C. L J 612. In the absence of evidence to the ... may be properly judicially received in ... *Gyua* v *Ma Nque*, 2 L B R 56 A ... in the
... the silted bed of a
... 83; but it is a
... before it can be
... 23 C 385 In a
... valuable evidence
which should be conside
Ranee v *Gireedharee*, 20 W
ment, while in charge of
only that of a private prop
a presumption of the accu
574; *Ram* v *Bansidhar*, 9
making a *thak bust* map
what lands were *debutter*, but only to lay down and to map boundaries, *held* that this map could not be treated as raising a presumption of correctness within this section, on the question as to the amount of *debutter* land in one of the villages mapped Where statements as to what lands were *debutter* appeared on the face of the map to have been made as pointed out by agent on behalf of the proprietor of the mouzah and the principal tenants, in the presence of the agent of the holders of
section has not the
v *Lalon Moni*, 18 C 2
accuracy of drawings and measurement It has no reference ... W R 179.

must be presumed to be accurate under this section. *Rahimatullah* ... *of State*, 113 P L. R 1913=112 P W R ... 1913=18 Ind. Cas. 799 No presumption of accuracy can
within this section *Madhabai* v *Gagan*
section a *thakbust map* must be presumed
22 W. R 519, see also *Photal* v *Ranee*, 19 W R 301 ...
Government survey map having been prepared does not affect the presumption of accuracy, under this Act of an earlier superseded map. *Joggessur Singh* v. *Bycunt Nath*, 5 C. 823=6 C L R 519 A copy of a map prepared by an Amin employed by Government,
for possession It was adm
ultimately rejected by him,
was made by the High C

as correct when made *Gopal Lal* v *Mariamunnissa*, 84 Ind. Cas. 435=A... 1924 Pat. 719 The signature of a revenue-surveyor on a thakbust map signifies,

not that the thakbust map is correct, but that the demarcation boundaries laid down in the course of thakbust survey have been correctly picked up on the
e survey map *Sashibhusan* v.
=83 Ind Cas 205 There is
to preference over a *Thak* map.
agree, where they differ, the
one that more nearly agrees with the ... land marks is the one which should
incumbent upon the
may, if it considers the
rvey map *Maharaja of Cooch Behar* v *Raja Mohendra Ranjan*, 66 Ind Cas 923; see also *Abed Hossein* v. *Doucauy*, 6 C W N 620, *Burn* v *Ichambut*, 20 W R 14, *Kanab* v. *Gopinath*, 13 C L J 625 (632), *Amrita* v *Sheraudhin*, 19 C W N 565 (576)
But where the Thak proceedings and the decision of a dispute took place in the presence of the predecessors of the parties to a suit, that map must be treated as valuable evidence in the suit between the successors of the persons who were present *Maharaja of Cooch Behar* v *Raja Mohendra Ranjan*, 66 Ind Cas 923; see also *Surja Kanta* v *Sarat Chandra*, 18 C W N 1281 P C, *Dunne* v *Dhavan*
a *Sudan* 2 W R 210;
Gunga v
W R 179, *Nobo* v *Gobind*, 9 C L
lal v *Kuan*, 7 C W N 819
The tha
the state of things at the
time th
they show conclusively what
was the state of things at the time of permanent settlement *Secretary of State* v *Hazed Ali* 65 Ind Cas 867, *Jagadindra* v *Secretary of State*, 7 C W N 193 P C, see also 20 C W N 1028; 35 Ind Cas 132 Presumption both as to physical features and to statements as to possession may be made from kistwari map 64 Ind. Cas 326

The question whether a map is a public document within s 74, Evidence Ac.
in
the
state, is a
ion has no
3=10 Ind
ortion of a
, *and the*

the Government, acting not in its sovereign capacity, but as the landlord of *certain holding is admissible in evidence, if not under this section, under* section 13 of the Act *Upendra* v *Chairman of the Calcutta Corporation*, 16 C W N 116

received in evidence as correct when made *Jagadindra Nath* v *Secretary of State*, 30 C 291=7 C W N 193=5 Bom L R 1; see also *Satcouri* v *Secretary of State*, 22 C 252, *Maung Than* v *Maxan*, 44 Ind Cas 247, *Syama Sunderi*
784;
n v.
V.

s. 13 when it is not known whether they were acted on for the pur of re
tion proceeding or if in fact reliance was placed upon them by

& 5.

the purpose of
Ind Cas. 85 = A
without enquir
be placed on it
C L. J. 319
ment on which
evidence, there
such matters as to which it is admissible in evidence *Secretary of State for India v. Ananda Mohan*, 31 C L J 205; see also *Naresh Narayan v Secretary of State*, 71 Ind Cas 1048 = 32 M L T 162 = 50 C 446 = 45 M L J 444 = 28 C W N. 453 P. C, *Haridas Acharyya v Secretary of State*, 43 Ind. Cas 361 = 26 C L J 590 = 22 M L T 438 = 20 Bom L R 49 (P. C), *Secretary of State v Kalika*, 15 C L. J. 281.

84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

Presumption as to collections of laws and reports of decisions.

and of every book purporting to contain reports of decisions of the Courts of such country.

Principl
ness of print
to a general c
publications
stantly issued
however, are
to be printed
original, and secondly, the presumption of genuineness of a particular printed document purporting to be of such official origin The two questions are seldom separated, either in decisions or in statute; a sanction of the former principle has usually been regarded as carrying with it a sanction of the latter also" *Wigmore* § 2151

Scope of the section The words "any country" are wide enough to

as section 38 reports of cases recognised by the Courts of a country will be evidence; and be relevant and receivable *Nort Ev* 202; see also notes under section 38.

85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty, or of the Government of India, was so executed and authenticated.

Presumption as to powers-of-attorney

Principle. The genuineness of certain purporting official seal impressions need not be evidence otherwise than by the production for inspection of the document bearing them. What is the significance of this rule? What is it that Courts actually do, evidentially, when they accept such seals with *no further evidence*? When a document bearing a purporting official seal—a notary's

certificate to a power of attorney, for example—is offered in Court the accept- S

ocument purports to be
iet result of the first three
ry, did make this written
and the document was
merge (i e the purport-
ing J S' ly in the case of a
seal that and yet another
person n third elements are
always judicially united, i e any presumption of genuineness, whenever made covers both elements Hence, in effect, the situation, for seal or signature alike, is reducible to the following elements and is so in practice treated (1) that there is an official of that name (2) (3) that this document was genuinely executed by him Now the remaining element (4) that this hearsay statement of his is admissible, is obviously concerned with the Hearsay rule

Of these, the elements (2) and (3) are obviously pure questions of authentication, i e, the acceptance of the document signifies that we have somehow assumed that this document was genuinely executed by one J S What is the true nature of the process? Is it the process of Judicial Notice? It is some-

soon as the party alleged by counsel that J S had executed an alleged document, the Court must notice that as a fact, and no production of a purporting seal or signature would be necessary; but this is obviously not the practice Further more it is conceivable that a Court might judicially know what the design of a certain public seal was but this would not of itself enable the Judge to declare that the specific impression offered in Court was genuine or forged It would seem, then, that what is actually done is not done by virtue of any doctrine of jud
cient
The
of an
this may well serve as sufficient evidence because the forgery of the seal or signature would be a crime, and detection would be fairly easy and certain On the other hand the element (1) noted above, namely that J S who has thus genuinely executed this document is the official that he purports to be, is a real result of the principle of Judicial Notice This element is wholly separable from that of the authenticity of the paper *Wigmore* § 2161

and authentication of a power-of attorney when such execution was done before and authentication was done by any of the officials mentioned in this section. The section is an extension of the provisions contained in the Registration Act, with reference to powers of-attorney executed for the purpose of procuring the registration of conveyance or other such instruments *Cun Ev 11th Ed* 178 Where a power of-attorney was neither executed before nor authenticated by any persons mentioned in this section, letters of administration to the estate of a deceased
the goods of
execution a
not exhausti
16 C 776

5. been executed before, and authenticated by, a Notary Public, is produced before the Court, an affidavit of identification as to the person, purporting to make the

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is admis
genuine-
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III, rule
Ind. Cas
England
ed by his signature alone without
ds of Bridoon, Nov 19th 1899, per

e term "power of attorney' is given
the *Indian Stamp Act*, "power-of-attorney" includes any instrument (not chargeable with a fee under the law relating to Court fees for the time being in force) empowering a specified person to act for and in the name of the person executing it So a power or letter of attorney is a in such case is called the attorney of a t, in the stead of another; as to person; transfer stock or give possession upon a deed of feoffment It is either general or special, i e, general in respect of the conduct of all affairs of a person, as where he leaves the country; special in respect of any one or more named matters, as to receive money This instrument gives the attorney authority to act in his name exactly as the party giving it would himself do until revocation *Bank of Bengal* v *Ramanatham*, 43 C 527, *Venkataramana* v *Narasinha*, 38 M 134–24 M L J 180=1913 M W N 72=18 Ind Cas 137; *Permanand* v *Sat Prasad*, 33 A 487=19 Ind Cas 617 (F B), *Reference under the Stamp Act, s 46*, 15 M 386, *Raghu* v *Ramchunder*, 10 W. R 39=11 B L R 55 (F. B), *Jogi* v *Mohammad*, 80 Ind Cas 467, *Bryant* v *Banque du Peuple*,

the power of attorney was a proper power under s 33 of the Registration Act. Section 34 of the Registration Act imposes upon the registering officer the duty of enquiring as to the due execution of the document, and by s. 35, he registers the document on being satisfied as to the various particulars mentioned, so that when th
tion of *omnia*
in his procedu
v. *The National*
v *Jamal*, 28
375=27 C W N 437 P C ; *Kristonath* v *Brown* 14 C 176; *Jambu* v *Muhamad*, 42 I A. 22=37 A 49=19 C W N 282 As regards deposit of original instruments creating powers-of-attorney; *Vide* section 4 of the Powers-of-Attorney s Act (VII of 1882) Powers of attorney should be strictly construed. *Krishna* v *Tribhuban*, 114 Ind Cas 305=A I R 1929 Oudh 12, *Bank of Bengal* v. *Ramanathan*, 43 C 527=13 I A. 48

Notary Public In the interests of commerce the rules of evidence have been so extended that the acts of notaries public in the discharge of their duties under the law merchant are judicially noticed in all Courts, and their proper official acts under the law merchant are *prima facie* sufficiently authenticated
ooke v *Brooke*,
n of a notary to
d l not affect

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Ineff, 24 L J Ch 120, under s 138 of the Negotiable Instruments Act (XXVI of 1881) the Governor General in Council is authorized to appoint notaries public within any local area and by s 139 of the same Act power is given to the same authority to make rules for notaries public

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India *[in or for] such country, to be the manner, commonly in use in that country for the certification of copies of judicial records

Presumption as to certified copies of foreign judicial records.

†[An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a Political Agent therefore, as defined is section 3, clause (40), of the General Clauses Act, 1897,‡ shall for the purposes of this section, be deemed to be a representative of the Government of India in and for the country comprising that territory or place.

Principle *The theory of judicial records is that the judgment roll, as finally made up embodies in itself alone the entirety of the controversy as adjudicated, and thus supersedes the miscellaneous mass of oral and written pleadings, motions, and orders, which have gone to make up the proceedings Wigmore* § 2450 The doctrine about producing the original of a document, or ... d when the original is not ... of the original judicial

under the Great Seal of a State in as m ... proof than inspection, the seals of state of other nations which have been recognized by their own sovereign *Greenleaf Ev* 479) They may be authenticated by a copy, proved to be a true copy by a witness who has compared it with the original, ... roperly authorized by law to give a copy, ... ly authenticated *Buttrick* v *Allen*, 8 ... er 152, *Church* v *Hubbort*, 2 Cranch 228, ... subject is thus stated by *Marshall C.* ... The sanction of an oath is required for their establishment unless they can be verified by some other

So this section authorises the representatives of his Majesty or the Government

* These words in s 86 were substituted for the words "resident in," by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891), s. 8

† This paragraph was added to s 86 by s 4 of the Indian Evidence Act, 1899 (5 of 1899), in substitution for the paragraph added by s 8 of the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891)

‡ X of 1897.

86. of India in or for such country to give such certificate. So if the copy is merely certified by an officer of the Court, without other proof it is inadmissible. *Appleton* v *Lord Braybrook*, 2 Stark 7, *Thompson* v. *Stewart*, 3 Conn 171.

Scope of the section This section does not exclude other proof *Vallabdas* v *Pra*
So a c
Court i
being
If the
cker, 1 Campb
proved, even
avin v *Start*,
1 Stark. 525, *Findt* v *Atkins*, 3 Camph 215 n And if it is clearly proved
that the Court has no seal,
entitle it to credit *Black* v
Cowen 434 If the copy is mer
other proof, it is inadmissible
section says that if a copy of a
a given way, the Court, may pr
exclude other proof The as
and that she gave evidence bef
evidence of those matters His
and by ss 65 and 66 of the I
public documents, which they a
party, when the person in po
not subject to the process of the Court, which is the case here" *Per Lord*
Hobhouse i
L R 562,
this sectior
1924 Lah
86 of the I
are not dul
Cas 929
with merely because it can be ol
of depositions of a Court of
due course does not make them
Achut Das, supra. So also
authenticated in accordance with the
prescribed by the English Extradi
the records were admissible under it
C W. N 1053=14 C L J 375
instance of documents to which s 65 cl (f) seems to refer. *Hurish* v *Prosonno*, 22 W R 303

Section 14 of the Civil Procedure runs as follows "The Court shall presume, upon the production of any document purporting to be a certified copy of a
s pronounced by a Court of competent
the record; but such presumption
jurisdiction" The presumption is a
Hadjee Isup, 6 C W N 829=29 C
31, *Udhe* v *Puran*, 41 P. L R 1910;
Ramanthan v *Lakshmanan* 24 M L J 343, *Sita Devi* v *Gopal Saran*, 9 Pat. L. T. 397=111 Ind Cas 762=A I R. 1928 Pat 375, *Ishri Prasad* v *Sri Ram*, 25 A L J 887=105 Ind Cas 186=A I R 1927 All 510

546 In th
of the 8th
regarding
the Governor General in Council had, under s. 434 of the Civil Procedure Code, notified that decrees of Coach Behar Courts might be executed as if they were decrees of British Indian Courts, was a compliance with the provisions of s 86 of

the Evidence Act, when there was a representative of the Government of India resident in Coach Behar. The notification referred to above is of no use when ... ent of India in Coach Behar, so that ... oach Behar cannot then be received in ... 86 of the Evidence Act

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S.

87 The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for inspection, was written and published by the person and at the time and place, by whom or at which it purports to have been written or published

Presumption as to books, maps and charts

Scope of the section In proving matters of public or general interest the declarations will not be confined to those which are merely oral Thus in England *ancient maps showing public roads and the boundaries between counties,* towns, parishes and manors are admissible, when it is proved that they have been made or recognized by persons having knowledge of the subject who are since deceased *Hammond* v *Bradstreet* 10 Ex 390 *Pipe* v *Fulcher* 28 L J Q B 12, *Reg* v *Milton* 1 C & K 58 But this section authorises a Court to presume that book on matters of public or general interest and any published map or chart, was written or published by the person and at the time and place, by whom or at which it purports to have been written or published A Court is

28 C L J 306 = 48
legitimately be made to the work of Mr Crokes on Castes and Tribes on the North western Provinces and Oudh as an authoritative custom prevalent among the Eraki sect of Mahomedans Great weight attaches to the accuracy of survey maps but they are not conclusive In the absence of evidence to the contrary, however they should be presumed to be accurate *Secretary of State* v *Radha Kishore,* 38 Ind Cas 379 P C = 21 C W N 291 = 44 C 328

88 The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent, but the Court shall not make any presumption as to the person by whom such message was delivered for transmission

Presumption as to telegraphic messages

Scope of the section To prove a telegram sent by the accused the writing handed to the telegraph office not the copy received is the original *R.* v *Regan* 16 Cox Cr 203, *Hinkel* v *Pape* L R 6 Ex 7, *Godwin* v *Francis,* L R 5 C P 295 Whether in proving the terms of a telegram the despatch sent or the despatch delivered and received is the one to be accounted or depends upon the substantive law involved *Wigmore* § 1230 In *Durlee* v *Ro. Co*, 29 Vt 127, 140 (a *Vermont Case*) *Redfield C J* said 'It depends upon which party is responsible for the transmission across the line, or in other words whose agent the telegraph is ' Where the received despatch is the legally material document, it must be accounted for, a recorded copy of it would ordinarily ' be preferable to mere recollection, and the message as handed in by the sender perhaps might also serve as a copy, but where the party to whom the communication is made is to take the risk of transmission the message delivered to the operator is the original ' *Wigmore* § 1236 This section allows the

9. Courts to treat telegraph messages received as if they were the originals sent,

addressed In the absence of such evidence, the telegram cannot be held to have been proved *Thackin Singh* v *Emperor*, 4 Ind. Cas 240. The Court is forbidden by the express provisions of this section to make any presumption as

telegram to ask the Court to presume that it was sent by a supposed sender But there is nothing in the section to prevent the telegram once admitted from being considered along with the rest of the evidence *Emperor* v *Abdul Gani*, 49 B 878 = 27 Bom L R 1373 = 91 Ind Cas 690 = A I R 1926 Bom 71

Presumption as to due execution, etc, of documents not produced.

89. The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

Principle A circumstance sometimes treated as an extra judicial admis-

the paper) Everything is to be presumed *in odium spoliatoris*'; and had it certainly appeared that the destroyed paper purported to be an agreement such as is attempted to be established, it would have sufficed for the admission it

he can be fixed with the must be proved to have been who have not papers which it would be not only innocent but prudent to destroy If the paper destroyed were shown to have been an agreement for the land, it would raise a presumption of identity, sufficient to dispense with the ordinary proof of execution, and let in the contents of the paper (as proved by another witness) (But the witness

identity and consequent execution." *Wigmore* § 2132. So this section proceeds on the maxim, *omnia praesumentur contra spoliatorem* (Every presumption is made against a wrong doer)

Scope of the section. There is a presumption also in favour of innocence, the law esumed, produce *Vort Ev* nature of his case would be manifested, every presumption to his disadvantage will be

adopted" 1 Smith L C 10th Ed 353; 1 Vern 19. According to the same principle, if a man withhold an agreement under which he is chargeable, after a notice to produce, it is presumed as against him, to have been properly stamped Anderson, 1 Stark N P C 35, Marine, 625 This section is restricted to cases, party It does not extend to cases, where a summons to produce is delivered to a stranger to the suit Mark Ev p. 68 See also *Ahmad Raza* v *Saiyad Abid*, 38 A 494=21 C W. N 265 So where any document is not produced after due notice to produce, and after being called for, it is presumed to have been duly stamped, (*Closmadence* v. *Carrel*, 18 C B 44), unless it be shown to have remained unstamped for some R 5 E & The Act sumed to nents In case (a) they are presumed to have been made after the execution of the Will *Simons* v *Rudall*, 1 Sim N S 136 In case (b) they are presumed to have been so made that the making would not be an offence *Gordon's Case* Dear Sl & P 592 *per Jervis C J*, *Stoke's Anglo Indian Code*, Vol II p 909 Where the gagee and where the mortgagor failed to produce the deed before the Court though called upon to do so *Held* that the execution of the mortgage deed was in view of s 89 of the Evidence Act satisfactorily established, irrespective of the provision of s 68 *Jang Bahadur* v *Chandraj Singh*, 41 Ind Cas 171

Presumption as to documents thirty years old

90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested

Exlpanation —Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be, but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81

Illustrations.

(a) A has been in possession of landed property for a long time He produces from his custody deeds relating to the land, showing his titles to it The custody is proper

(b) A produces deeds relating to landed property of which he is the mortgagee The mortgagor is in possession The custody is proper

(c) A, a connection of B, produces deeds relating to lands in B's possession which were deposited with him by B for safe custody The custody is proper.

Principle The
First, after a long
saw the document's ex

90. exists for resorting to circumstantial evidence Secondly, the circumstance of

been found amongst deeds and evidences of land may be given in evidence, although the execution of them can not be proved ; and the reason given is, 'that it is hard to prove ancient things, and the finding them in such a place is a presumption that they were fairly and honestly obtained and reserved for use, and are free from suspicion of dishonesty" *Wigmore* § 2137; *Wynne* v. *Tyrwhitt*, 4 B & Ad 376 ; *Andrews* v *Motley*, 32 L J C P 128, 131. So as a rule of procedure, the
witnesses in provin
procedure or practice
of convenience may
to writings thirty years old are conclusively presumed to be dead,—so that execution of such a deed, will or other document need not be proved *Chamberlayne's Ev* § 1165 As the question is one of procedure and not of logic, this presumption is not allowed to be rebutted by proof that such witnesses are alive and actually in Court *Doe* v *Wooley*, 8 B & C 22, *Doe* v *Burdhet*, 4 A. & E 19, *Marsh* v *Collnett*, 2 Esp. 655 ; *Phip Ev 7th Ed* p 504

the case may be, by persons, ...

state or otherwise identify the means or characters of the parties to it, some sort of evidence will be necessary before it will be admissible *Wills Ev, 2nd Ed* 381
The rule is ... T.
R 466 ; *Chel* ... sp
665) but als ... *ns*,
6 Dow 149, ... 12,
Doe v *Bu*
presumed to
witness nee
E 1, 19 V
cated and
gestae, yet ...
purporting to be ancient is not likely to escape exposure, when subjected to the
... 18 The in-
... documents
... he general
rule and to admit, under proper restrictions, ancient documents purporting to constitute part of a transfer of title or
3 App Cas 653 "The proof of
difficulty Time has removed the witn

nection with many different kinds of docu-
Doe v *Samples*, 8 A. & E 151), Wills
, bonds (*Chelsa* v *Couper*, 1 Esp 275) memo-
28 L R. 144), leases (*Plaxton* v. *Dare*, 10
. *Thornbury*, 29 L J M. C. 109), cases stated

for counsel's opinion (*Meath* v . . . S.
containing entries of the receipt

years old, they need not be proved, provided they have been so acted upon or brought from such a place as to offer a reasonable presumption that they were

title which such documents profess to create *Luleeffunnissa* v *Goor Sarun*, 18 W R 485 The rule regarding the proof of documents more than thirty years old is that they need not be proved provided they have been so acted upon or brought from such a place as to offer a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty *Hari Dhangonr* v *Biru Dasee*, 5 B H A C 135 In order to establish the authenticity of an ancient document it is not necessary to show that it was accompanied by possession *Bisheshur Bhattacherji* v *George Henry Lamb*,

than 30 years old and that it was produced from proper custody, yet before
ce, it must be shown that it is
Evidence Act *Mathura Pershad*

thirty years old and is produced from proper custody, the Court may under this section presume its genuineness and more particularly that of the signature appearing on it *Bhupati Sigh* v *Khetal Singh* 21 Ind Cas 274, *Nur Muhamad* v *Allah Wasal*, 5 P W R 1915=35 P L R 1915=27 Ind Cas 562, *Gulab* v *Mahomad*, 35 Ind Cas 598, *Dwarka* v *Maka*, 49 Ind Cas 419 The Will in dispute having been duly registered and the document being over thirty years old, it must under this section, be presumed that it was a genuine document, and the fact that it was registered raised the presumption that the testator was of sound mind at the time of the execution of the Will *Babu Badri Prasad* v *Anupurna Kuer*, 6 O L J 311=52 Ind Cas 837 A Will of 1873

the attesting witnesses except one were dead and the surviving attesting witness

of the law may not have been given to the purchaser, there is no reason why the Court should presume that no possession was given *Pandurang* v *Basappa*,

0. A. I. R 1923 Bom 364.
rently from proper custod
show that it was not acted
nature to be acted upon, the presumption as to the title created by such document falls down *Mahadeo* v *Ragotrai*, 1923 Bom 293 In the case of a document more than 30 years old executed by an illiterate person but registered, there is from this two circumstances a presumption of its being genuine *Bhim Sankar* v *Mani Ram*, 9 O & A L R 893 A deed more than 30 years old and executed before the Transfer of Property Act, even if not signed by the executant but only by some scribe at his instance will be presumed to be genuine *Gaya Singh* v *Surnjbali* A I R 1924 All 832 If one is dealing with a document some thirty years old the main fact that the proof of consideration is not at all satisfactory, is by itself a slender ground for holding that the document known to have come into existence was entirely unreal *Sailaja Nath* v *Raja Resheecase* 51 C 135=39 C L J 380=81 Ind Cas 493 The document was more than 30 years old and was produced from proper custody and all the witnesses were dead *Held* that the presumption must be made under s 90 of the Evidence Act that the attestation ... *der*, 12 O L J
ore than 30 years
that the Record
Held, the presump-
was no proof that it
proof establish that the
)0 *Purna Chandra* v.
Radhakamohan, 90 Ind Cas 722 Where all the executants are dead, the scribe is dead the persons who purport to have been the attesting witnesses are dead,
receipt of consi-
)o is also dead,
d by this section
udh 510=4 O
a document was
executed by the person who purported to be the executant, but the Court cannot presume the correctness or genuineness of every statement appearing in the document *Kshetra Mohan* v *Bhairab Chandra*, 98 Ind Cas 1021=A. I R 1927 Cal 229; *Abdul Ghani* v *Faquir Mahomed*, 111 Ind Cas 361 Genuineness of *jama wasil baki* papers more than seventy years old, can be presumed under this section *Nirod Krishna* v *Prodyat Coomar*, 45 C L J 129 The presumption of execution of the document extends to the marks man *Shailendra* v *Girija*, 58 C 686=A I R 1931 Cal 896 This section does not contain any restrictions that a presumption should not be drawn thereunder if the person claiming under the document in question is out of possession or has not actually signed or thumb marked the document itself *Iman* v *Natha*, A I R 1932 Lah 43=32 P L R. 626.

Purporting Section 90 of the Evidence Act, does not enable a Court to presume that unsigned accounts, which do not purport to be in the handwriting of

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would be excluded were it not for this section, which contains an excellent provision, if it is not misunderstood *Mark Ev* p 68

Thirty years—Mode of reckoning Since the chief reason for the rule is the impossibility of obtaining living testimony to the signing or to the hand-

writing, the necessity does not arise until time has made such testimony unavailable At first under the English Common law, this requirement was satisfied by the simple and indefinite notion that the deed must be ancient In some of the old books the average age of a man was computed to be sixty years,
that an
. ars old
. enson v.
Olive, Bunbury 280, *Clarkson* v *Woodhouse*, 3 Doug 169 But this reckoning was too strict, because the witness were more
persons and therefore at least thirty years of age,
suffice to bring them near the end of the span
1700 S, the period of thirty years has sufficed to constitute an ancient document.
I v *Baker*, 1 Atk 21, 49, *R.*
252, *Chelsea Water Works* v
Wigmore § 2138 The period

have forged the written date
years ago must be somehow shown *Forbes* v *Wale*, 1 W. Bl 532 In the above named case *Lord Mansfield* said; 'If the length of the date is alone sufficient to establish it a man has nothing to do but to forge a bond with a very ancient date" *Wigmore* § 2138 But it seems that this section does not require any such extra evidence Hence in the case of a Will the period of thirty years is reckoned not from the testator's death, but from the date of execution of the instrument *Doe* v *Wolley*, 8 B & C 22 In applying the presumption allowed by s 90 of the Evidence Act, the period of thirty years is to be reckoned not from the date upon which the document is filed in Court, but from the date,
or otherwise becom
R 135 But in an
years old when it was produced, there is no presumption as to its genuineness

thirty years old on the date when arguments were heard *Mahadeo* v *Nasiban*, 54 Ind Cas 368 The period of thirty years mentioned in this section is to be reckoned from
the date when
233=75 Ind C
Thirty years should be counted from the date of its genuineness being subjected to proof *Konda Reddi* v *Pichi Reddi*, A I R 1925 Mad 184

Proper custody The mere production of an ancient document by a party affords no proof of proper custody and it is for the party producing it to explain how the document came to be in his custody *Trimbak Das* v *Mattabai*, 27 N L R. 75=124 Ind Cas 609=A I R 1930 Nag 225, *Ramnaresh* v *Chukut*, A I R 1932 Oudh 227=9 O W N 379 The Court added that it was only necessary to show the age of over thirty years, and that they came from a natural and reasonable cu
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or any other custody which in the circumstances of the case appear to the Court to be consistent with its genuineness *Doe* v *Philips*, 8 Q B 158, *Doe* v. *Keeling*, 11 Q B 884, *Wills Ev 2nd Ed* 385 In *Meath* v *Winchester*, 3 Being. N C 183, 200, *Tindal C J* said: "It is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any question as to their authenticity But it is when documents are found in other than the proper place of deposit that the investigation commences whether it was reasonable and natural under the circumstances in the particular case to expect that they should have been in the place where they are actually found. For it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable though differing in degree, some

S. 90. A. I. R 1923 Bom. 364.
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than 30 years old and executed
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med to be genuine *Gaya Singh*
v *Sumybali*, A. I R 1924 All 832 If one is dealing with a document some
thirty years old the main
factory, is by itself a

custody and all the witnesses were
dead *Held* that the presumption must be made under s 90 of the Evidence Act
that the attestation was duly made *Mahomed Hasan* v *Ali Hider*, 12 O L J
1=85 Ind Cas 509 A partition *chitta* purporting to be more than 30 years
deposed that the Record
Court *Held*, the presumption
was no proof that it
nor did the proof establish that the
collectorate custody was proper custody within section 90 *Purna Chandra* v.
Radhamohan, 90 Ind Cas 722 Where all the executants are dead, the scribe
is dead, the persons who purport to have been the attesting witnesses are dead,
and receipt of consi-
who is also dead,
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section is that a document was
executed by the person who purported to be the executant, but the Court cannot
presume the correctness or genuineness of every statement appearing in the
document *Kshetra Mohan* v *Bhairab Chandra*, 98 Ind Cas 1021=A. I R
1927 Cal 229; *Abdul Ghani* v *Fuqair Mahomed*, 111 Ind Cas 361 Genuineness
of *jama wasil baki* papers more than seventy years old, can be presumed under
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Gaya, 58 C 686=A I R 1931 Cal 896 This section does not contain any
restrictions that a presumption should not be drawn thereunder if the person
claiming under the document in question is out of possession or has not actually
signed or thumb marked the document itself *Iman* v *Natha*, A I R 1932
Lah 43=32 P L R 626

Purporting Section 90 of the Evidence Act, does not enable a Court to
presume that unsigned accounts, which do not purport to be in the handwriting of
any particular person or
the temple to which the

does not make it admissible without proof under s 90 of the Evidence Act

would be excluded were it not for this section, which contains an excellent
provision, if it is not misunderstood *Mark Ev* p 68

Thirty years—Mode of reckoning Since the chief reason for the rule is
the impossibility of obtaining living testimony to the signing or to the hand-

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Horner, (1913) 2 Ch .
thereof so far as t
which, judging from
tances of the case, it would naturally be expected to reside, then the document ought to be treated as authentic to such extent as to become admissible in evidence between the parties *Chundra Kant* v. *Brojonath*, 13 W R 109. Whether the custody of a document is a proper one under section 90 of the
s of each case.
documents sixty
custody of the
the presumption
uld be admitted
Pat L T. 474=5
than 30 years
old comes from custody of the mortgagee, the presumption of proper execution readily arises and it is proof of the mortgage *Ramachari* v *Sadho Saran*, A. I. R 1924 All 869 The mere fact of a certain document having been produced from a Court where it had been filed does not necessarily bring that document within the requirements of this section *Rajendra* v *Gopal* 4 Pat 66=A I R. 1925 Pat 442

May presume It is in the discretion of a Court whether it will raise the presumption, in favour of a document for which s 90 provides But this discretion is not to be exercised arbitrarily but must be governed by principles which are consonant with law and justice And while, on the one hand, great care is requisite in applying the presumption, on the other hand, it is clear that very grave injustice may be perpetrated, if an ancient document coming from proper custody is rejected by a Court capriciously or for inadequate reasons *Govinda Hazara* v. *Protap Narain*, 29 C 740; *Ram* v *Chhkut*, A I R 1932 Oudh R 227=9 O W. N 379 When a document, which is over thirty years old, has b
which is a
mentioned
ment, stating its reasons in the latter event and, in the former, whether the presumption has been rebutted or not *Srinath Patra* v *Kuloda*, 2 C L J. 592 The effect of the presumption is weakened by circumstances which tended to raise doubts as to its authenticity *Madan Mohan* v *Kumar Rameswar*, 7 C. L J 615 The presumption allowed by this section is not a presumption which the Court is bound to make *Honuman* v *Ramchuntra*, A W N 1901, 28. As to the presumption which a Court may make under s 90 of the Evidence Act, the power thereby given must be exercised with great discretion in a country where documents are written on such material as *parabick* and palm leaf, and where in Burmese time neither parties nor witnesses were ever in the habit of attaching their signatures, so that the term execution is rather a convenient

it be more than thirty years old and purports to come from proper custody and that under the circumstances of the present case the discretion was rightly exercised *Safiq unnissa* v *Shaban Ali Khan*, 7 O C 290 The words "may presume" in this section, ought generally to be construed in the more rigorous of the sense allowed by s 4 and in view of danger of a blind acceptance of a document as genuine for all purposes, merely because it purports
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at the time, and as to whether it has ever been acted on previously to its production in Court *Mehar Amir* v *Nur Muhammed*, 110 P. L. R, 1902. So it

90. is not obligatory, under this section, upon a Court to assume that the document produced is genuine merely because it purports to be thirty years old and is produced from proper custody. The Court has a discretion in the matter, but the di
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Mahabir Prasad, ...
presumption with regard to the genuineness of a document under this section is one in which the Court has to exercise its discretion and when that discretion has been exercised with due care and the presumption allowed by law has been made an appellate Court should be slow to interfere with such discretion *Mahomed v Rahim,* 57 P W R 1918 = 44 Ind Cas 559 The presumption ... applied to a deed executed by an illiterate

in refusing to draw the presumption under s 90 ... of the deed nor would such presumption be

... to prove the genuineness of a document but such evidence ...

age of the document ...
R 1930 Bom 39.

in my opinion, lays down more a rule of expediency than a ... of law"

Unsuspicious appearance. A third requirement is that the document must in appearance be unsuspicious *Wigmore* § 2140 'On inspection it must

is suspicious, on the face of it, and when the very place of importance has been erased and re-written, presumption under this section does not arise *Baldeo Misir* v. *Bharos Kunbi*, 95 Ind Cas. 261 = A I 1926 A. 537 Where a document more than 30 years old purporting to come from proper custody, is required by the Court before which it is produced to be proved and is left unproved, and there are circumstances, both external and internal, which throw great doubts upon the genuineness of the document the Court can, in the exercise of the discretion vested in it under s 90 of the Evidence Act, decline to admit it to evidence without formal proof and their Lordships of the Privy Council will be always slow to overrule the discretion exercised by a Judge under s 90. *Shafiqq-un nissa* v *Shafan Ali*, 6 Bom. L R. 750

Old Copies The use of raises two or three questions ficance, moreover, of the circums

but this rule does not enable one to use an unauthorized record Thus, when the record is unauthorized, some other mode of proving the deed must be resorted to. Keeping these principles in mind, the various situations may be distin-

cular mode of proof has been prescribed by the Act *Krishnasuami* v *Ananthachar* 4 Mys L J 264, *Sarju Dey* v *Ram Buxakh*, 18 Ind Cas 250 This section of the Evidence Act does not make it incompetent for the Court to draw any presumption
a copy of the sa

which section id was 94 = A 218,
Nanu Nair v *Kantan Ashta*, 2 L W 509 = 29 Ind Cas 386 But this section

M W N 454 = 73 Ind Cas 66

Where the alleged ancient original is lost, and proof of its contents (including the purporting signatures) is offered to be made by one who having seen it before its loss, recollects its contents or took a copy, the difficulty in

any witness and the presumption in section 90 cannot apply, for that only relates to documents which purport or are proved to be thirty years old, and . . . This is not one of such documents, and, section 90 can not apply. One of the . . . agent for admitting Exhibit E is *Ponnam Taleth Porapmaran v Karoth Sankaran*, 12 Ind. Cas 153, but from the brief judgment of . . . the contrary, . . . the copy." . . . copy is offered, made by a private hand, and the purporting maker being unknown a . . . and the co . . . 2113. The . . . an alleged official record copy offered, though . . . *Ibid.* When a copy of a document is exhibited in a suit and the original document is not produced, though the original purports to be more than thirty years old, the presumption which, under s 90 of the Evidence Act, may be made where a document over thirty years . . . not to be made *Appathura v. Gopala*, . . . cases in which the document is actually produced in Court, . . . secondary evidence of an . . . document is admissible, without proof of execution of t . . . have been last . . . P. R 1910 = 1 . . . case of a copy . . . Court to presume that the copy is in the hand-writing of the person in whose . . . Though this section does not refer to stamps, . . .

Evidence Act regarding the same on the production of certified copy . . . *Bahadur* v . . . The presumption mentioned i . . . *Banwarilal* v. *Dwarkanath*, . . . v. *Subramania Aiyar*, 16 L . . . 2 = (1922) M W. N 611 = 46 M . . . authenticating, a copy *Seethaya* . . . Bom L R 756 = 4 . . . this section with . . . as well as originals . . . be made in favou . . . *Prosad*, 6 O W N 880 = A I R 1929 Oudh 483 The Court may presume the genuineness even of an unregistered document thirty years old from a copy of such document, if the original is proved to have been duly executed, and further it is also proved that the original is since lost But such a presumption can only be made after a careful consideration of all the circumstances of the . . .

. . . competent to execu . . . The words 'duly . . . according to law . . .

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whether she has fully understood
question of execution The term
only an abbreviated form of expression intended to connote the necessity of bringing home the transaction to the executant and of proving that it was fully explained to and understood by the pardanashin lady *Afsar Begam* v *Mahomed*, 5 Luck 526=8 O W N. 55=130 Ind Cas 861=A I. R. 1931 Oudh 103

Presumption of genuineness whether presumption of executant's authority to sign or grant Where the executant of a document purports to sign it on behalf of others, the fact that it is more than thirty years old, though it would, under the provisions of section 90 of the Evidence Act, raise a presumption in favour of the genuineness of the document, would not dispense with proof of the authority of the executant to sign it on behalf of others so as to bind them or those claiming under them *Llulack Rai* v *Dallial Roi*, 3 C 557. Where it is not shown that the executant of an ancient document was entitled to grant such a document, mere production of it would be no proof of title *Uggar Kant* v *Hurro Chunder*, 6 C 209 The provisions of s 90 of the Evidence Act merely establish that the document was executed by the persons whose signatures it purports to bear, but that can not and does not
rim v
Lagan,
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only the execution of the deed, but not, in the absence of the power or evidence thereof, the authority of the solicitor to execute it *Re Airey*, (1897) 1 Ch 164, *Phip Ev 7th Ed* 505

This section does not prove the authority of the person who has made the grant, the genuineness whereof is presumed by the Court under the provisions of that section. *Kashi Nath* v *Jagat Kishore*, 20 C W N 643=23 C L J. 583=35 Ind Cas 298 The presumption that arises under s 90 of the Evidence Act only extends to the genuineness of old documents coming from proper custody, it does not further go to the extent of holding that the document was in fact executed by persons possessed of the requisite authority *Tarakesuar Pal* v *Sush Chandra*, 27 C W N 964 Although in the case of sale deeds more than 50 years old the presumption of law was that they were executed by the persons who purported to execute them, there was no presumption that the scribe who signed these documents
executants to do it *Haji Shaikh*
Ind Cas 989, *Ramani Kant* v *Bhu*
Cas 220

Full Bench case has held that the
e Act in the case of a document
executed by the party by whom it purported to be executed includes the presumption that when the signature of the executant purports to have been made by the pen of the scribe, the latter was duly authorized to sign for him *Haji* v *Sulhiam*, A L J 837=1925 All. 1=47 A 31 (F B), *Balloran* v *Mt Dulai*, 24 A L J 920=97 Ind Cas 292

7 O C 299=31 I A
Cas 773 When the
applicability of the pro
the High Court can
7 In *Parankura Zatei*
said. "The presumptio

Act as to the genuineness of a document 30 years old, is one of fact and stands

that the District Munsiff had drawn the presumption under this section in

Vayya Dayan, 108 Ind Cas 112

Ancient document—Corroborative evidence It is well settled that mere production of an ancient doc
evidence of acting under it is nc.
be corroborated by evidence
by other equivalent or explanatory proof, it is then presumed to have constituted part of the actual transfer of property mentioned, because this is the usual
gh absence of proof of possession does
tedly affects the weight to be attached to
a, 12 C L J 14=89 Ind Cas 747=A
I R 1925 Cal 1189

later when even that attesting witness was dead There was no reasonable explanation about the delay after 1910 in making the application for probate There was no evidence as to the custody of the Will before 1907, *held* that the applicant cannot get the benefit of s 90 *Channulal* v *Mt Puna*, 75 Ind Cas 660=1923 Nag 169 Where circumstances of suspicion surround the genuine character of a document thirty years old, the question of applying to it the present rule is one largely of administration Should the evidence in the case explain and account for these circumstances to the satisfaction of the presiding judge, he may admit the writing to the benefit of the rule of procedure *Chamberlayne's Ev* § 1165

Rule should be applied with proper care and caution The rule laid down in s 90 of the Evidence Act as to proof of execution of documents thirty years old ought to be applied with special care and caution *Trailokia Nath* v
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Din, 241 P. L R 1913=19 Ind. Cas. 964 Before a Court is justified in making

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presumption contained in this section *Gobinda* v *Pulin Behary*, 31 C W N 215 = 98 Ind Cas 147 = A I R 1927 Cal 102

Explanation This is to provide for cases in which the custody is not, perhaps, that where it might most reasonably be expected, but yet sufficiently reasonable to constitute such custody not improper Thus in the two first illustrations, (a) and (b), the documents are produced from their natural place of custody; in (c) the documents ordinarily would be with the owner B, but

v *The Bishop's*

the see

laxton v

Date, 10 B & C 17, or of the lessee *Hall* v *Ball* 3 M & G 242

CHAPTER VI

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

Evidence of terms of contracts grants and other dispositions of property reduced to form of document.

91 When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained

Exception 1—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved

Exception 2—Will *[admitted to probate in British India] may be proved by the probate

Explanation 1—This section applies equally to cases in which the contracts grants, or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one

Explanation 2—Where there are more originals than one, one original only need be proved

Explanation 3—This statement in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

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* These words in s 91, *Exception* 2 were substituted for the words under the Indian Succession Act" by the Indian Evidence Act Amendment Act 1872 (18 of 1872), s 7

91.

Illustrations

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved

(c) If a bill of exchange is drawn in a set of three, one only need be proved

(d) A contracts, in writing, with B, for the delivery of indigo upon certain terms The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion

Oral evidence is offered that no payment was made for the other indigo The evidence is admissible.

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judgment, the contract, the devise, etc, it is in reality declaring a doctrine of the substantive law of these subjects, namely in the case of a written contract, that

rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved It does not concern a probative mental process,—the process of believing one fact on the faith of another What the rule does is to declare that certain kinds

antive law; and this of course (like

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affected by it. Of these four, the first and the fourth are necessarily involved in every jural act, the second and the thi

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between them and therefore to

Wigmore § 2401 The practical

parts, in their former and inchoate shape, have no longer any jural effect, they are replaced by a single embodiment of the act, in other words: When a jural act is embodied in a single memorial, all other utterances of the parties on the topic are legally immaterial for the purpose of determining what are the terms

of their act *Wigmore* § 242) This rule is based upon an assumed intention on the part
contract,
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niteness, and to put their ideas in such shape that there can be no misunderstanding, which so often occurs where reliance is placed upon oral statements Written contracts presume deliberation upon the part of the contracting parties,
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cited with approval by *Lord Carson in M Subramoniam* v *Lutchman*, 50 C 338=38 C L J 41=28 C W N 1=44 M L J 602=50 I A 77 P C

instruments, or to contradict or alter them This is a matter both of principle and policy of principle, because such instruments are, in their own nature and origin, entitled to a much higher degree of credit than parol evidence of policy because it would be attended with great mischief if those instruments, upon which me by loose collateral evidence . *Charan*, 5 W R 68 (69) 'which requires the

Statute of Frauds In all these cases, the law having required that the evidence of the transactions should be in writing no other proof can be substituted for that, as long as the writing exists, and is in the power of the party *Greenl Ev* § 86 In the second place oral proof cannot be substituted for the written evidence of any contract which the parties have put in writing Here the written instrument may be regarded in some measure, as the ultimate fact to be proved especially in cases of negotiable securities and in all cases of written contracts, the writing is tacitly agreed upon by the parties themselves, as the only repository and the appropriate evidence of their agreements The written contract is not collateral, but is of the very essence of the transaction If for example, an action is brought for the use and occupation of real estate, and it appears by the plaintiff s own showing that there was a written contract of tenancy, he must produce it, or account for its absence, if he were to make out a *prima facie* case, without any appearance of a written contract, the burden of producing it, or at least of proving its existence, would be developed on the defendant. *Brewer* v *Palmer*, 3 Esp 213, confirmed in *Ramsbottam* v *Tunbridge* 2 M & S 434, *R* v *Rauden* 8 B & C 708 *Strother* v *Boor*, 5 Bing 136, *Per Parke J* But if the fact of the occupation of land is alone in issue without

respect to the terms of the tenancy, this fact may be proved by any competent [illegible] clarations of the tenant, notwith- [illegible] an agreement in writing; for [illegible] n question *R* v *Inhabitants of* [illegible] ing 239, 241. The same rule applies to every other species of written contract *Greenl Ev* § 87. Save and [illegible] itings, there is a third class of document [illegible] existence of which is disputed, and which is [illegible] the parties, or to the credit of witnesses [illegible] be proved in accordance with the provisions of section 64 *supra*, "I have always" says *Lord Tenterden*, in *Vincent* v. *Cole*, 1 M & M 258, 'acted most strictly on [illegible] only be proved by the writing itself [illegible] danger of relying on the recollection [illegible] contents of written instruments; the [illegible] the purposes of justice r [illegible] the writing does not [illegible] there is no ground fo [illegible] written communication [illegible] latter may [illegible] of the writing [illegible] may be pro [illegible] 4 Esp 213; [illegible] *Vide* [illegible] 3 to this section In stating that oral testimony cannot be substi- [illegible]

[illegible] although they relate to the [illegible], which are directly in issue in the cause [illegible] *Parke B*, *Newhall* v. *Holt*, 6 M & W [illegible]; *Bethell* v *Blencowe*, 3 M & Gr 119, *Howard* v *Smith*, 3 M & Gr 254 "The reason" [illegible] Baron Parke "why such statements or acts are admissible, without [illegible]

[illegible] may reasonably be presumed to be" *Taylor* § 410 But in illus- [illegible]

[illegible] the genuineness of a document produced is in question (*Vide* s 22) When [illegible] to be [illegible]

[illegible] limitation it must be taken that even a third party if he wants to establish a [illegible]

[illegible] made orally there being no docu- [illegible] is in fact reduced to the [illegible] be determined on a [illegible] and the circumstances [illegible] e terms are not reduced to the form of a document registration is not necessary and while the writing cannot be used as a document of title it can be used as a piece of evidence, *e g*

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settlement made Any antecedent documents and maps can be used solely

in the plaint, to the effect that he would make good any loss the (plaintiff) purchaser might incur in respect of the property sold, is not excluded by section 91 of the Evidence Act, and renders proof of the agreement unnecessary *Sadhu* v. *Nga Si*, U B R 1907, Evidence 1' When men agree to preserve by writing the remembrance of past event of which they wish to create a memorial either with a view to lay down a rule for their own guidance, or in order to have in the instrument a lasting proof of the truth of what is written, the truth of the written act must be established by the acts themselves, that is, by the inspection of the originals *Upendra* v *Umesh Chandra* 12 C L J 25=6 Ind Cas 346 The consent in writing by the landlord to the division of a tenure has the effect of substituting a new contract for the old It should
terms of the new cont
section 91 of the E
the terms of the co

application *Ganoda* v *Girish*, 4 Ind Cas 400 As required by ss 250 and 251, of the Code of the Civil Procedure, the warrant must have been in writing and therefore, under s 91 of the Evidence Act, the fact, that the warrant gave

admissible *Sheo Ko* v *King-Emperor*, 3 L B R 128 Previous conviction should, regard being had to the provisions of this section, and section 511 Cr Pro Code, be proved by copies of judgments or extracts from judgments or by any other documentary evidence of the fact of such previous conviction,
of those convictions is, having
warrant or justification Jasin
70 When a dying declaration
not evidence, but the precise
by the Magistrate who recorded
the statement or some one who heard it This section does not apply to such a document *Gowindas* v *Emperor*, 36 C 659=13 C W N 680=10 Cr L J 186=2 Ind Cas 841 Section 91 of the Evidence Act has no application to matters embodied in the special diary under s 172 of the Criminal Pro. Code,

1\. Ind Cas 766 An agreement within the meaning of section e record of Court, i e., reduced

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gift has been validly made in accordance with Muhammadan law *Ali Baksh* v *Ghurai*, 28 Ind Cas 180 = 18 O C 122 Where the terms of a compromise are found to be set out in a petition, the petitioner is to prove the terms of the compromise and oral evidence would not be admissible to vary or alter its terms *Bharora* v *Sikhdar*, 12 A L J 998 There is no rule of law that the only evidence of an agent's authority admissible in evidence is a written power of attorney The fact can be proved by evidence, *aliunde*, and so far as third parties are concerned, non the-less so because the agent was appointed under a written document executed by the principal. There is nothing in section 91 or section 92 of the Evidence Act to preclude such third party from proving the existence of a particular relationship between the persons who respectively executed and accepted the power of attorney, though the terms which govern such relationship appear to be in writing *Lala Nanakchand* v. *Mahammad Abzal*, 279 P W R 1912 The object of s 10 A of the Dekkan Agriculturists'

the parties but embodies only some of the conditions, oral evidence to prove

judicial determination of the meaning of the language of parties to an agreement though the parties may not testify as to their intention. *Morris* v *David Jones*, 125 Ind Cas 867 = Ind Rul (1930) P C 231 It is not necessary to get a family settlement reduced into writing and get the writing registered Oral evidence on the point of the alleged settlement is therefore admissible *Rangu* v. *Lakshman*, A I R 1930 Bom 438

When the terms of a contract or of a grant, or of any other disposition of property have been reduced to the form of a writing Where a transaction

memorial may be terme l the Integration of the act i e, its formation from **S.** scattered parts into a integral documentary unity. The practical consequence of this is that its scattered parts, in their

material for the purpose of determining what are the terms of their act *Wigmore* § 2425. It is for this reason that whenever the parties to any contract or grant or other disposition of property have set out its terms and conditions in a writing, which they presumably intend to be a record of the transaction, the law forbids any attempt to establish any other terms by means of oral evidence. *Powell Ev* p 181. The moment an oral contract is reduced to writing, it is not open to any of the parties thereafter to seek to prove the term of contract referring to the original oral agreement and this section applies not only to cases where the contract is brought about or concluded by the writing, but also where the contract having been originally made by parol is subsequently reduced to writing Where the parties reduce the terms of a contract into writing, it clearly indicates the contemplation of the parties that the terms would be reduced to a form where there could be no question at all as to what the terms were and the undoubted policy of the law is that whichever parties have taken such precaution it is the document itself that must be produced and proved as evidence of the contract subject of course, to any rules as to secondary evidence *Kappu Swami* v *China Swami*, 28 L W 234 - 111 Ind Cas 671 = A I R 1923 Mad 546 Thus, where a contract of agency had been orally made between the parties, but had subsequently been put into writing and signed by them, it was held that the document was only admissible evidence of the agreement *Morris* v *Delobbel Flipo*, (1892) 2 Ch 352; *Phip Ev 7th Ed* p 547 Having regard to the terms of this section, what the Court has got to do is to find out the real contract between the parties *Meenakshisundaram* v. *Chenchu*, 109 Ind. Cas 18 = A. I R 1928 Mad 459 The fact of partition may be proved by oral evidence although the deed embodying the terms of partition cannot be proved because of the inadmissibility of the document *Maung Tan* v *Ko Tu*, 111 Ind Cas 472 = A I R 1928 Rang 196 But where an award in writing which effected a partition of joint family properties, plainly and unambiguously effected an out-and out partition among all the members of the joint family, *held* that extrinsic evidence was admissible to explain or control its terms, to show for instance that there was no separation between two of the members *inter se* *Babu* v *Gakuldass*, A I R 1928 Mad. 1064 = 55 M L J 132 = 112 Ind Cas 184 The agrement to refer to ar
other disposition of property and so th
Ram v *Lala Ram*, 116 Ind Cas 853 = A
walf may be created by word of mouth,
been put in writing the document itself or secondary evidence of the same should be tendered *Mahomed* v *Bibi Marian*, 8 Pat 484 = 117 Ind Cas 638 = A I. R 1929 Pat 410 When a plaint alleges that possession of immoveable property has been given to the defendant as security for a loan of hundred rupees or upwards, but without the execution of a registered instrument, oral evidence is not admissible to prove the transaction. *Maung Sa* v *Maung*

have been reduced to the form of a document, except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible *Maung Pan* v. *Ma Bwe*, U. B. R (1892 1896) Vol. II, 347.

1. **Terms of a contract.** The general rule laid down in section 91 of the Act is, that when the terms of a contract have been reduced to writing, no evidence shall be given in proof of terms of the contract except the documents itself, or, in certain cases, secondary evidence of its contents *Sri Dunji v Bodri*, 15 R. D 309, *Nasir v. Ram Mohan*, 53 A 114=1931 A L J 61=A I

From the mere fact that a bill of exchange or hundi has been executed, it does not necessarily follow that the whole of the contract between the parties

dence of an agreement as well as of what took place when the agreement was made to prove the agreement if the written instrument is not produced *Iyankatesh v Ganesh*, 61 Ind Cas
whenever the terms of a contr
inadmissible in evidence the
Ishar Das, 3 Lah. L J 157=60 .
23 Bom L R 767=63 Ind
parties been reduced to writing and the of the contract of loan but if the hundies

then it is the oral terms
proved and this section is
180=57 Ind Cas 394 If
contract contemplate the e
it is a question of constr
is a condition or term of
desire of the parties as
to will in fact go through
either because the condit
a contract to enter into
and the reference to the mere formal document may be ignored 4 Pat L J. 580=(1919) Pat 305=53 Ind Cas 832 When it was admitted that the terms of the contract were reduced to writing and as no oral evidence was admissible to prove the said terms, the suit should have been brought within three years of the date of the transaction if it could be maintained on the original consideration. *Gobinda v Ram Chandra*, 29 C L J 508=51 Ind Cas 945 Oral evidence to prove
admissible under tl
22 C W N 416=4

controlled by final expression of obligation
his own language *Maung Po Thet v irna*
Vol II,
into at a . in
the writ . W
N 147 (P C)=32 C. 96=31 I A 188 A question as to who the contracting parties are is not a question as to the terms of the contract, within the meaning of this section *Venkata Subbiah v Gobindarajulu*, 18 M L J. 1=3 M L T 259=31 M 15 Where an agreement is inadmissible, oral evidence is barred.

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Samsam v *Ram*
rocedure does not
eed to the form
the suit or in
roceedings The
agreement or compromise itself, that is made out of Court may be in writing or by word of mouth If the Court did not record the terms of it, this section is no bar to the suit being brought on the terms of the compromise *Bija* v *On Gaing*, 3 L B R 243 Ordinarily when the terms of a contract preceded by proposals, negotiations conditional acceptances, counter proposals and so on are reduced finally to the form of a document signed by one or both of the parties the strong presumption is not that there are two independent contracts (the first an oral contract the second written contract) but that the written contract is the only final contract between the parties and when a contract is once reduced to writing no other evidence can be given of its terms *Kotam Reddi* v *Vennalakant*, 20 M L T 41—(1916) 2 M W N 33—31 M L J 240=35 Ind Cas 18 When the terms of contract for payment of interests were
was excluded from evidence by
Court of Waras Act oral evidence
idence Act to prove the terms of
contract *Ram Bahadur* v *Dassuri* 17 C L J 399=19 Ind Cas 818 The rule of evidence, which excludes evidence of the terms of a contract which has been reduced to the form of a document has nothing to do with an action for money had and received the basis of which action is not the contract reduced to the form of a document but the doctrine of equity that a person who has received a sum of money from another for a consideration which has wholly failed must return the money to the payer *Baij Nath* v *Sahj Ram* 16 Ind Cas 33

Promissory note—Proof of oral contract of loan Apart from the promissory note there is always a contract to repay a loan and such contract can be proved independently of the instrument It is only the other contract relating to the rate of interest which can only be proved on reference to the instrument itself So even in cases where the lending of the money and the execution of the promissory note are contemporaneous the plaintiff is entitled to maintain a suit for recovery of the money lent and to adduce evidence other than the instrument or the promissory note itself in order to prove the loan *Dhanesuar* v *Ramrup Gir* 7 Pat 845=111 Ind Cas 482=9 Pat L T 471=A I R 1928 Pat
bserved "It is a well
a contract to repay
ransaction, cannot be
ing in law to prevent
and if he can satisfy
o reason why a decree
Mahamad A I R
1931 Pat 293=133 Ind Cas 685, see also *Iwaj* v *Ram* 130 Ind Cas 347,
T 506 But a Full
Khan v *Ram Mohan*
question differently
between cases where
the transaction is separable from the promissory note and cases where the execution of the promissory note and the payment of the money are part and parcel of the same transaction, it being held that in the former case the debt could be held proved, although the promissory note was not admissible in evidence, while in the latter cases it could not and the suit must fail if the promissory note itself be inadmissible in evidence In that case the cases of
Sima 34 A 153=13
Ind overruled see
also *Khan* 7 C
256= The case of
Sheik *int* v *Bhoj*
Chan Ind Cas 646
But the case in *Sheikh Akbar* v *Sheikh Khan*, *supra* was sought to be explained away in a later case in the same Court in *Promotha Nath* v *Dwarkanath*, 23 C 851 In the Madras High Court in *Yarlagadda* v *Govantala*, 29 M 111=15 M L

L. J. 484 and in *Muthu* v *Vishuanatha*, 38M 660=21 Ind Cas 864, s 91 of the Evidence Act was relied upon and it was held that in circumstances similar to the Allahabad Full Bench Case, oral evidence could not be given in proof of the loan; see also *Alimam* v. *Kohsetti*, A I R 1932 Mad 693=63 M L J 303. In *Chandra* . , A I R 1922 Lah 307=66 Ind Cas 201=2 . also took the same view The point of vie whether the fact of payment of a sum of money can be regarded as a term of the contract does not seem to have been considered by the learned Judges who decided the case In a recent full Bench case of the Oudh Chief Court, it has been held that inspite of the provisions of s 91, it is open to the party who has lent money on terms recorded in a promissory note which terms ought to be inadmissible in evidence for want of proper stamp duty to recover his money by proving orally the advance of the loan *Kunuar Bahadur* v *Suraj Bikh*, A. I R 1932 Oudh 235, see also *Krishnan* v *Rajmal*, 24 B 360=2 Bom L R 25; *Duarla* v *Idu*, 74 Ind Cas 813=26 O C 361, *Narlu* v *Gaja*, A I R 1929 Oudh 349, *Maung Kyi* v. *Ma Ma*, 10 L B R 51=54 Ind Cas 81 (F B) For further discussion on the subject *vide* pp 1007—1009 *infra*

Terms of a grant Under this sect ... grant when *it has been reduced to the form of* ... secondary evidence of its contents is ad... admissible only under the terms of section ... is not proved to have been lost, (1 (C) of s 65 cannot be invoked *Mahomed Khan* v. *Sheo Bhikh*, A I R 1929 Oudh 447=6 O W N 550 Under section 85, sub section (2) of the B n ...

... Oral evidence of such grant is also excluded by section 91 of the Evidence Act *Jarip Khan* v *Durfa Bewa*, 16 C L J. 144=15 Ind Cas 116=17 C W N 59

... want of registration—whether secondary ... he ... n, ... contract can be received *Nga Sheic* ... The combined operation of s 49 of ... the Evidence Act is to completely ... partition In other words it would prevent the plaintiff from proving that in th ... n ... d ...

... intention of ... 927 Nag 113 ... property can ... to determine ... *van* 103 Ind Cas. 153, see ... R 276=103 Ind Cas 281=A. ... I Cas 47=1923 Rang 57; ... *ngdas* v *Uttamchand*, A I R ... deed can be used as evidence ...

terms of a partition deed. *Mg Po Leen* v. *Ma E Mai*, 1 Bur. L J 111. Secondary

evidence of a lost unregistered document affecting an interest in an immovable **S.**

oral agreement to lease made before the execution of the document, in order to support a claim
Kashiram 71 In
1923 P 111 W
tered, the tenant
formance *Damodar* v *Masoodan Singh*, 105 Ind Cas 172: *Tilaram* v *Sukka*, 111 Ind Cas 358 = A I R 1928 Nag 338 Though a lease for agricultural purposes for more than a year ca fact reduced to writing, it cannot be recei Act unless registered The document shuts out other evidence of the transaction Pat. 349 = 79 Ind Cas 26 = 5 Pat L T 541, *Ram Chandra* v *Tama*, 11 Bom L R. 390 = 36 B 500 = 15 Ind Cas 830, *Jasoda Kaulan* v *Ram Kuar*, L R 34 537, *Budhan Teli* v *Madanmohan*, 3 Pat L T 155 = 68 Ind. Cas 653 An unregistered deed of lease is not admissible to prove that the property to which it relates was let for a term of three years nor can oral evidence of the terms of the lease be tendered in such a case *Madar* v *Ranl*, 63 Ind Cas 90 The plaintiffs having agreed to convey a house to P received the purchase money, executed a sale deed,
suit for possession of
deed, secondary evide
Held, on second appeal, that under s the deed was compulsorily registrable, and prove the sale Section 91 of the Evidence secondary evidence of sale deed *Gangabisan* Cas 244. Section 49 of the Registration Act prohibits unregistered lease from being given in evidence whether the suit be for specific performance or for damages, and section 91 of the Evidence Act forbids any other evidence from being given of the agreement *Sreeramulu* v *Ramaswami* 33 M L J 596 Where the tenant wrote to the landlord to grant a lease in pursuance of an oral conversation and the landlord sent a reply which in law amounted to an agreement to lease but which was rendered inadmissible for want of registration and the tenant thereupon sought to fall back on prior oral agreement, held that if there was a prior oral agreement, it was either the same as that in interest or it was modified by the letters and that in neither case did s 91 of the Evidence Act admit oral *Bakam Chand*, 125 Ind C 1930 Lah 675

Docu her evidence —A pro note payable otherwise than on demand, bearing an one anna stamp is an insufficiently stamped document and is, under section 34 Stamp Act, inadmissible in evidence for any purpose even on payment of penalty In such a case a person is not entitled to fall back upon the original consideration of the contract as no other evidence of the terms of the document which is the best evidence in the case is admissible under this section *O Gorman* v *Mahtab Singh*, 92 P R 1898, *Chandan Singh* v *Amritsar Banking Co*, 2 Lah 330 = 1923 Lah 307 = 66 Ind Cas 201.

Where a plaintiff is able to prove the loan independently of and without the assistance of a promissory note, which cannot be admitted in evidence for some reason, he can fall back upon a claim for money lent *Ram Sawrup* v *Jasodah* 9 A L J 72 = 34 A 153 = 13 Ind Cas 138 [Since over ruled by 53 A 114 (F B)] So a creditor can fall back on the original transaction and recover his money on its basis when it is found or conceded that the document or instrument which he had obtained from the debtor was ineffective to establish any contractual relation of debtor and creditor between them so as to serve as a basis for a suit in a Court of law. *Udaram* v. *Laxman*, 104 Ind. Cas 470 = A. I. R, 1927 Nag 241. Where a person

91. sued to recover money on the duly stamped but the said hat appeared to be a *held*, that if the plaintiff was able to prove ... ndant had the money he was entitled to a decree *Launjari Chaube* v *Parsotom Chaube*, 25 A L J 567=103 Ind Cas 631=A I R 1927 All 503

The mere existence of an unstamped receipt which is inadmissible in evidence does not prevent other ... payment *Ram prosad* v *Nathu Rai* ...

If a creditor has a cause ... or has executed a promissory note separate from and independent of the note he can recover upon such cause in case the note for any reason as for want of being properly stamped cannot be put in evidence *Kashi Prosad* v *Panna Lal*, 74 Ind Cas 379=L R 4 A 377=1923 A 729 A promissory note which is insufficiently stamped if sued upon may give rise to three kinds of transactions Either the contract may be considered as contained wholly in the promissory note or bill of exchange as in ... to s 91 of the Indian Evidence Act, in which case the plaintiff cannot sue on the promissory note,—he can not sue at all, or secondly the promissory note may be regarded as a conditional payment of the amount of the loan in which case, of course, if the promissory note is insufficiently stamped it is only the plaintiff may sue on the loan; or the passed as security for the loan, in which case plaintiff to sue on the promissory note at all a or not, he can bring a suit on the loan *Jacob* 132=102 Ind Cas 138=A I R 1927 Bom note there is always a contract to repay a loan independently of the instrument It is only the other contract relating to the rate of interest which can only be proved on reference to the instrument itself *Dhaneshwar* v *Ramrup* 7 Pat 845=111 Ind Cas 482=9 Pat L T 171=A I R 1928 Pat 426, *Chedu Singh* v *Jagannath*, 26 A L J 416=108 Ind Cas 912=A I R 1928 All 297, *Nanhu Singh* v *Girja Bux*, 6 O W N 649=119 Ind Cas 865=A I R 1929 Sind 399, *Ram Sarup* v *Jasodha Kunwar*, 9 A L J 72=13 Ind Cas 138–31 A 158 But where the money was borrowed simultaneously with the execution of a promissory note by the borower and it appeared that the note was unstamped *Held* that the promissory note could not be sued upon and that it was not a case in which the suit was maintainable on the basis of the original contract either as there was none *Venkata* v *Munammal* 6 Mys L J 157 If a hundi is an embodiment of the whole of the contract between the evidence and cannot be looked at for the the contract, other evidence to prove the allowed But where the hundi embodies ... form

... 57 Ind Cas 709 ...

the original consideration, even when a pro note has been executed and when for any reason the document is excluled The reasonings of the several decisions apply not merely to unstamped documents, but to any case in which reliance cannot be place of,
or a collateral G
White, U B ione

under section 34 of the Stamp Act, cannot according to ss 65, 91 of the Evidence Act, be given *Bakshi Ram* v *Kokka Ram*, 42 P R 1895 A person who takes a promissory note on account of a pre existing debt, may, if the document becomes inadmissible in evidence sue upon the original consideration, disregarding the instrument, provided he has not endorsed, lost or parted with the same But if the original cause of action is the promissory note itself and does not exist independently of it, he cannot succeed without the instrument, according to s 91 of the Evidence Act, as the instrument is the only contract between the parties *Sheo Das* v *Kanhaya Lal* 61 P. R 1898 Where a promissory note itself is the agreement of loan a plaintiff cannot sue on the original consideration and the promissory note must be proved *Ram Singh* v *Perumal*, 9 S L R 150=32 Ind Cas 582, *Ballj Singh* v *Bhugwan*, 7 Bur L T 95=23 Ind Cas 975=7 L B R 101

When it is proved that certain *hundis* were renewed from time to time and the suit, but the r and could not be upon the *hundis* that were given prior to the last renewals and secondary evidence could be admitted to prove them *Jagan Prasad* v *India Mal*, 12 A L J 361=36 A. 259=23 Ind Cas 589 Where the contract in case of a loan and a simultaneous promissory note has been reduced to writing in the form of the note which contains the definite terms of the contract, Courts cannot resort to inconsistent or consistent implied contracts in such cases, simply because the contract as entered in the promissory note cannot be admitted in evidence *Muthu Sastrigal* v *Viswanath Pandara*, 14 M L T 520=(1914) M W N 58=26 M L J 19.

Any matter is required by law to be reduced to the form of a document Oral Evidence can not be substituted for any instrument which the law requires to be in writing, such as records public and judicial documents, official information or examinations, deeds of conveyance of lands, Wills, other than nuncupative, promises to pay the debt of another person, etc, *Taylor* § 399 In all these cases the law having required that the evidence of the transaction should be in writing no other proof can be substituted for that, so long as the *writing exists, and is in the power of the party Ibid Instances of this class* in India are —

(1) Judgments and decrees in civil cases *Vide* Or XX, and Or XXXI, of the Civil Procedure Code

(2) Depositions of witnesses in civil cases, *Vide* Order XVIII of the Civil Procedure Code

(3) Judgments and orders in criminal cases *Vide* §§ 367, 424 of the Criminal Procedure Code

(4) Deposition of witnesses in criminal cases *Cr Procedure Code*, sections 354—362

(5) Examination of an accused person *Cr Pro Code s 364*

(6) Confessions of an accused person *Cr Pro Code s 364*

(7) Lease of immovable property from year to year or for any term exceeding one year *Vide s 107 of T P Act* But this does not include an agreement to lease *Nanda* v *Sarat*, 5 Ind Cas 562

(8) Deed of mortgage when the principal money secured is one hundred rupees or upwards, other than a mortgage by deposit of title-deeds *Vide s 59 of the T P Act*

(9) Gift of immovable property *Vide s 124 of the T P Act*

(10) Sale of immovable property of the value of one hundred rupees and upwards *Vide s 54 of the T P. Act*

S. 91. (11) ... ndred rupees and upwar...

(12) ... Vide s. 511 of the Criminal Pro. Code

(13) Acknowledgment of debt under s. 19 of the Limitation Act.

(14) Acknowledgment of debt by part payment of debt under s. 20 of the Limitation Act

(15) Assignment of copy right. Vide s. 5 of the Copy Right Act.

(16) Agreement without consideration (Vide s. 25 of the Contract Act)

... Pitumal v ... nderlying s. 360 ... n the grounds of ... on oath if the accuracy of the record of such examination is to be vouchsafed, particularly when it is to be utilised as a basis for a possible perjury in future for it would be unsafe to use against a complainant what on face of it purports to be only a substance and not the full version of his examination But under the present state of the law, it cannot be contended that the substance of the oral examination is inadmissible in evidence under s. 91 of the Evidence Act in proof of the statement therein contained *Bhagirathi Bai* v *Emperor*, 89 Ind. Cas. 713=26 ... able. *Queen* v *Nga*, L B R (1872—1892), 572

Mortgage When in a suit for redemption of a mortgage the existence of the mortgage ... ossession on the strength ... ground of a contract of sal... evidence to rebut the existence of such a contract *Held* also that a *pyat paing* which reported an actual sale could not be considered as a document recording the terms of a contract for the purpose of section 91 of the Evidence Act. *Maung Kin* v *Maung Sun*, 5 Rang 679 Where on the back of a mortgage deed an endorsement of the payment was made and it was also added that the mortgages were extinguished, the endorsement requires registration But oral evidence is admissible to prove the payment of mortgage amount, apart from the endorsement *Labhu Ram* v *Sazawar*, 100 Ind. Cas 129=A I R 1927 Lah 237. If ...

transfer and have an account taken as to what was due on the mortgages ...)=A. I. R 1926 ... ontract relating to ... ment, no evidence ... document itself ... Where a mortgage ... stantial evidence

such as recitals in deeds referring to the mortgage, extracts from account books and by a transfer of a share of the mortgage *Held* that the written

per mensem compoundable yearly and the defendant alleged in a suit on the
ble interest
agreement
al v *Abdul*
a mortgage
s produced.
transaction.
Maung Po v. *Ma Le*, 3 Bur L J 238=84 Ind. Cas 468=A I. R. 1923 Rang. 102 A mortgage which ought to have been by a registered instrument cannot be so proved by other forms of evidence *Maung Tun* v *Maung Khan*, 2 Rang 441=A I R 1925
title deed, in the
open to the plaint
document was depo
But as the defendant executed a document in writing the Court must refer to it in order to ascertain what the contract was *Chunilal Lal* v *Vital Das*, 24 Bom. L R 502=68 Ind Cas. 1005=A I R 1922 Bom 440 According to section 91 of the Evidence Act, the terms of a mortgage can only be proved by the production of the mortgage deed or of secondary evidence of its contents, in case it is shown to be lost or destroyed,
ment fails to produce it after notice
1907, 4th Qr Evidence 13, *Fateh Sing* v
Samandar, 276 P L R 1913=20 In
of transaction completed independently of them and not embodying terms of
evidence
ut where it
nature of
the transaction *Holka* v *Nanupan*, A I R 1932 All 259=1932 A L J 101.

Sale Where propety is
the document cannot be relied up
be referred to for the purpose
ween the parties and to prove delivery of possession To such a case this section does not apply *Keshwar Mahton* v *Sheonandan*, 10 Pat L T 449=A I R 1929 Pat 620 An unregistered sale deed can not be made basis for suit for specific performance as if it were merely document creating right to obtain another document *Diwan* v *Guba Chan*, A
227 *Section 49 of the Registration Act*
17 of that Act and s 91 of the Evidence Act
an unregistered document, which is
being given in evidence as to the
Pe v *Maung Sein*, 7 R 411=A I R
evidence of the terms of a dispositi
applicable to both classes of documents mentioned in section 91 Consequently

91. to take effect for want of registered conveyance *Mg Myat* v *Ma Dun*, 3 Bur. L J 78-81 Ind Cas 857=A I R 19'4 Rang 214 Where unregistered deed of sale is inadmissible in evidence other evidence of the contract of sale is inadmissible *Parmeshri* v *Autar Singh*, 3 Lah L J 173; *Baggu* v *Tara Singh*, 5 P L R 1919 So also where an agreement to relinquish ex proprietary rights which should be in writing and registered was not executed, held that oral evidence was not admissible regarding the agreement *Ram Nath* v *Special Manager*, 12 L R 1 Rev The plaintiff can rely upon an oral sale accompanied by delivery of possession in a case where a sale deed was executed in evidence

Ma Nuai Paul, 34
property under a re
the production of
evidence with regard
section 91 of the Evidence Act *Safar Ali* v *Mohesh*, 23 C. L J. 122=34 Ind Cas 956 After acknowledging the receipt of consideration in the deed of sale, a vendor is not estopped from showing that he had not actually received the consideration stated in the deed *Puthi* v *Nand Kishore*, 25 Ind Cas. 27.

Deposition Since the act of deposing is a physical act which can always be proved by any one who has heard the statement being made, the fact of deposing might be proved by any one who has seen and heard the witness *Ganapathe* v *Sakharayappa*, 115 Ind Cas 140=A I R 1929 Mad 187. But under Order 18 rule 5, C P Code, it is necessary that the deposition of a witness in an appealable case, in order to bind him to the statement recorded therein, should be read over to him This provision is mandatory and not directory. The omission to do so renders the deposition inadmissible in evidence against him on his subsequent trial for perjury Section 91 of the Evidence Act excludes
or
10
Ir
Si
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a
record thus made is the only admissible proof of what was said, but in a ... trial, the Magistrate need not generally record the evidence, and where no obligation is laid upon the Judge or presiding officer by law to reduce depositions or statements to writing, they may be proved by the presiding officer or by persons who heard them, in order to establish the fact that they were made *Howard* v *Rustamji*, Rat Un Cr C 334 The accused was charged in the
constable in
Held, that the

writing, was
as to such sta
the present be
his memory
the oral evidence of the contents of the accused's deposition at the trial before the Magistrate was inadmissible under this section *Queen Empress* v *Bapu Narain*, Rat Un Cr C 401 Under section 91 of the Evidence Act the document embodying the deposition is the only evidence of the statement charged having been made under section 80 of the same Act, it is admissible only when it was taken in accordance with law *Kadir Pakiri* v. *Emperor*, 18 Cr L J. 966=42 Ind Cas 326.

cused before S,
a Bom. L R.
10 compromise
a s nine, seven
of nd admitted
having received rupees five from S, but when he was prosecuted he denied the
and proved the
but a confession
e been recorded
ar being recorded
when departmental enquiry was going on was not a matter required by law to be in writing, and section 91 of the Evidence Act had no application The Magistrate therefore was competent to prove the confession. *Haidar Raza* v. *King Emperor*, 12 A. L J 306 – 36 A 222 = 15 Cr L J 569 = 25 Ind. Cas 321. Where statements made by an accused person are inadmissible in evidence, secondary evidence of the contents of those statements are inadmissible also under this section *Queen Empress* v *Viran*, 9 M 224 = 2 Weir 125; *Reg.* v. *Bai Ratan*, 10 B H C 166 The confession of an accused person made to a Magistrate holding an enquiry is a matter required by law to be reduced to the form of a document within the meaning of section 91 of the Evidence Act, and no evidence can be given of the terms of such a confession, except the record, if any, made under s 364 of the Code of Criminal Procedure *King Emperor* v. *Gulabu*, 11 A L J 286 = 14 Cr L J 211 = 19 Ind Cas 507 = 35 A 260

Acknowledgment of debt. Secondary evidence of the contents of an acknowledgment, used to keep alive a cause of action beyond the ordinary period of limitation, can be given, where the original is proved to have been lost or destroyed, the effect of paragraph 2 of section 19 of the Limitation Act of 1877 not being absolutely and always to exclude secondary evidence in such a case Para 2 of the above section belongs to that branch of the law of evidence contained in section 91 of the Evidence Act *Shambu Nath* v *Ram Chandra Saha*, 12 C 267 Section 19 of the Limitation Act (XV of 1877) says clearly that oral evidence of the contents of an acknowledgment may not be received; nor has the Act made any saving of acknowledgments received or given back before the Act came into operation *Zaiulnissa* v *Motidev*, 12 B 268.

Search list A search list is not evidence of the facts stated therein and this section, therefore has no application to it It is simply a declaration, not on oath or affirmation or subject to cross examination, made by a police officer and the person's presence at the search that certain formalities were observed and certain events took place Oral evidence may, therefore, be given as to what took place at the time of the search *Public Prosecutor* v *Saralu Chennaya*, 2 Weir 776 This section, presupposes that, where a certain matter is required by law to be reduced to writing the writing is itself evidence of the matter so reduced, and the section does not apply if the writing is not evidence of the matter *A search list is not evidence of the matter stated therein and it does* not therefore exclude oral evidence of such matter *Public Prosecutor* v *Sarabu*, 33 M 413 = 8 Ind Cas 608 = 11 Cr L J 716 The search list prepared under s 103 Criminal Pro Code, is proper evidence of the matters which it should contain, *viz* the properties found and the place where they were found *In re Mammadi*, 2 Weir 47 = 2 Weir 515 The provisions of this section do not apply to the case of search list prepared under s 103 of the Criminal Procedure Code, *In re Solai Naick*, 8 Ind Cas 178 = 21 M L J 281 = 11 Cr L J 576

Application of section 91 to an oral statement made by a witness to a Police officer "In discussing the non applicability of section 91 of the Evidence Act to an oral statement made by a witness to a police officer and entered by him in his special diary I shall show that the distinction between the oral

Procedure prohibits the use of oral statements made by a witness to ... gating officer and that is the point in question In the ... 91 of the Indian Evidence Act has no application to an oral ...

to an investigating police officer, for it is not a matter, which is required by law to be reduced to the form of document (see *Reg* v *Uttam Chand,* 11 B H C R 120 and *Empress* v *Kali Churn,* 8 C 151). In the third place the entry in the diary of the police officer, correctly speaking, is not the statement either oral or written by the witness for any legal purpose It is by habit of thought with the depositions of witnesses statement made by a witness by the try in ordinary parlance This calls t speech and writing are two distinct objective entities perceptible by two different senses Speech is heard by the ear and writing is seen by the eye A deaf person is not a possible witness to a speech nor a blind person to a writing Both are means for expressing ideas A may state orally that a certain event happened or may write that it happened, but in order to constitute the oral or the written statement of A to be his act in the eye of the law it must have been made with a consenting mind as his own juristic act A making an oral statement within the hearing of B C and D The oral statement of it under section 8, illustration (c) of the Evidence
direc. ev
and so
writing
made by A, ... cannot be allowed to

... deemed to represent his own oral statement and his own juristic act' Per *Karamat Husain J* in *Rustam* v *King Emperor,* 7 A L J 168 (481)

Exception 1 ... fice is raised by showing that the p ... er This strictly involves two element ... or openness of such action, or, as ... officer But often the first element alone is mentioned as essential *Greenl Ev* § 38(*a*) This presumption is based on the maxim *omnia præsumuntur rite esse acta,* that is that will be presumed to have been done which ought to have been done The general rule is that where the contents of a writing are desired to be proved, the writing itself must be produced, or its absence is sufficiently accounted for before other evidence of its contents can be admitted *Greenl Ev* § 563 (*a*)
For sin
turbed
general,
are pro
the offic
arises
party to
366, *M*
Cross v
Campb 131, *R* v *Verelst,* 3 Campb 432, *Greenl Ev* § 563 (*g*)

Will annexed when no executor is therein appointed or the appointment of executor fails), or other proof tantamount thereto of the admission of the Will

in the Probate Division is legal evidence of the Will in any question respecting personalty. *William on Executor, 11th Ed.* 206. It can only be granted to an executor. *Behary Lall* v. *Jaggo Mohan*, 4 C. 1. Probate of a Will can not be refused on the ground simply that it is what lawyers in ancient time called "inofficious" *Rammal* v *Kalalkoli*, 22

S.

Under this exception the contents of a Will
may be proved by the probate. Section
(XXXIX of 1925) lays down that probate of
Will from the death of the testator, and renc
the executor as such
madans as well as to the
do not belong to the P
do not live within the loc
the High Courts of Ju
the executor by virtue of the Will, not of the probate The Will gives property to the executor; the grant of probate is the method which the law specially provides for establishing the Will So long as the probate exists it is effectual for that purpose *Kamal Lochun* v *Nilruttun*, 4 C 560 (562) The law on the subject is the same as in England *In re Ezekiel Joshua Abraham*, 21 B 139. Probate is an evidential ceremony *Smith* v *Miller*, 1 T R 480, *Ganapathi Iyer* v. *Sivamali*, 36 M 375, *Mathuradas* v *Gokuldas*, 10 B 468; *Jehanger* v *Kukibai*, 27 B 281; *Bai Harkar* v *Manicklal*, 12 B 621 The probate is only conclusive as to the appointment of executors and the validity of the contents of the Will *Hormusjee* v *Bai Dhanabai*, 12 B 161, *Whicker* v *Hume*, 7 H L C 124, *Brajnath* v *Anandamoyee*, 8 B L R O C 208, *Balgangadhar* v *Sakwarbai*, 26 B 762, *Chintaman* v *Ram Chandra*, 34 B 589. The probate shows that it was duly executed by the executor *Bhabangana* v *Harendra*, 17 C. W. N. 445=16 Ind Cas 48

Explanation I. "The learning on this head" says *Mr Norton* "must be sought for in work
grant, or disposition
Take the familiar i
from a series of letters passing between the parties" *Allen* v. *Bennett*, 3 Taunt. 169; *Jackson* v *Lowe* 1 Bing 9. *Phillimore* v *Barry* 1 Camp 513 *Warner* v *Wellington*, 25 L J
suffice if the contr
party, provided su
together *Spardlow*
a letter in which the
with the letter *Pearce* v *Gardner*, (1897) 1 Q B 688, *Taylor* § 1026 It is sufficient if the contract can be plainly made out in all its terms from any writings of the party, or even from his correspondence But it shall be collected from the writings, verbal testimony not being admissible to supply any defects or omissions in the written evidence *Boydell* v *Drummond*, 11 East 142, *Greenl Ev* § 268; *Cox* v *Middleton*, 23 L J Ch 628, *Ridgway* v *Whorton*, 21 L J Ch 46, *Caddick* v *Skidmore*, 3 Jur N S 1185

Telegrams "Telegraphic messages are instruments of evidence for various purposes and are governed by the same general rules which are applied to other writings If there be any difference, it results from the fact that messages are first written by the sender, and are again written by the operator at the other end of the line, thus causing the inquiry which is the original The original message, whatever it may be, must be produced, it being the best evidence, and in case of its loss,
next best evidence the

ork from which
message, and the
party sending

91. returned, are what would govern in construing the contract, provided both parties voluntarily and of their own accord sent their messages by the telegraph and thus adopted the company as their agent So when a contract is made by telegraph, which must be in writing by the Statute of Frauds, if the parties authorize their agents, either in writing or by parol, to make a proposition on one side and the other party accepts it through the telegraph, that constitutes a contract in writing under the Statute or Frauds; because each party authorizes

rite for him; and it makes
r the acceptance in the
, with a steel pen an inch
long attached to an ordinary penholder, or whether h s pen be a copper wire a thousand miles long In either case the thought is communicated to the paper by use of the finger resting upon the pen, nor do s it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the office . We know that by the admirable system regulating the government of the telegraphic companies, the original despatch is preserved and may be at all times procured for the proper purposes The paper filed at the office from which the message is sent is of course the original, and that which is received by the person to whom it was sent purports to be a copy If the despatch is sought to be used in evidence the original must be proved and its execution proved precisely as any other instrument, ie same mode, before the copy can be receive H 488, *Lurr Jones* § 53 By the decided weight r the communication sent in or the one received is to be deemed the original depends upon which party is responsible for its transmission, in other words, upon the question for whom the telegraph company is agent. If there is but a single communication, the despatch as delivered at the place of destination is the best evidence In such case the telegraph company is the sender's agent, but if the message were sent in response to a request by letter to telegraph a reply, it appears to us that the company would be the receiver's agent and the despatch as handed for transmission the original And generally in controversies arising between sender and the receiver, when the
the messa
Durkee v
by telegr
the point
for transmission *Burr Jones* § 210.

Broker's
negotiation, as t
ness books and
of the transact
and that which
Sales § 276 A
two parties (*Sto*
frequently acts
a proxy, a factor agent, but with this difference that the broker being employed by persons who have opposite interests to manage, he is as it were agent for both the one and the other to negotiate the commerce or affair in which he concerns himself Thus his agreement is twofold and consists in being faithful to all the parties in execution of what every one of them entrusts him with' (*Domat, Bk. I, tit 17, cited in story on Agency, p 28, in notes*) But primarily he is deemed merely the agent of the party by whom he is originally employed To make the other side liable to pay him brokerage, it must, we think, be shown that he has been employed by such party to act for

no parol evidence is admissible, but if they intend only to reduce into writing

ract, then I think they are entitled to give S
did not intend to reduce into writing
exchanged, is it usually intended that
these notes should constitute the whole of the contract? I think not. *Mr. Benjamin* in his work on the law of 'sales" lays down as the result of the authorities that the bought and sold notes do not constitute the contract I think this proposition is clearly borne out by the case of *Sievwright* v *Archibold*, 20 L J Q B 529=17 Q B 115 [See especially the decision of *Mr Justice Erle* in that case] and also by the case of *Pitton* v *Crofts*, 33 L J C P 189 In both these case the distinction between making a contract and a memorandum showing that the contract has been made is pointed out The result of those cases is that broker's notes as a memorandum may satisfy the Statute of Frauds but not exclude parol evidence In *Clarton* v *Shaw*, 9 B L R 252, *Sir Richard*

have been falsified the plaintiff
Durga Prosad v *Bhajan Ali*,
iscussion as regards the evi

defen
as having been made between a third person and the defendant In a suit

Court as to whether the mistake in the sold note was a bar to the plaintiff's suit for damages on the contract. *Held* that there was a contract between the parties for breach of which the plaintiff could sue for damages *Mahomed Bhoy* v *Chutterput*, 20 C 854 In *Ali Shain Shol e* v *Moothia Chetty* 4 C W N 453—27 C 403 (P C), a contract was made through a broker for the purchase of a quantity of paddy at a settled price The bought and sold notes were in
taken with the
wrote thereon
ot if wet The
ion until after
of yellow rice
ondent sued for

Explanation II Where a document is executed in several parts, each part is primary evidence of the document Where a document is executed in

Nort Ev 269

terms (a) of
re a document
s for instance,
tten contract,

etc., (*Sreequlty* v. *Loharam*, 7 W. R C R 384), it relates to some other indepen-
money [Illustration
ceipt
Smith
& J.
ntract or a grant or
tion and it does not
l Narain, 80 Ind Cas
which is inadmissible in
prove discharge by pay-
a document relied on,
eds is held to constitute a
inadmissible in evidence
is admissible to prove
of the Evidence Act is no

41 M L J 297

ed by this section to
g, or by action, and so
dmissible in evidence,
Vansittart, A. W N,
require to be
n for a contract
at Chandra v
ere a receipt for
amount can be
proved *aliundi* by virtue of section 91 of the Evidence Act *Chhutan* v *Mul Chand* 8 P R 1917=28 P W R 1917, see also *Sharaf Ali* v *Jogandar* 98 P R 1916

Existence as distinguished from terms of contracts, or of a grant or any other disposition of property Extrinsic evidence is sometimes admissible to

reduced to the form of a document, no evidence shall be given in proof of the terms of such a contract, grant or disposition of property except the document itself This however refers only to the method of proof of the terms of contract, grant or disposition of property,
and this being so, the
lduced in proof of the
I R. 1922 P 222 The
oral evidence, although
be proved for want of
ah) 43=61 Ind Cas.
ender, where there has
been a writing is not produced, section 91 of the Evidence Act unlike as in the case of documents required to be in writing only bars proof of the terms of the

if there be any. *Nago* v. *Tukaram*, 49 Ind Cas. 843 Where the plaint in a suit for rent showed that the suit was not based exclusively on a *Kabuliyat* executed by the defendant, but also on the collection of rent, and the plaintiff did not produce the *Kabuliyat*, but filed collection papers to prove that the defendant was holding at the rate claimed by the plaintiff in the year, collection papers were admissible in evidence, as they were not put in proof of the terms of the *Kabuliyat*, and section 91 of the Evidence Act did not apply. A raiyat

g year *Gouri* S
d deed cannot

properties claim
joint properties
Ind. Cas 83
of the contract.
the parties sign
case must be decided upon its own facts, and the real question is whether a document in question is a true award of arbitrators, or merely a deed of partition by the parties themselves disguised in the form of an award in order to escape
the only evidence
document itself,
m proving *ahundi*
, plaintiffs could
i partition *Sukh Dial* v *Mani Ram*, 29 P R 1915=27 Ind Cas 489=29 P. R. R 1916.

432; *R* v *Langton*, 2 Q B D 296) *Phip Ev.* p 509 The fact of birth, baptism, marriage, death, or burial, may be proved by parol testimony, "though a narrative or memorandum of these events may have been entered in registers which the law required to be kept" The reason for the above is that the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of the fact, which may furnish a satisfactory and convenient mode of proof, but can not exclude other evidence, though its non-production may afford ground for scrutinizing such evidence with more than ordinary care *Jivandas* v *Framji*, 7 B H C R 45 p 63, *Evan* v *Morgan*, 2 C & J 453, *R* v *Alison*, R & R. 190; *Lady Limerick* v *Lord Limerick*, 32 L J P & M 22; *Taylor* Vol I 5th Ed. 413.

Exclusion of evidence of oral agreement

92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtacting from, its terms·

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, *[want or failure] of consideration, or mistake in fact or law.

Proviso (2) —The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering

* The words "want or failure" were substituted for the words ", want of failure" by s 8 of the Indian Evidence Act Amendment Act, 1872 (18 of 1872).

2. whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved.

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations

(*a*) A policy of insurance is effected on goods "in ships from Calcutta to London" The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy cannot be proved

had always been regarded as part of the estate and was meant to pass by the deed cannot be proved

(*d*) A enters into a written contract with B to work certain mines, the property of B upon certain terms A was induced to do so by a misrepresentation of B's as to their value This fact may be proved

(*e*) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake A may prove that such a mistake was made as would by law entitle him to have the contract reformed

(*f*) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery B sues A for the price A may show that the goods were supplied on credit for a term still unexpired

(*g*) A sells B a horse and verbally warrants him sound A gives B a paper in these words "Bought of A a horse for Rs 500" B may prove the verbal warranty

(*h*) A hires lodgings of B, and gives B a card on which is written—"Rooms, Rs 200 a month" A may prove a verbal agreement that these terms were to include partial board

A hires lodgings
up by an attorney,
A may not prove that

(i) A applies to B for a debt due to A by sending a receipt for the money B keeps the receipt and does not send the money In a suit for the amount A may prove this

(j) A and B make a contract in writing to take effect upon the happening of a certain contingency The writing is left with B, who sues A upon it A may show the circumstances under which it was delivered

Principle The principle underlying this section is the same as that underlyi
single m
from sca
quence of this is that its scattered parts, in their former and inchoate shape, have no longer any jural effect, they are replaced by a single embodiment of the act In other words, when a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act *Wigmore* § 2425 So there is a general rule sometimes spoken of as the "oral evidence rule," which declares evidence, the effect of which is to vary the terms of a written instrument, or to change cut down or alter the effect thereof to be inadmissible *Mc*

the Courts to defeat this object When persons express the agreements, in
indefiniteness, and to
understanding, which so
nts Written contracts

disinclination to disturb the condition of
act of the parties The general rule, therefore, precludes the introduction of testimony to show that the parties meant other than they have said in the writing itself But it sometimes happens that writings are procured to be executed by fraud, or do not contain all the agreements between the parties, having been used only to cover certain matters, while others are left to oral understanding or there may be other circumstances which make it unjust to

These cases are usually
rictly such *Mc Kelvey's*

the
writing, it is conclusively presumed between themselves and their privies that they intended the writing to form a full and final statement of their intentions and one which should be placed beyond the reach of future controversy bad faith or treacherous memory *Phip L*
Lord Bacon said "The law will not cou
which is of the higher account, with
account in law" (*Bacon's Maxims*, Reg
matters in writing made by advice a
import the certain truth of the agreement

1 P & D 117, *Davis* v *Symond* 1 Cox Cc 403), sometimes on the doctrine of estoppel, for "in each the party is precluded by his acknowledgment in writing ... so acknowledged—in estoppel however it is a matter of

another ...
where and in what sources and materials are to be found the terms of jural act.

92. *Wigmore* § 2425 Gulson also remarks that the rule is one of substantive law directed not against parol evidence as an improper mode of proving the contract, etc, but (1) against such evidence as an improper mode of making it and (2) against extrinsic facts (however proved) being received to affect the meaning of written instrument *Gulson* §§ 418 54; see also Thayers' Pre Tr Ev. 401, 17 Harv L Rev 240

Scope of the section When the terms of a contract, grant or other disposition of property have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representat .

of the contract, grant

of the writing The

to be reduced to the fo

In *Pickering* v *Dowson*, 4 Taunt 779, 786, *Gibbs J* said . 'I hold that if a man brings me a horse and makes any representation whatever of his quality and soundness, and afterwards we agree in writing for the purchase of the horse, that shortens or corrects the representations, and whatever terms are not contained in the (written) contract do not bind the seller, and must be struck out of the case" So 'where the whole matter passes n

be taken together as forming part and p

be

can

2 B *Abbott C J* in *Kain* v *Old*,

secti *Knight* v *Barber*, 16 M & W 66,

says *Lord Blackburn* in *Angell Dale*, 3 L T Rep N S 320, "that, where there is a contract in writing, it should not be added to, if the written contract is intended to be the record of all the terms agreed upon between the parties Where there a collateral contract, *Wigmore* § 2425

d on

that that writing

ell 4 H & N. 1, 7

writing, it will admit ere is a deed in

Child, 1 Bro C C 92 leed" *Inham* v

contract, and put it

argain." *Per Martin*

en v *Blake*, 13 M

a written document,

etc., is not governed

that oral evidence

provisions of this sec

'The language of this section is" says *Mr Field* 'not quite free from ambiguity, the words No evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, etc, correspond with and have clear reference to the words 'contract, grant, or other disposition of property' in the beginning of the section; but their application to any matter required by law to be reduced to the form of a document

quired by law to be reduced to writing be a d

an oral statement appears to be admissible

the writing in cases other than those inc

Field Ev 8th *Ed* 501 But according to *Mr*

contradiction Section 91 deals with three

contract, grant, or any other disposition

been reduced to the form of a document (2) contract grant or any other disposition of by law to be reduced to

the form such as deposition of

witness, co reduced to the form

of a docu , so as to bring it under

section 91, e an act involving a

single pa
parties)
contracts,
been reduced to the form of a document by the parties, as well as those bilateral acts which the law requires to be reduced to the form of a contract Therefore these acts or matters must be contracts, grants or other disposition of property. So this section does not include such matters which the law requires to be reduced to the form of a document which are not contracts, grants or other disposition of property. *Woodroffe Ev 8th Ed* 611. The deposition of a witness does not fall within this section and oral evidence is admissible to contradict
raised by section 80 is only a
Ev p 611 Section 92 is also
s

ict that a
in fact
r portion
of the transaction *Cockle Cas Ev* 340 In *Allen* v *Pink*, 4 M & M 140, *Lord Abinger, C B* said "The general principle is quite true that if there has
terwards reduced by the parties into writing,
ed to ascertain the terms of the contract, but
, there was no evidence of any agreement by
should be reduced into writing by the defendant, the contract is first concluded by parol and afterwards the paper is drawn up, which appears to have been meant merely as a memorandum of the tran-
the
om
ced
of
the document I R 1929 Rang 240 While or written document by virtue of sec law for the time being in force, *of Act* applies that bar ceases to operate and the Court can make enquiries, that bar of statutory prohibition no longer existing because of section 10 A of that Act *Dada* v *Bhanu*, 29 Bom L R 1419=105 Ind Cas 754=A I R 1927 Bom 627 This section merely prescribes a rule of evidence It does not better the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances *Munna* v *Narain*, 107 Ind Cas 658 See also *Baijnath* v *Haju Valley*, 26 Bom L R 787=48 M L J 339 (P C) In a suit on promissory note, the defendant can prove a
condition precedent to the attaching of any obl
by the promissory note was that there should
under it unless there was a final balance
against the defendant which he failed to pay. *Bhogi* v *Kishori*, 50 A 754=26 A L J 696 A lessee under a registered lease wanted to prove an oral agreement regarding his preferential right to purchase the leased property if it was brought to sale The lease was silent on the point *Held* that under s 92, evidence of

s ble to show
Cas 897=
of showing
that one of the parties to the contract had acted as agent is admissible *Lachomal*
neous oral evidence is
r The parties must
terest and compound
interest and if they deliberatly have chosen to use one expression they cannot be
u v *Ganpati*, A I. R 1931
Act it is immaterial whether
subsequent to the dispos-

92. tion *Gopala* v *Sankara*, 1930 M W. N. 240=125 Ind. Cas 545 In the case of a covenant for title which is presumed to go with a sale under s. 55 (27 of the T P Act a contract to the contrary cannot take the shape of an oral agreement since it would be inadmissible in evidence under s. 92 of the Evidence Act *Mahammed Siddq* v Ind. Cas 185=A I R 1930 . duced to writing no evidence between the parties to show that the document was not to take effect forthwith as mentioned in the document but after the expiry of a certain period *Parmeshwari* v *Lachman*, 129 Ind Cas 439=A I R 1930 All. 824=1930 A L J 1066 In case of a deed of gift by husband to wife the husband can prove that the same is of a fictitious nature *Mahommed* v *Sayed*, A I R. 1931 Oudh 177=8 O W N 349

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contract and such an agreement can be proved *Irpan Ali* v *Jogendra*, A. I R 1932 Cal 708=36 C W N 645=59 C 111. Oral evidence is not admissible to prove an agreement between mortgagor and mortgagee whereby a contract in the registered mortgaged bond was split up *Ram Barman* v *Sanat Kumar*, 25 C L J 24=44 C 162=21 C W N 740 Oral evidence is admissible to show that a mortgagee's possession of a certain plot was terminated by the payment of a certain amount of money *Baid Ram* v *Tila Ram*, 15 A L J

s to certain paddy
be divided *Held*,
section 92, cl (2) of
d not been divided
ala, 4 L W 329=34
and so far as the

adjective law is concerned, the code
to be followed but also as to the extent

en the

England; and Courts of India are not justified
statute law in the same way, as Courts of Equity
of common law The effect of section 92 is

it, by proof of an entirely different contemporaneous oral agreement, is not sound *Gujarmal* v *Sitaram*, 3 N L R 19 An acknowledgment is not a document contemplated in section 92 *Chhedilal* v *Monohari*, A I R 1930 Nag 298=26 N L R 320.

circumstance that some
collection of the terms of
sole memorial of the
There may have been
attempt to make the
merely to furnish an aid
other party's satisfaction. The essential idea remains for it, that the writing is something distinct

from the transaction itself. *Wigmore* § 2429; *Dalison* v. *Stark*, 4 Esp. 163; S.

Parsons v. *N. Zealand Co.* (1901) 1 K. B 548; *Phip. Ev.* 555 When the parties during their negotiations reach a final agreement, but provide therein that the terms shall be reduced to a single memorial, the failure to execute such an agreed memorial does not preclude resort to the prior negotiations to ascertain

memorial was a

until supplanted.

referring to an

for the parties. *McKelvey's Ev.* § 297.

Partial integration; General test for applying the Rule; Collateral agreement. The most usual controversy arises in case of partial integration, i e, where a certain part of a transaction has been embodied in a single writing, but another part has been left in some other form. Here obviously the rule against disputing the terms of the document will be applicable to so much of the transaction as is so embodied, but not to the remainder. It is of course

may within the same half-hour sign articles of incorporation, authorize an overdraft, assign a mortgage and join in a committee's report to stockholders. Or a purchaser of land, negotiating with a broker, may at the same sitting accept a deed of grant of one piece of land and appoint the broker his agent

clearly distinct,

g wholly distinct

duced to writing

istances in which

a negotiation concerns one general subject—such as the purchase of a single

"parts" of the same transaction, and therefore, if reduced to writing at all, must be governed by the same writing. In searching for a general test

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be known till we know what there was to cover

the negotiation. *Wigmore* § 2430 In *Webb* v

Balyby J said "Where there is a written agre

naturally to be expected that it will contain al

if it is entirely silent as to the terms of quitting.

the country as to that particular If, however, it specifies any of those terms we must then go by the lease alone" *Dickson* v *Zizinia*, 10 C. B 602, 610 Where the writing covers only part of the transactions between the parties and there are oral agreements relating to the same subject, such agreements may be shown If it appears that the parties did not intend the writing to embody all the transactions between them, the rule is that such transactions as do not purport to be covered by the document, but which supplement or complete it, may be proved Here, again, there is no varying of the terms of a written instrument

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v. *Hobby*

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for the purpose of adding to a deed a stipulation to which the parties did not intend by that deed to

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satisfied by those means but the part

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plied in it, there is no reason why he

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N. Y. 216.

It is also held that the collateral oral agreement must have an independent consideration in order to be admissible *Coe* v. *Hobbey*, 72 N. Y. 141. As a principle of the law of contracts, it would seem that no collateral agreement would be of any effect in modifying the original unless there was a consideration to support it, and these decisions are therefore strictly logical *Mc Kelvey's Ev* § 296.

Parol evidence rule—Nature of. Notwithstanding the phraseology generally employed in the cases relating to what is called the "Parol Evidence

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of them illustrate anything in the law cerned with questions about the legal effect ive law, of requiring or agreeing upon a writing, or with the principles governing the construction of documents or the like; and not with merely evidential quality or operation of extrinsic facts, or any rules of law relating to these. As when it is said that parol evidence is not admissi anythir reason is of r

in the other. *Thayer Cas. Ev.* 2nd Ed. 820.

As between the parties t to the suit were not the parties to the cludes parol testimony for the purpose of contract, is

of others *Greenl Ev* § 279. *Holt* v. *Collyer*, L R. 16 Ch. D 718; *Chemical E.*

stranger to it, either party may show that the instrument does not speak the truth, and that the general rule does not apply as it does in cases where the controversy arise between the parties to an instrument which they have made the written memorial of their agreement *Venable* v. *Thompson*, 11 Ala. 147; *Pawel* v. *Young*, 51 Ala 518, *Burr Jones* § 449

by the statutory restrictions"
22 C W N. 257 (262) = 45 C. 320;
A. I. R 1929 R. 86; *Annada* v.
4 N. L R. 115; see also *Jagat*
v. *Panchoo*, 28 A. 473 = 3 A. L. J.
mzundar v. *Collector of Gorakh*-
1930

2. the terms of a contract which have been reduced to the form of a document "as between the parties to any such instrument or their representatives in interest." In the case of 10 A 421 the words quoted above were construed as meaning between the parties to the instrument on both sides and not on one side only as between t
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the parties t
not prevent the proof of a fraudulent dealing with a third person's property or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person, who was not a party to the conveyance *Maung Kyin v Ma Shwe La*, (1911) 2 M W N 30=14 C L J 276 (P. C)=13 Bom L R 797=1 A L J 1181 Sale deeds and mortgage deeds are essentially transactions
mortgagee
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that they agree to make provisions for certain relations or dependants does not make such persons parties to the instrument and oral evidence given by a person concerning maintenance allowance to
cannot be excluded by reason of section 92,
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ve" documents between the contracting parties *Vodiah v Voiada*, 9 Mys L J 203

Section 92 limits its operation to cases where the issue as to the real nature of the written transaction arises between the parties thereto or their privies. It leaves out cases of strangers to the instrument wishing to adduce extrinsic evidence in order to prove that the real transaction was different form what it purports to be *Saboji v Naual Sing*, 104 Ind Cas 736; *Mahomed Sultan Mohideen v Amthal*, 101 Ind Cas 603=52 M L J 557, *Ma Mi v Maung Aung*, 111 Ind Cas 832=A I R 1928 Rang 244, *Mahomed Ishaq v. Fahemunnessa*, A I R 1928 Oudh 472=5 O W N 825, *Maung Thein v. Maung Pyu* 5 Rang 836=108 Ind Cas 734=A I R 1928 Rang 61, *Narra v. Koganti*, (1925) M W N 214=87 Ind Cas 246=A I R 1925 Mad 775=48 M L J 280; *Hiraji v Vishnu*, 1923 Bom 429, *Bhullan v Kushi*, 21 A L J 932; *Jairam v. Rajnarain*, 20 A L J 777, *Sukumari v Kalipada*, 45 Ind Cas 13 If a father

be between the nominal purchaser and the vendor, and in cases of dispute between the nominal and the real purchaser, there being no writing between them, no difficulty can arise, under this section, in proving oral agreement. *Laxmibai v Keshav*, 18 Bom L R 134=33 Ind. Cas 396; see also *Pathammal*

statement is admissible in such proceeding for the purpose of contradicting

mortgagor was placed in possession of a part of the mortgaged premises, the income whereof was sufficient to wipe out the annual debt *Held* that as the arrangement was not in supersession or even variation of the mortgage, oral evidence was admissible to prove the transaction *Ramavatar* v *Tulsi Prosad,* 14 C L J. 507. The liability undertaken by the drawer and the acceptor of a bill of exchange is in
different ways and are
of section 132 of the
preclude the acceptor of a bill from proving that he never received any consideration for the bill but that he accepted it only for accommodating the drawer or some other party. *Pagose* v *The Bank of Bengal,* 3 C. 174.

Extrinsic evidence to control document is inadmissible Evidence of oral agreement between the parties to a written and registered document, distinctly adding to its terms, another term which had been antecedently agreed

the defendants sought to show that the written contract was varied by adducing parol evidence as to the matter on which the document was silent *Held* that such evidence was not admissible under section 92 of the Evidence Act *Jadu Rai* v *Bhubotaran,* 17 C 173 The executants of bond as principals, are not competent t
Saing v *Nga Lu Aun*
bond are clear and
it was an assignment
oral evidence of intention is not inadmi
deed or ascertaining the intention of the pa
L R 523=22 A 149=4 C W N 153

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as to the consent of the donee of the life estate to such an arrangement *Held,* that such oral evidence was clearly inadmissible *Nabooma* v *Khedar Hussain,* 108 Ind Cas 637=A I R 1928 Mad 613 Contemporaneous oral agreement not to charge compound interest though bond may stipulate therefor and the fact of simple interest only being realised cannot entitle a party to vary effect of written contract *Abdul Aziz* v *Amanmul* A I R 1925 Cal 276 Evidence of conduct of parties is inadmissible to contradict an unambiguous grant, *Gopal* v *Ramadhar Singh,* A I R 1925 Pat 228, see also *Kesho* v *Thakur,* A I R 192
person under
deed and or
this section
oral agreeme
till he got possession of the entire property is inconsistent with the terms of the

deed it is not open to the executants to set up and prove an agreement that the rate of interest to be charged was lower than that agreed upon. *Sukh Lal* v.

2, *Murari*, 95 Ind Cas 1019=A. I. R 1926 Oudh. 273 Evidence of subsequent oral agreement not to charge compound interest is inadmissible to vary the original contract which is a registered one *Jogendra Nath v. Khoda Baksh*, 1924 Cal 280, *Abdul Aziz v Amanmal*, 78 Ind Cas 742=1925 Cal 276 An entry in certain account books evidenced a contract to sell goods and they were described as arriving by a certain ship *Held* that oral evidence cannot be let in to show that there was an agreement to deliver goods within a fixed time *Firm of Jicanjo v Firm of Mathabari*, A I R 1924 Sind 127

In a suit on a joint and several promissory note payable on demand executed by A and B A cr
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formed the foundation of the suit formed a completed contract, whilst the defendant vendor urged that it was only a provisional arrangement conditional to the preparation by a vakil of a formal document evidencing the contract *held* oral evidence to show what actually took place on the occasion when the *parties entered into the agreement relied upon by the plaintiff is irrelevant* and inadmissible *Harichand v Govind* 44 M L J 608=47 B 335=28 C W N. 73=50 I A 25=37 C L J 440=(1923) P C 47. Where the terms of an
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Evidence of an oral agreement substituting a new executory contract in lieu of a decree is inadmissible *Lachmi Das v Babalali*, 44 A 258=20 A L J 65=69 Ind Cas 990 It is not permissible to a person who wishes to impeach a
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L R 239=66 Ind Cas 865 Where a pro note is sought to be enforced according to its tenor, it is not open to the defendants, to let in evidence an alleged
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it by way of security for others cannot be tried or determined except so far as it affects the question of consideration *Durgacharan* v *Lakhi Narain*, 47 Ind Cas 917 In a suit to recover possession of the properties conveyed under a sale deed, evidence was adduced to show that the parties to the document intended to give simple mortgage rights to the alleged purchaser for the sums which one had promised to pay to the creditors of the other party *Held* that such oral evidence is clearly inadmissible to prove that a different mode of operatation was

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the express terms of the promissory note be proved *Muthu Erulappa* v

e and it was sought to
recited *held* that such
tion *Narra Reddiar* v
=3 L W 589=35 Ind.
Cas 301

Where the terms of the mortgage contract are reduced as required by law to writing, an oral agreement varying those terms can not be admitted in evidence *Muthu Kumar* v *Govinda*, A I R 1932 Mad 218=35 M L W 145 where according to the terms of the registered mortgage deed the whole of the mortgage money is payable on demand with interest, evidence of a contemporaneous oral agreement between the parties that the amount would not be payable on demand but shall be accepted on instalments, is inadmissible under the express provisions of s 92 *Mohammad* v *Kishori*, A I R 1932 All 375=1932 A L J 414 But when a mortgage bond is silent as to how the money due on it is to be paid and the mortgagee executes a *kist bandi* which merely provides that mortgagor is to pay the amount then due in certain instalments spread over a certain member of years with a proviso that in default of any *kist* the entire amount under the mortgage bond would become due, the *kist bandi*, shows the arrangement between the parties and does not alter or vary the terms of the mortgage bond and it
Ram, A I R 1932 Ca
provided that each one of

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Section 92
an v *Sanat*
be rent, it
t, has been
raised, and any length of payment of a lesser rent will not help the tenant, *Maharaja of Bobbili* v *Appala Naidu*, (1916) M W. N 139=32 Ind Cas 703. Where in a suit by the payee of a Hundi against the drawer and the acceptor, the Hundi is silent as to interest, the plaintiff is entitled only to 6 per cent

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not admissible under
Pat L J. 71=35 Ind
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of the deed
Muhammad
party to a written contract to prove a contract the terms of which are clearly inconsistent with terms of the written contract *Baranashi* v *Lulla Mal*, 29 Ind Cas 950

Where a promissory note executed by defendants 1 and 2 contained an uncond is not admis sible to be conditional on the ariation of the contrac clearly forbids eviden ble exceptions to the *Narasimma* v *Ra* 336=18 Ind Cas 696 Where the subject matter of an appeal is compromised by the parties by means of a written agreement, which recited that "all matters in dispute" was adjusted, it is not open to any of the parties to tender oral evidence of a separate agreement not on the

therein as 400 bighas
was not the stated area within the specified boundaries Extrinsic evidence as to the negotiations which led up to
construction of the lease *Raja Durga*
N 66=19 C L J 95=11 A L J
sale deed recites as consideration a cash
contract that the amount was really
of the sale price is a term of the contract within the meaning of section 92 of the Evidence Act Evidence cannot be admitted to vary the provisions of the ition fixed for the same *Adityam Ayar* M W N 847=25 M L J 632=21 to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations *Saiyid Abdulla* v *Saiyid Basharat*, 17 C W N 233=13 M L T 182=(1913) M W N 131=35 A 48=17 C L J 312=25 M L J 91 (P C) Oral evidence is not admissible to prove that a document which in terms is an out an out gift was really meant to be *donatio mortis causa* *Benode Kishore* v *Ashutosh Mukhapadhya* 16 C W N 666=14 Ind Cas 720 Oral evidence to prove that parties to a sale deed, which was duly executed and registered, subsequently rescinded it by mutual consent, is inadmissible under section 92 of the Evidence Act *Bijulallu* v. *Yeddula* 15 Ind Cas 282 Oral evidence to show that one of the executants of a note of hand signed it only as a security and that his liability was only to the extent of standing as surety for a month is inadmissible under this section *Harek* v *Bishnu* 8 C W N. 101 Neither a contemporaneous oral agreement nor the subsequent acts and conduct of the parties can be proved under this section to show that the rent *Padla*

mortgage, it is only agreed b
to be made by the mortgagee to
the season's crop such agreem
as such, would be inadmissible

Act. *Moran* v. *Mittu Bibee*, 2 C 58 Under this section no oral evidence is admissible to show that certain deeds of sale are not deeds of sale, but deeds of gift *Rahiman* v. *Elahi Baksh*, 28 C 70 Where the plaint in a suit for specific performance of a contract to sell a certain share of a house, set out a written contract, and alleged that, on its having been subsequently discovered that the share was less than it was originally believed to be, the price was reduced by verbal agreement, *held* that the written contract must be taken as intact save as to the price, and that no evidence could be given by the defendants in contradiction of the other terms of the document *Brown* v. *Cutts*, 5 C L R 487 Where a written instrument provides for a joint tenancy and joint contract by all the parties executing it to pay the whole rent of a village without any reference to the quantity of land in the holding of each, oral evidence is not admissible to show that separate specific contracts have been entered into by each of the parties, and it makes no difference that the evidence is put forward as evidence of a custom *Mr G Lee* v *Panchananda*, 5 M H C R 135 Defendant was lessee under a joint lease by K and P. co owners of the premises Plaintiff having purchased an undivided moiety from P gave defendant notice to quit the moiety from the termination of the lease and sued for possession The defendant set up an oral agreement giving him an option of renewal of the lease, but it could not be proved as being

instrument whose terms are in themselves clear and undoubted *Rambuddin* v *Ranee Sree Koonwar*, W R 1864 Act X Rul 22 Bought and sold notes together may form the contract in accordance with the custom of merchants in Calcutta So, parol evidence was not admissible to vary or add to the terms

of rent of a holding held under a registered lease, nor is the conduct of the

issible to prove the
Kabuliyat was granted
partly in cash, and
in kind was not duly
um *Held* that oral
had agreed to pay the
price of the paddy at the current market rate, and not at the rate specified in the *Kabuliyat*, upon failure to deliver it duly *Godai* v *Sarju*, 12 C L J 649=7 Ind Cas 842

The Writing is really not the con
paper in writing, which purports to

contract, may be produced, it is still

92. Cas 929, see also *Woodroffe's Evidence 8th Ed* p 613 But in a recent Allahabad cases *Ashworth J* said · "The Appellant's counsel has referred to the following dictum in *Woodroffe and Amir Ali's* well known commentary, the Indian Evidence Act 'Though evidence to vary the terms of an agreement in writing is not admis ib ... ement at all is admissible' In suppo ... are relied upon namely, *Harris v. Rich.* ... *ym v. Campbell,* 6 El & Bl 370=25 L ... no authority for the dictum as stated ... the whole of a ...

92 of Evidence Act There is no authority for holding that evidence in any shape can be admitted for the purpose of showing that there was agreement at all or in other words, that a deed was meant to be inoperative" *Lachmandas* v. *Ramprasad,* 49 A 680=A I R 1927 All 422 (424)=100 Ind Cas 1029=25 A L J 349, see also *Gujar Mal* v *Sitaran,* 3 N L R 19.

Cases where the oral evidence is admissible "The cases in which parol evidence when objected to is apart from fraud or mistake receivable to correct written instruments are cases where, for example, the evidence supplements but does not contradict the terms of the deed; or where the provisions of the deed leave the question doubtful whether merely a mortgage and not out and out sale was intended, or where the language sought to be explained in evidence s language in an ordinary conveyancing form not exhaustively accurate but ... Instances of each of these will be found ... *Burton* v ... *Personal* ... *urgh* in *Tsang Chuen* v *Li Po Kwai,* A I R 19 ... Where there was a mortgage by which a fixed rate of interest wa agreed to be paid, and there was a contemporaneous oral agreement that the mortgagee should go into ... he was ... reement, ... was not ... s of the written agreement, that it was merely a provision as to how the interest should be paid and that therefore the oral agreement was valid *Brindaban* v *Umrao,* A W N 1887, 61 In a suit for money due on a promissory note payable on demand the defendant pleaded a contemporaneous agreement in writing allowing ...

agreed not to be executed against the judgment-debtors is not inadmissible by reason of the section *Ganga* v *Ram Oudh,* 113 Ind Cas 760=A. I R 1921 ... persons jointly, a ... the joint ... e 56 I A ... C) Oral ... which the ... under the ... settle- ... h and ... future ... idence which shows that two documents executed and registered on the same day are

... ount to leading evidence so as ... v *Ramlal*, 25 A L J 723 = 103 ... oral agreement providing for repayment of a mortgage debt from the usufruct of the mortgaged property may be proved Such an arrangement does not amount to a lease nor does it constitute an usufructuary mortgage. It is only a means of discharging the debt by putting the simple mortgagee in possession of the mortgaged property. *Nookamma* v *Dharmayya* 53 M. L J 863 This section prohibits only the proof of any contemporaneous oral agreement between the parties in variance of the terms of the document Where the father purchased certain properties and took a sale deed in joint names of his two minor sons and subsequently the individual share of each of the vendees was sought to be proved by evidence relating to the intention of the father *Held* that section 92 of the evidence Act was not a bar to the admissibility of such evidence as the sale-deed was silent regarding the share of two vendees *Mohammed* v *Amthal*, 101 Ind Cas 653 = 52 M L J 557 = 38 M L T (H C 247) In the case of an outright sale by registered deed, an independent contract to re-sell either orally by unregistered deed can be proved, but where the contract is not an independent transaction but froms part and parcel of the original transaction and together constitutes a mortgage, such contract cannot be proved If the facts p ... of each other, b ... oved for want o ... endent of each ... leed is one of an outright ... *Ma Nan* v *U Yaing*, 6 Bur. ... 314 There is nothing to prevent the parties from entering into an oral agreement for the settlement of decrees for money They have the same freedom to do so as to make narrative of contract by an oral agreement modifying the previous written contract so long as the contract is not required to be in writing and registered It cannot be said that the judgment debtor selling upon a verbal agreement by the decree-holder to accept some variations is ... Evidence Act *Ma Shwe* v *Maung San*, ... Oral evidence to prove that the def ... plaintiff on the understanding that it sl ... when the liability arise upon his part to restore to the plaintiff his share of the capital is inadmissible *Sheo Prosad* v *Gobind* 49 A 464 = 100 Ind Cas 332 = 25 A L J 305 A I R 1927 All 292 This section is no bar to the admission of oral evidence of circumstances to show the relation of the written language ...

... out of the rents for a certain charity, to pay also the cist and credit the balance of the rents towards the mortgage debt The plaintiffs alleged that the defendant failed to pay the said sum of Rs 200 and the cist and that the mortgage debt had bee ... admissible and that section ... case because it was not oral ... mortgage deed at all *Ram* ... 85 = 107 Ind Cas 808 = A I ... that the amount of Rs 50 ... mensem" The question was whether interest should be at one rupee per mensem or only one rupee for Rs 500 per mensem *Held* that oral evidence was admissible to prove that the parties intended that interest should be paid at 1 rupee per cent per mensem, under proviso 1 to section 92 of the Evidence Act. *Venkataramappa* v *Rama Setty*, 3 Mys L W 146 Oral evidence is admis-

2. sible to prove a discharge and satisfaction of a mortgage bond *Krishnaji* v *Kashirao*, 90 Ind Cas 450 A recital on a sale deed that there is no incumbrance or that the vendor has a good title to convey is not one of the terms of

succeeded to the estate of their father made an oral partition of the same and also arranged orally to extinguish their mutual rights of survivorship It appeared from the evidence that two lists had been drawn up of the properties as divided and mention was made in those of the right of survivorship having been extinguished The lists were not produced but oral evidence was let in regarding the same *Held* section 92 of the Evidence Act did not apply and the oral evidence was admissible *Nelakanta* v *Sundarasiva Row*, 48 M 933=22 L W 398=(1925) M W N 643=A I R 1925 Mad 1267=49 M L J 266

Even where an agreement is silent as to the consideration under this section oral evidence is admissible to determine what the consideration was *Pameshwar das* v *Neu Jooria*, 94 Ind Cas 371=A I R 1926 Sind 202 This section has no application where evidence of the conduct of the parties and their rights of the various members is let in to prove partition by the defendant in a suit *Ramuchetti* v *Panchammal* 92 Ind Cas 1028=A I R 1926 Mad 409 Where a promissory note is executed by two persons, oral evidence is admissible rety for the other *Moolji* v This section does not prohibit ischarge of a debt secured by a 710=96 Ind Cas 11=A I R 1926 Cal 906 by payment and partly by the release to roved by oral evidence *Mahim* v *Ram* Cal 170 In a mortgage suit it is open to the mortgagor to prove that the mortgagee had been satisfied not merely by payment in full of the amount which was due thereon but by part payment and remission of the balance *Bhaba Sundari* v *Ramkamal* 44 C L J 269=A I R 1927 Cal 27 See also *Ramchandra* v *Kailash*, 1931 Cal 667=58 C 532 An oral agreement between the lessor and the lessee that the lessor should give credit for certain sums for having cut certain trees is admissible as the transaction is a mode of payment or a discharge or waiver of a portion *rao*, 94 Ind Cas 169=24 A L J of Lading evidences a contract varying its terms is admissible Where in a suit on a bond the nd evidence is offered to show that the money due under the bond was meant to be the premium for a lease agreed to be executed by the creditor but which in fact was never executed, *held* that the evidence was excluded by section 92 of the Evidence Act *Baldeo* v *Ram Autor*, 22 A L J 850=82 Ind Cas 347 Where all the terms of a contract have not dence is admissible to prove the terms not *Coalfields of Burma* v *H H Johnson* Rang 128 Where a date is fixed in the oral evidence to extend the period is terms of the contract so as to make it 76 Ind Cas 62 Where a promissory note is endorsed on the back by a person who is neither the maker nor the holder, oral evidence can be let in to prove a contract of guarantee *Thakersay* v *Kishendas*, 76 Ind Cas 282=1925 Sind 9 agreement between the mortgagee and of redemption as regards the terms on assign his interest *Sailesh Chander* v arol evidence is admissible to prove a debt acknowledged in writing by the debtors when such acknowledged writing being unstamped is inadmissible in evidence *Thakan Ram* v *Lall*, 74 Ind Cas 939=1923 Lah wrongly ent real intentic 301 (Rev) evidence of a contemporaneous oral agreement to the effect that the

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agreed to treat it as a mortgage is admissible *Talak Chand* v *Atmaram*, 25 Bom L R 818 = A I. R 1924 Bom 58 Oral evidence is admissible as to negotiations antecedent to execution of the mortgage instrument, showing that what was intended to be offered and accepted as security was a certain ancestral share
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cured by a promissory note does
purpose for which the advance was
239 = 64 Ind Cas 33 Where an
oral agreement is made, which in respect of the manner of payment rescinds or
required by law to be in
payment if made in accord-
partial satisfaction of the
not exclude evidence of the
payment or the oral agreement that explains it It does, however, exclude
evidence of the agreement in respect of future payments not in accordance

L J 387 = 18 A L J 359 = 55 Ind. Cas 522 = 47 I A 17 (P. C) Where in agreement for the sale of land, it was impossible to reconcile the statement in the body of the agreement with the recital in the schedule as to the extent of the land to be conveyed, extrinsic parol evidence is admissible to explain the facts that led to the execution of the agreement, in order to reconcile the different statements regarding the property sold *Hussonally* v *Mangoldas*, (1920) M W N 726 (P C) There is nothing in this section to exclude evidence of an oral agreement which contradicts varies, adds to, or subtracts from not the terms of the contract, but some recitals in the contract itself, *Mukhi Singh* v *Kishun*, 51 Ind Cas 320 Where there is an oral agreement to grant a lease section 92 of the Evidence Act does not stand in the way of proof that there has been an agr
the circumstances as to the time of the
Chandra v *Bijoy Kanta*, 23 C W
Kabuliyat executed and registered by a tenant is proved by the tenant in a suit there is nothing in the Evidence Act to prohibit the landlord from showing that he never assented to or accepted the *Kabuliyat Hemanta* v *Birendra*, 47 Ind Cas 1003 Oral evidence of a sale by the mortgagor to the mortgagee

agreement made out of Court between the parties as a ground of adjournment does not purport to be and is not a record of the terms of the compromise: and additional evidence to add to the terms of the compromise is not inadmissible under section 92 of the Evidence Act *Sambanda* v *Chinnasuami*, 29 Ind Cas 860 Where the ostensible consideration shown in a document was the payment of a certain sum of money said to have been made by the defendant, oral evidence is admissible to show the real nature of the transaction *Narayan* v *Vithoba*, 11 N L R 34=28 Ind Cas 355 A receipt which says 'I release you from the liability to pay compound interest as written in the said mortgage bond' is admissible in evidence Registration is not necessary and the receipt operates as a full acquittance for the money already paid *Kailash Chandra* v. *Sheikh Chennu*, 42 C 546 A executed a usufructuary mortgage in favour of B in respect of one property Subsequent to this mortgage, there was an arrangement between A and B whereby the mortgagee was put into possession of another property, on the understanding that the profits derived from the latter were to be applied to payment of the princip
evidence to prove subsequent arrange
v *Shib Sahai*, 18 Ind Cas 324 P
one of the contracting parties was acting for himself or on behalf of a principal; for such a question under section 92 of the Evidence Act M L J 501.

In a suit for m on demand, the defendant pleaded a contemporaneous agreement in writing allowing the repayment by instalments *Held* that the contract was as contained in the two documents, and the defendant was entitled to prove the contract by showing that between the
lence Act
age rights,
nption by
I W N
er written
contemporaneously with a sale deed can be admitted in evidence to prove that
Neither ection 92 of the
t, would apply so as to
Mutha Venkata v *Pyanda*,
ecution of a mortgage bond, the mortgagor placed the mortgagee in possession of the mortgaged premises under an agreement by which the mortgagee was to continue in possession for seven years and to receive the profits in full satisfaction of his dues under the
to alter,
merely to
l by oral
v *Babu*
ral assurance given by the grantor of the lease, that it was intended to last, for ever, is admissible *Narsingh Dyal* v *Ram Narain*, 30 C 883 Where a document records the terms agreed to at the time of the execution of another document, the parties being the same, there is no objection, under s 92 of the Evidence Act, to the
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consideration that has passed, by showing that the actual consideration was something different to that alleged *Vashudeva* v *Narasamma*, 5 M 6; *Dookha* v *Ramlal*, 7 W. R
Indarjit v. *Lalchand*, 1
Bomaya Naik v. *Vir*
rent is admitted by the lessor, the lessees can rely on it This section does not affect the case *Satyesh Chunder* v. *Dhunpul*, 24 C 20 Where the plaintiff executed a mortgage instrument to the defendant and the consideration recited therein was that the defendant was to pay certain debts, and the instrument was not signed by the defendant nor was there any promise by the defendant to pay the debts, the
ment, does not c may be tendered which *Ranga-sami*, 7 M 19 greement entered into between the parties, when some others have been reduced into writing in letters exchanged between the parties *Ambika* v *Gaullstaun*, 13 C W N 326

and not a sale—the question being regarded as purely one of intention *Ismail* v *Hafiz*, 10 C W N 570 (P C) = 3 A L J 353 = 33 C 773 Section 92 of the Evidence Act, only enacts that oral evidence cannot be given to vary or contradict the express terms of a document and does not prevent a party from giving evidence to prove that certain persons caused the document to be executed in favour of certain others mentioned in the document *Shaikh Muhammad* v *Ram Dutt*, 5 P R 1896, see also *Tani Mahesha* v *Secretary of State*, 67 P. R 1894
Liabili
person
upon
rescind
a case
1903
and re
able from any oral agreement to vary the terms of mortgage contract and can be proved without the evidence of such agreement *Suppanchetti* v. *Yegnarayan*, A I R 1932 Mad 141

Evidence of conduct or intention for varying, contradicting etc The acts and conduct of the parties can only be proof either (1) of a contemporaneous oral agreement varying the terms of the registered contract, or (2) of a subsequent oral agreement having the same effect In the former case the evidence

tional sales, which it has always been permitted to be shown to be mortgages As pointed out in *Rahiman* v *Elahi Baksh*, 28 C 70 such cases are admitted idence Act But eption to the rule f the plea of the

question wa
Banerjee, 5
Full Bench
was really varied by a verbal promise to reconvey on repayment of money, making it in fact a mortgage" In answering the question in the negative

2. *Peacock C J* representing the views of the majority of the *Full Bench* said "I am of opinion that verbal evidence is not admissible to vary or alter the terms of a written contract in cases in which there is no fraud or mistake, and in which the parties intend to express in writing what their words import. If a
e executes to
, he cannot
both parties
intended that their contract should not be such as their written words express but that which they expressed by their words to be an absolute sale should be a mortgage It is said that there is no Statute of Frauds, and therefore parties may enter into verbal contracts for the sale of lands in the Mofussil without writing But admitting that the law allows sales of land or other contracts relating to land to be made verbally, it does not follow that, if the parties choose to reduce their contract into writing, they can bring forward mere verbal evidence to contradict the writing, and to show that they intended something different from that which the writing expresses and was intended to express That would be contrary to a well
(see *Starkie* on *Evidence*, pages 648, 65
holding that every rule of the Eng
transactions in the Mofussil, I have no hesitation in saying that a rule of evidence allowing a contract expressed in writing in words which the parties intended to use, and of which they knew the import could be varied by mere verbal evidence that the parties did not intend that which they expressed in writing but something very different, would lead to grossest fraud, and would open the widest door to perjury in support of fraud . If mere verbal evidence is admssible in this case to contradict a written contract, it would apply to every other case, and a man who writes 'one thousand' intending to write 'one thousand' might prove that by verbal agreement the words 'one

and that he was never possibly ous
or follow the absolute bill of sale, . the
transaction therefore, becomes material
to try whet , and forcibly dispossessed as
alleged by h the amount of the alleged
purchase money advanced, and to the value of the interest alleged to be sold, and the acts and conduct of the parties, they intended to act upon the deed
for I am
parties,
ersuance
ssession,
as never
ink that
ain and
t before
us is consonant to equity, good conscience, and public policy It is not equitable or right that parties should be allowed by a formal instrument to
There can in no case be
written instrument, could
as between the parties
ly is any understanding or

Nath, 23 W R. 167; see also *Madhab Chandra* v *Gangadhar*, 11 W R 450= 3 B L R A C 83 ... 300=4 C L R 419 it was held that ... by *Peacock C J* in *Kashi Nath* v *Chan* ... *Ram Dayal* v *Heera Lall*, 3 C L R ... What is the effect of this section on the Full Bench case was again considered in *Hem Chandra* v *Kali Charan Das*, 9 C 528 There *Garth C J* for the Court consisting of *Garth C J* and *Miller J* observed: "It has now been argued ... to established the la... was passed in 1872, ... so altered the law If I could see any ground for supposing, that the Full Bench case is not law at the present day, ... made, or intended to make, any ... prevailed here before the Act was ... in the Full Bench case, I should consider that our proper course was to refer the question to another Full Bench; but whe... seems ... rule as ... which the judgment in the Full Bench case proceeded is one which, in my opinion, is perfectly consistent with that rule It is a principle which has constantly been ... England, as well as by the C... the present ... *Wright* had brought an action of ejectment against *Lincoln* to recover certain land, which the latter had conveyed to him by a deed, which appeared on the face of it to be an absolute conveyance *Lincoln* then brought a suit in equity to restrain the ejectment, on the ground that the transaction was in reality a mortgage, and he relied in support of that contention, partly upon a parol agreement, and partly upon the acts and conduct of parties *Turner L J* says "The principle of the Court is that the Statute of Frauds ...

9 C 898

So although parol evidence will not be admitted to prove directly that simultaneously with the execution of a bill of sale there was an oral agreement by way of defeasance, yet the Court will look to the subsequent conduct of the parties, and if it clearly appears from such conduct that the apparent vendee ...

2. real intention and purpose of the parties at the time The exercise of this remedial jurisdic ... raud
The Courts of I ... exer-
cising a simil ... 115,
covers the who ... That
section does not say that, in order to constitute an estoppel, the acts which a

s action was one of ... ce of what the English Cour
call 'past perform ... n the Indian rule of estoppel
But the ground upo ... Courts in India may most
safely be rested, ... them to prevent fraud The
Courts will not allow a rule or even a statute, which was passed to suppress fraud, to be the most effectual encouragement to it and accordingly in England
the Courts for ... t aside the
common law ... rts in India
have the same ... terposed by
the Indian Ev ... sections 91
and 92 of the Act, ... of
the Legislature,
Specific Relief Ac
Indian Evidence Act so as to bring them into conformity with the practice of the English Courts of Chancery *Bakshu Lalsman* v *Govinda*, 4 B 594 So
the principle of law laid down in the ... *ndy
Churn*, 5 W R 68 was approved or ... ises
Pheloo v *Geerish*, 8 W R 515; *Ha* ... n
Sheikh Parabal v *Sheikh Mohammed*, 1 B L R A C 87; *Behary* v *Tejnarain*, 10 C 764, *Nundo* v *Prosunno*, 19 W R 333, *Bholanath* v *Kaliprashad*, 8 B L R 89, *Venkataratnam* v. *Reddiah* 13 M 494 *Rakken* v *Alageppudayan*, 16 M 80, *Kader* v *Nepean*, 21 I A 96=21 C 882 (P. C) see also *Balkishen Das* v *Legge*, 19 A 434, *Holmes* v *Mathews*, 9 Moo P C 413, *Mutty* v *Annundo*, 5 M I A 72, *Barton* v *Bank of New South Wales*, L R 15 App Cas 379 The question was again considered by a Full Bench of the Calcutta High Court in *Pranath Sha* v *Madhusudan Bhuiya*, 2 C W N 562=25 C 603 (F B) There *Banerjee* and *Wilkins JJ*, in their order of reference reviewed all the previous cases on the subject *Maclean C J* in delivering the judgment of the Full Bench observed "In regard to the question of law, which was the main ground for this reference, namely, whether oral evidence as to acts and conduct of the parties was admissible to prove that the deed in this case was intended to operate as a mortgage and not as an out and out sale, the learned vakil who appeared for the Appellant stated that having regard to the authorities he could not successfully contend that such evidence was not ...

... *oda Baksh*, 26 In Cas 717
... v *Legge*, 4 C W N 153 (P C)=
... y Council In that case the question was
whether certain deeds executed by the respondent in favour of the appellants constituted a mortgage transaction or an out and out sale with a contract of repurchase *Lord Davy* in holding that oral evidence of intention was not admissible for the purpose of construing the deeds or ascertaining the intention of the parties, said. "By section 92 of the Indian Evidence Act (I of 1872) no evidence of any oral agreement or statement can be admitted, as between the parties to such instrument or their representatives in interest, for the purpose of varying, or adding to, or subtracting from, its terms, subject to the exceptions contained in several provisos It was conceded that this case could not be brought within any of them The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not in the opinion of their Lordships any application to the law of India as laid down in

S. 92

of the parties, that is, evidence of the repayment of the money, the return of the deed and the exercise of the acts of possession by the vendor, and not ... s by the parties . If that was ... ction 92 of the Evidence Act does ... the parties The view we take is supported by a Full Bench decision of this Court in the cas of *Preo Nath* v *Madhu Sudan*, 2 C W N 562=25 C 603 It was contended by the learned vakil for the appellant that the decison must be taken to have been in effect overruled by the decision of the Privy Council in the case of *Balkishen* v *Legge*, 27 I A. 58=4 C W N 153 We do not consider the argument sound The evidence that their Lordships considered inadmissible in the case just referred to was certain oral evidence of intention which had been admitted in the Courts below and the ground upon which their decision is based is that ...

evidence of the acts and conduct of the parties not being in the nature of an oral agreement or statement" See also *Mahomed Ali* v *Mir Nazar Ali*, 5 C. W N 326=28 C 289; *Ali Sheikh* v *Imam Ali*, 35 Ind Cas 102; *Miriam* v *Ibrahim*, 28 C L J 306=48 Ind Cas 561; *Kamala* v *Nandan*, 11 C L J. 39, *Ramauatar* v *Tulsi*, 16 C W N 137, *Sharadi* v *Jamal*, 17 C W N. 1053 In the last named case B executed in favour of A a deed of out and out sale with a condition of re-purchase of a house but no date was fixed for the repurchase On the same date B executed a *kabuliyat* in favour of A by which he acceped a lease of the housesold The Court took into consideration how the language of the document was related to the existing facts such as that the vendor continued in possession, paid rent at the usual rate of interest, etc, and further that the value of the property was much more than the consideration paid In delivering the judgment *Jenkins C J* said "The argument before us has been that it was not open to the Appellate Court to regard the transaction as a mortgage I designedly use the word 'transaction' because that with which we have to deal is not contained in one document but in two, and what we have to consider, in the circumstances is, whether there is anything in section 92 of the Evidence Act or in *Balkishen* v *Legge*, 22 A 149—which is in opposition to that section—that would compel us to hold that the decision of *Mr Justice Chatterjee* is erroneous We would certainly ...

in Calcutta But it appears to me that all these authorities to which allusion has been made are beside the point in this case, for I cannot find that the learned Judge of this Court has relied on any evidence of oral agreement or statement or of intention, with a view to coming to the conclusion at which he arrived He took the transaction as it is expressed in the documents He also took into consideration those facts which may legitimately be proved with a ...

principal document is expressed in qualified terms, and it is only open to the suggestion that it is an out and out sale, if and so far as it can be said that the express terms of the deed must be disregard ...

In *Narendra Lal* v *Bhola Nath*, 27 C W N 336=77 Ind Cas 154, ... cases of *Preonath Shaha* v *Madhu Sudan*, 25 C 603=2 C W. N 562; *Khankar Abdur* v *Ali Hafez*, 28 C 256 and *Mahomed Ali* v *Najar Ali*, 28 C 289=5 C W N 306 were followed, see also *Kailash Chandra* v *Darbaria*, 20 C W N 347; *Manindra* v *Durga Sundari*, 20 C W. N 680; *Arjad Ali* v *Sheikh*, 50 Ind Cas 12; *M* ... *Priyabarta*, 26 C W ... an instrument, only ... of showing that the transaction is not what it purports to be *Krishna Lal Singh* v *Sri Raj Kuar*, 104 Ind Cas 299=1 Luck C 97=A I R 1927 Oudh 278, *Mariam Bibi* v *Ibrahim*, 28 C L J 306=48 Ind Cas 561 The rule, that the conduct of the parties in respect to an instrument may be looked to in construing a document, is subject to this reservation that it can be admitted only after every other means to construe a deed have been exhausted *Devjee Trikamjee* v *Dayamoy*, 108 Ind Cas 418=A I R 1928 Pat 225 Subsequent conduct of ... *Lal Ghose* ... terms of ... not an ... Court to ... le if the ... 30 Ind ... s to the ... of the contract were never in the deed to be acted upon from the very beginning *Narendra* v *Bholanath*, 77 Ind Cas 154=27 C W. N 336, see also *Ali Sheikh* v *Iman Ali*, 35 Ind Cas 102

A different view has been taken by the Bombay High Court in *Dalloo* v *Ramchandra*, 30 B 119=7 Bom L R 669, where *Jenkins C. J* said "The plaintiffs sue to recover possession of land alleging that the document passed by his father, though in form an absolute conveyance was intended to operate as a mortgage The grounds on which their contention is based, are that the consideration was a debt and not money paid at the time; that the plaintiff's father, notwithstanding the execution of the deed, remained in possession until his death, and that after his death his widow remained in possession for ... of the trans ... nder- ... eous ... he-e ... il in ... is of ... Act; ... enable the ... ule, 2 Deg ... ples We ... within the ... we should ... g on us" ... dmissible, ... 92 of the ... L R 239 ... ning the

intention of the parties in interpreting languages used in a written document **S.**

case is that there was no agreement enforceable by law to sell the property, but that there was a mortgage agreement, it should be specifically determined

[illegible] parties as shown by evidence, is a mortgage

Bom L R 764 The plaintiff sued to

is not open to misrepresentation void *Sangira* ma v *Godigeya,* om L R 684 mortgage dated

1899 The mortgage having been expressed in the form of a sale deed, he

words which refer to s 12 of the Evidence Act, and does not point to any

Gopal v *Morar,* 15 Bom L R

aua, 31 Bom L R 1266, *Gopal*

The object of s 10 A of the

Bom L R 1266

the case of *Balkishen Das* v

inference that there was a contemporaneous oral agreement or statement between

2 from, the terms of any contract, grant or disposition of property which has been reduced to writing, and no exception is made in any of the provisos to sect on 92 or elsewhere in the Act, in favour of evidence which consists of the acts and conduct of parties from which an inference might be drawn that there was such an oral agreement to vary the terms of the contract or grant The question before us is really concluded by the recent decision of the Privy Council in *Balkishen Das* v *Legge*, 27 I A. 58=22 A. 149 In this connection we may also draw attention to the distinction which is drawn by the same tribunal between admissibility of evidence to show that a recital of a fact in a contract or grant is erroneous, and evidence to vary the terms of a contract or grant (*Sri Lal Chand* v *Indrajit*, 27 I A 93=22 A. 370), and also to the decision in the House of Lords in *North Eastern Railway* v *Lord Hastings*, (1900) A C 260 in which it was held that when the words of a deed were plain and unambiguous, the fact that the parties understood it otherwise and acted on such understanding for a period of more than forty years, could not affect the construction of the instrument and the effect to be given to it.' See also *Venkata* v *Subramania* (1917) M W N 674, *Chall Venkata* v *Devaj hakshmi*, 1912 M W. N. 164. Where the contemporaneous agreement though in writing is not registered, it is not open to the party to show that what is apparently a sale was really a mortgage *Meenakshesundaram* v *Chenchu*, 109 Ind. Cas 18=A. I R. 1928 Mad 409 Evidence of subsequent conduct to prove contemporaneous agreement is not admitted *Fit. Holmes* v *The Bank of Upper India*, 77 Ind Cas 523=5 Lah L J 439 In delivering the judgment the Court observed "On the question of whether he can be allowed to produce evidence of a contemporaneous oral agreement varying the terms of the written document, the learned senior ... very clearly and we find ... which he comes that this ... n which the High Courts ... *Ma Shwe*, 44 I. A 236 (P C) It was contended ... ouncil has not definitely ... =114 P L R 1901 As ... wed *Preonath* ... *ankar Abdur* ... the Calcutta ... g conduct as ... ly the same way in ... *Holms* v *The Bank of* ... *anhya Mal*, 15 P W ... *g Bin* v. *Ma Baliy*, 3 ... J. B R. (1902-1903) ... 14 O. C. 321; *Ramesh* ... 3 R 1908, 3rd Qr ... Cas. 644, *Sookna* v ... B L. R Sup Vol 399=5 W. R 76, *Jugobundhoo* v *Rukee*, W R. (1869) 388; *Mahomed* v *Raesoodeen*, 6 W. R 117, *Radha* v *Ram*, 9 W R 251; *Bulaki* v *Flad*, 27 P. R 1911=118 P W R. 1911=10 Ind Cas 1004

In Maung Kyin v *Ma Shwe*, 15 C W N 958=38 I A 146 P. C=21 M L J 1105, the appellants who ... of certain properties unde ... absolute conve ... subsequently p ... gagor In thi ... conveyance sou ... parties (as distinguished from evidence of oral statements and conversations constituting in themselves an agreement to contradict or vary the written instrument) to prove that the transact ...

on this appeal is whether or not that evidence was properly rejected .. . Its object was to show that whatever the terms of the document may have been, none of the parties had acted on them as effecting an absolute sale, but that through a long course of mutual dealings materially affecting their respective positions

claim
disclosed
anteceden
certainly
opinion on the construction or application of section 92 of the Indian Evidence Act in relation to the deeds of the 4th March, 1903 That case again went up to the Privy Council (*Vide Maung Kyin* v *Ma Shwe La*, 22 C W N.

Lordships are now in possession of the facts and of concurrent findings upon the most important of them Upon the non admissibility of the evidence reliance is placed by the respondents upon section 92 of the Indian Evidence
the respondents maintain that the
ed On the contrary, the Appellants
the section, they are entitled to set
the parties as inconsistent with the transfer of property and only consistent with the true nature of the transaction having been one of mortgage or transfer of mortgage They found upon a considerable body of authority to that effect, the cases cited being, *Bakshu Lakshman* v *Govinda Kanji* 4 B 594; *Hem Chander* v *Kally Charan*, 9 C 528, *Rakken* v *Algappudayan*, 16 M 80, *Preonath* v *Madhusudan*, 25 C 603=2 C W N 591, *Khankar* v *Ali Hafez*, 28 C 256 and *Mahomed Ali* v *Nazar Ali*, 28 C 289=5 C W N 326 The judgment of *Mr Justice Melville* in the first of these cases is repeatedly founded upon in the course of the series, in which the learned Judges expressly followed the English equity doctrine as expressed in *Lincoln* v *Wright*, 4 Deg & J 16 by *Lord Justice Turner* thus 'The principle of the Court is that the Statute of Frauds was not made to cover fraud If the real agreement in this case was that as between plaintiff and *Wright*, the transaction should be a mortgage transaction, it is, in the eye of *this Court, fraud to insist on the conveyance as being absolute, and parol* evidence must be admissible to prove the fraud' In the opinion of their Lordships, this series of cases definitely ceased to be of binding authority after the judgment of this Board pronounced by *Lord Davey* in the case of *Balkishen Das* v *Legg*, 27 I A 58=4 C W N 153 It was there held that oral evidence was not admissible for the purpose of ascertaining the intention of the parties to written documents *Lord Davey* cites section 92 of the Indian Evidence Act, and adds —The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not in the opinion of their
he Acts of the
consideration of
isic evidence of
what manner the
ithstanding the
the subject still
remains in India But the respondents rightly refer to *Achuta Ramaraju* v *Subbaraju*, 25 M 7, *Maung Bin* v *Ma Hlaing* 3 L B R 100 and *Datloo Valad* v *Ram Chandra*, 30 B 119, and in particular to the judgment of *Jenkins C J* in the last case In this the
Lord Davey, has been rightly followed
Annada Chandra, 71 Ind Cas
W. N
336=77 Ind Cas 151 In
=17 M.

729 (P C) the question was whether documents executed between the parties constituted a mortgage ... ith an agreement to reconvey I ... ostensibly as a sale with a r ... a mortgage, *Lord* ... has ... now ... sent ... um- ... 58= 22 A 149=4 C W. N 153, are clearly required to show in what manner the language of the docume ...

In *Baijnath Singh* ... R. 787, the suits were instituted by ... the *Natu Singh Oil Co* on the footing that certain transactions entered into between the plaintiff and defendant, *Hajee Mahomed Jamal*, were mortgages The defendant contended that the transactions were, as they purported to be, absolute sale to the original defendant followed by contracts for the resale of the shares to the plaintiff, that time was ... chase had been extingu ... of the transactions Sir ... in *Balkishen Das* v *Legge*, 27 I A 58=22 A 149=4 C W N. 153, that under section 92 of the Indian Evidence Act, as between the parties to an instrument, oral evidence of intention ... 92 merely pres- cribes a rule of ...

PROVISO (1).

Scope of the provisos The admissibility of extrinsic parol testimony to ...

or variation or contradiction of, a written transaction

... concern- ... orandum,

(2) Fraud, mistake, illegality, incapacity, failure of consideration, or other matter showing that the writing is not the valid transaction it purports to be

(3) Any collateral verbal agreement on the same subject-matter, consistent ... the written ... g is not a ... the written

statement of ... S.
of an agreer
agreement n
provisos 1
49 A. 680—

Scope of proviso (1)—Parol evidence is admissible to show that a writing is not really the valid transaction which it purports to be. Such evidence may therefore be given to prove fraud mistake, illegality, incapacity, failure of consideration, or other matter affecting the validity of a writing as a document *Cockle Cas* 341. In *Henkle* v *Royal Ex Ass. Co*, 1 Ves 317, *Lord Hardwicke* said. "No doubt, but this Court has jurisdiction to relieve in respect of a plain

which they put down is final as to what they mean; it is the binding record of the agreement. But they are always at liberty to show whether it is the binding record of the agreement Suppose that the signature were made in the course of a dramatic representation, or suppose a printed form of agreement were used ... his name in the space meant for the p... be at liberty to show the real s... in *Wake* v *Harrop*, 7 Jur 710; *C*... *Platt*, (1900) 1 Ch 616, *Dobell* v *Stephens*, 3 L J K B 89, *Cockle Cas* 341 So the first proviso in no way ... *Mark Ev* 73 So the rule is ... nce, under the proper pleading, ... that it never had any legal ... of forgery or fraud, or for the ... due execution and delivery, ... *m*, 9 East 421, 422, *Taylor* § ... stive *Benimadhab* ... 3) In delivering

... defence to point ... nt and to claim protection from enquiry ... tradiction and variance of the terms ... of which is not in question In such cases, the Court is not bound by what has been described as a mere paper expressions of the parties and is not precluded from enquiring into the real nature of the transaction between them The first proviso to that section, therefore, declares that any fact may be proved which would invalidate any ...

want of due execution or cap...
But in my opinion, this is not so, as the instances given are not exhaustive but, as appears from the use of the words 'such as' are set out by way of illustration ... come ... the ... that ... the ... the

2. did not wish to put in writing *Mollayabhan* v *Palani* (1913) M W N 650=25 M L J 290=20

jointly and severally

he signed only as a s

his signature that he

in the evidence *Maung Sein* v *Ma Saw* 3 Bur L J 112=82 Ind Cas 816 When a document can be shown to come within proviso (1), evidence of contemporaneous oral agreement contradicting the document is admissible *Mahomed* v *Abdul*, 63 Ind Cas 368 Under proviso (1) to s 92 any fact may be proved ... wn that there was never any ... was altogether dropped ... cannot be given effect to ... to the defendant in a redemption suit to plead that the mortgage is a fictitious document intended to cover a previously ... the first proviso to sec ... invalidate the deed ... purporting to be a ... standing of both parties that it is not to be treated as the real contract between them, is not an agreement enforceable by law, and there is not a contract at all and does not acquire pre ... *Ma ... aiah* v *Cassim Ali* L ... property in suit to defend ... a conveyance in consideration of services rendered or to be rendered by defendant No 2 in inducing his master L to sell certain property to the plaintiff *Held* that the defendant No 2 was entitled to prove the real transaction by oral evidence *Nabi Khan* v *Mussamat Sewal* 9 Ind Cas 161=15 C W N 408 Where a party deliberately and with eyes open executes a deed of sale he can not be allowed to set up against it an oral agreement that the sale is a mortgage He may prove that a mortgage was intended but that by fraud, mistake or otherwise ... tended to execute a sale deed ... at that the sale was to be ... C P L R 12 Parties can show that they never came to an agreement or that written contract having ... e uncertain date *Radhakissen* v *D* ... admissible for the purpose of invalidating a written agreement *Dholan Das* v *Ralya Singh*, 85 P R 1898 Under this proviso any fact may be proved which would invalidate any document ... Therefore in a suit on a bond, a defendant ...

... *Haji* ...

... of a conveyance in an apparent sale deed formed only part of the real agreement between the parties, and the oral agreement to re convey to the vendors which gave them a claim to equitable relief formed another part of the same transaction, it is in the eye of law a fraud to insist on the conveyance as ... as for proving ... dence of the oral ... it would invalidate the document as a deed of absolute sale within the meaning of the first proviso to the section and constitute a ground for a Court of equity and good conscience giving effect to it only as a mortgage *Rakken* v *Alagappudayam* 15 M 80 This proviso seems to apply to cases where evidence is admitted to show that a contract is void or voidable, or subject to reformation upon the ground of fraud ... s where the ... f that kind, ... at the other ... 20 B 636

It may always be shown that the document in question never had any legal existence On this ground rests the very important exception that duress or fraud in the inception of the contract may be proved, although accompanied by the

e case, to
Waddel
Blantirn,
'8; Phip

Ev 4th Ed pp 537, 538 If the fraud is clearly proved, one of the essential elements of contract—consent—is wanting Thus it may be proved by parol evidence that any material part of the contract was fraudulently omitted or inserted by the other party, (*Heter* v *Glassgow*, 79 Pa 79) or that it was fraudulently misread to one not able to read and that he was thus induced to give his signature; (*Mc Messon* v *Sherman*, 51 Wis 303) or that a part of the contract was not reduced to writing because of the fraud of one of the parties, in which case the whole transaction is open to explanation by parol evidence *Phyfe* v *Wardell*, 2 Edw Ch (N Y) 47 In brief, if one person fraudulently

35=3 En
which ar
with the
negotiati
Russ, 16
alleged,
in such
motives and intentions that prompted the parties to execute the same Such evidence is permissible to show fraud in a transaction which, if shown, annuls the contract, and prevents its enforcement It is not admitted for the purpose of varying the terms of a contract but merely to ascertain whether it is a *bonafide* transaction or sham If there is no fraud, the contract will stand, conversely, if there is fraud, the purpose of the admission of parol testimony is served *Fairbanks* v *Simpson*, 28 S W 128 (*Am*) In such cases any secret agreement
radicting the face of the
nto (*Gray* v *Hankinson*,

entire transaction may be investigated
brought by one of the contracting pa

contract should not be impeached or changed, unless it appears that one of the parties was fraudulently misled or deceived Without enumerating them then,

cient to warrant the
The foundation

2. of the actual agreement
of fraud other than that
rol and written terms.
It is not enough that there are parol stipulations contradictory to the written agreement *Vansant* v. *Runyon*, 19 Ky Law Rep. 1981 The rule which prefers written to unwritten evidence does not so apply as to exclude the latter
...lently obtained, and
mnity to the party
year provided tha
at 75 per cent
suit for rent on the
kabuliyat was executed
payment of interest at
ound to be true *Held*
that under the circumstances the *kabuliyat* was not the real agreement between the parties, having been induced by fraudulent misrepresentation, and the tenant was not liable to pay interest claimed on the basis of the *kabuliat* *Nadia* v *Birendra*, 20 C W N 1067

The fraud, which under proviso 1 of section 92, may be proved must be fraud which would invalidate the document and therefore subsequent fraud in respect of the document not such as to invalidate it, could not be a ground for admitting extraneous oral evidence under proviso 1 of section 92 *Kesharrao* v. *Raya*, 8 Bom L R 287 When there is a duly signed receipt for the payment of rent oral evidence could not be admitted in supersession of the recitals in the receipts ... the receipts there is a question ... his proviso *Kunwar Behari* v ... in the proviso is wide enough to include a fraud on the registration law Thus a party can show that an item was fictitiously put in *Gopi Nath* v *Rup Ram*, 1930 A L J 926 = A. I R 1930 All 786

Where the transaction beginning with a sale deed amounted to a mortgage between the plaintiffs and defendands *Held* if s 92 be applied the proviso, to that section would admit the evidence, because it would be fraud to insist upon a claim made by the appellants to property arising out of such transaction, when the appellants must have known that the plaintiffs were the true owners. *Mahadeo* v *Tukaram*, A I R 1922 Bom 256

Where an assignment is impeached on the ground that it is colourable and has the effect of defeating the rights of third parties, the provisions of section 92 of the Evidence Act are no bar to the production of oral evidence by such third parties *Parumal* v *Mahomed Ali*, 6 S L R 107 In a suit to recover rent under a *kabuliyat held* that evidence of an oral agreement set up by the defendant, while admitting execution of the *kabuliyat*, was admissible for the purpose of proving the fraudulent character of the transaction between the parties. *Kashinath* v *Brindaban*, 10 C 649, *Kasim Noor* v *Bebee*, 1 W R. 76.

Coercion or intimidation Coercion is defined by section 15 of the Indian Contract Act When consent to an agreement is caused by coercion, the agreement is a contract voidable at the option of the party whose consent was so caused. (*Vide section 19 of the* ... instrument obtained by illegal duress is an instrument, ... be, by
food or
its may
ress or
d not a mere
Abdul 14 M
M 214 On
this ground rests the very important exception that duress or fraud, in the ... by the most
avoid a
Id 490,
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amount
on, the
ay him

a certain sum and deliver up a note of the lessee then held by the lessor. The evidence established the facts stated, and the Court said it would be difficult to

Undue influence U

'Influence, in order to
would make it sufficient to
by coercion or fraud"
at p 45 Similarly *Parl*
observed: "Undue influ

in a state of
l, in *Williams* v
destroying free

Illegality The c
it is forbidden by law, c
the provisions of any
person or property of another, or the Court regards it as immoral, or opposed to public policy In each of these cases, the consideration or object of an agreement is said to be un

in which it is intended to
Budge Budge Mill, 33 C 70[illegible], *Cun Contract Act* p 10[illegible] The legality of a contract has to be determined by the law of the place of performance, or if no particular place is designated by the law of the place where the contract is made But the *lex fori* det
be recognised Although ther
the law applicable to it, it
laws expressly prohibit such an agreement Nor will the *lex fori* suffer the foreign law to be applied, if the agreement is contrary to the interests of the state or to common principles of justice and morality *Santos* v *Illidge*, 28 L J C P 317 Accordingly, the Court will not enforce an agreement obtained by threats of a criminal prosecution although the agreement is valid according to the law of the country where it was made and where the parties to it were domiciled *Kaufman* v *Gerson* (1904) 1 K B 591; *Cun Contract Act* p 103 Illegality covers instruments or transactions against public policy, such as

Dickenson,
Ev § 1137 So oral evidence
bject or consideration of an agreement in writing is unlawful and that therefore the agreement is void *Kashi Nath* v *Brindaban*, 10 C. 649, *Anup Chand* v *Chanbsi*, 12 B 585; *Beni Midhab* v *Sadasook*, 32 C 437 Moreover, when it appears that the transaction

is thus unlawful, it is the right and may be the duty of the Court to take cognizance of the fact although it may not have been pleaded *Fischer* v *Kamali Naicker*, 8 M. I A 187; *Scott* v *Brown*, (1892) Q B 724; *Hill* v *Clarke*, 27 A 267, *Cun Contract Act* p 104 Oral evidence is admissible to show that an agreement in writing to sell Government pro notes is really an agreement made by way of wager on its market price on a future day *Eshoor Das* v. *Venkata Subba Ram*, 17 M 480

Want of due execution "Execution" when applied to a document, is the last act or series of acts
completion *Bhowanji* v *De*
to the act of completing a
by the testator, yet in ordinar
the testator and the attestation of his signature *Per Sir*
Syed Ali, 12 O L J 1=A I. R
with executing a signed document,
legal consequences, the act which
h he adopts and makes his own the
neral, immaterial whether he has
ned it It is even
acknowledged, or
Wigmore § 2134
st be in writing,
ion, Seal, Attesta
These formalities
some of the Acts
as an inherent element of form in the validity of the transaction Like all other
may be suffi
ty be
they
ding
certain general dange the
sake of this policy. r the
was entitled to produce oral evidence to prove that the
gal The *fact* that the
an unlawful object, is
n the suit is brought
rumengada v *Maung*

Want of capacity of the contracting parties Parol evidence may also under the proper pleading, be offered to show that the party was incapable of contracting by reason of some legal impediment, such as infancy, coverture, idiocy, insanity, or intoxication *Barret* v *Buxton*, 2 Atk 167. Besides the two classes of persons *non compotes mentis*, *viz* idiots and lunatics *Lord Coke* mentions two more classes *viz*, those who were of good and sound memory, but by the visitation of God has lost it, and those who have become *non compotes* by their own act, as drunkards (*Will Exor* 25) In the former of these two latter classes must be reckoned those who from sickness, grief, accident or old age
who are not like those classed by *Lord Coke*, as *lunatics*
those under
has assigned
rte Cranmer,
13; *Rigway* v

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1872)
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from
L J.

183 *Golshede* v *Su* ... S.
of *N. S. W.* 15 App
v *Harcharan*, 32 P L
... ent but it is the recital of a fact
... oviso (1) to section 92 *Nabin* v.
... to prove want of consideration
... to him to prove a variation in the
... *Mahomed*, A I R. 1930 Mad.
... M L J 414 Expl) If the state-
... al of a fact section 92 is not
... ght come under
... If one party to
... , the receipt of
... alls within the
... rty is at liberty
... given to prove
... 537=24 Ind.
... C W N 158
... sory note was
... in the meaning
... can be given
to prove that the consideration represented gambling losses *Balgobind* v *Bhaugg Mal*, 11 A L J 854=35 A 558 Notwithstanding an admission in a sale deed that the consideration had been received, it is open to the vendor to prove that no consideration had been actually paid *Le Hen* v *Elahi Bux*, U B R (1897—1901) Vol II, 400, see also *Sahdat* v *Dulogir*, A W N. 1886, 58 Pre emptor can show that transaction which is ostensibly a mortgage is really a sale 157 P W R 1909 Under this proviso, a party to a contr...

to adduce ...
that recited ...
standing a ...
it is open to ...
The provis...
will contrac...
of sale me...
received by the vendor it is competent to the vendor, under the provisions of the Evidence Act, to prove a collateral agreement that the purchase money should remain in the hands of ...
alleged by him *Sahpa*. ...
93=2 Bom L R 553 ...
proviso is a complete ...

L J 721 When there is a recital in a document of the payment of a certain sum of money as consideration, oral evidence is admissible to prove that the recital is incor...
of fact, s 92 of ...
it to be wrong ...
oral evidence to ...
in and for the purpose of proving it, he must be allowed to prove what the real consideration was Section 92 does not in any way bar such proof, for the proof is adduced not for the purpose of varying or altering any term of the written contract, but only to show ...

2. C L J 552=75 Ind Cas 537=1923 Cal 570 In the case of a deed of sale
actually paid and
ry to the recitals in
Singara Charlu v
A 612=A W N

it from that contained in recital Although this
purpose of contradicting
of the parties to the
contract from showing either that there was no consideration or that the consideration was different from that stated in a conveyance *Gopal Singh* v *Laloo Lal* 10 C L J 27=2 Ind Cas 953 Evidence is admissible to show that consideration, mentioned in a deed as having been paid never passed and also to shew that the consideration specified in the deed was satisfied in a different way from that mentioned in the document itself *Muhammad* v *Muhammad* 4 A L J 441=A W N 1907, 181

Mistake of fact With regard to deeds or

f agreement at all and may
resumption *Tay* § 1150
, *Jayne* v *Hughes*
, (1910) 1 Ir R 167), may be
5 Q B 574, *Phip Ev* 7th
the Indian Court sits as a Court
the principles which prevail in
equity vide illustration (e) evidence is often admitted to vary or even contradict a writing, where by some mistake surprise, or the like, it does not represent the party s true intention, but it requires a very clear case to induce the Court to interfere The mistake must be most satisfactorily made out and the error be shown to be one which ought to be corrected If this be done by the plaintiff, the Court will reform the instrument so as to make it in conformity with the true intent A defendant, against whom specific performance is sought may insist on the mistake in his defence, and establish it by parol evidence *Nort Ev* 2(5 Section 20 of the Contract Act enacts "where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreer
Act lays down "A contract is not voidabl
one of the parties to it being under a
section is not a bar to plead the mistake of
Sanjua 6 Mys L J 103 Where on
property was mis lescrib that description
belonging to the mor rtgage is permis
sible to establish iden *Ram Gopal* 44 A
246=20 A L J 53= al mistake made
deed can be proved by
d Cas 671 Where a deed
property was handed over
to the mortgagee, provided that there was to be no accounting between the parties at the time of redemption and it appeared that a portion of the mortgage consideration was set down in the deed as being due to the mortgagee from the mortgagor, merely by way of guess without any accounting having been really taken at the time. *Held* that the mortgagor should show that there was
entitled to
Cas 550
hat there
at the real
take may
ght under
agreement
v *Maung*
f interest
a clerical

S. 92

mistake the words "per cent" had been omitted from the mortgage deed *Held* that it was a case of mutual mistake for which provision was to be found in the

nce Act *Ram Bharosay* v *Janki Prosad*,

Oudh 95 Under this section, mistake of the

be proved *Sukdeo* v *Ram Narain*, A I R

may be adduced to show that owing to the ignorance of the draftsman, a deed of sale did not truly express the real intention of the parties *Thakur Rohini* v *Vishwanath*, 13 C P L R 33 It is open to the Court, having regard to this proviso to allow oral evidence of mutual mistake

260, see

Ch 530,

Ch. 285;

ilding v.

, *contra*

ctification

instrument, the proviso,

iguous unreformed and

mistake a term has been

one would found a claim

Venkata, A. I R 1931 Mad

Mistake of law A contract is not voidable because it was caused by a

with a knowle

practicable in th

note to § 126

against mista

circumstance

money or oth

Mohendranath, 17 C 602 The maxim *e g*, '*Ignoratia juris nemi nem excusat*' refers to ignorance of ordinary law of the land and not to mistakes regarding constructions of documents *Beauchamp* v *Winn*, L R 6 H. L 223, *Cun Ev* 99

in a suit brought for the purposes under section 31 of the Specific Relief Act, subject to the

faith and for value s

kantu, 31 Ind Cas

in the description of

the mistake is so proved the document can be construed by the Courts as if the mistake had been rectified, and a separate suit for rectification of the instrument under section 31 of the Specific Relief Act is not necessary, provided that the rights of third persons acquired in good faith and for consideration are not prejudicially affected thereby *Kotla China* v *Cannekanti*, 3 L W. 551. The combined effect of section 92 of the Evidence Act and section 31 of the Specific Relief Act is to entitle either party to a contract, whether plaintiff or defendant, to protect his right by proving a mistake in contract, as a mistake

same.

2. been wrongly entered Therefore the combined effect of section 92 (1) of the Evidence Act and section 31 of the Specific Relief Act, is to entitle either party to the contract to protect his rights by proving the mistake in the written contract *Rai* I R 1930 Oudh 95 see also *Rungasami* v M L J 229=29 Ind Cas 588; *Abdur Hakim* .2=44 A 246; see also *Pratap Chandra* v *Mahomed Ali*, 41 C. 342=19 C. L J 66=20 Ind. Cas 443=18 C W N 592

PROVISO (2).

Scope of Proviso (2) Parol evidence is admissible to prove any collateral verbal agreement as to any matter on which a document is silent, which is separate from it and not inconsistent with its terms, and which might naturally be omitted from the writing *Cockle Cas* 343, *Kaladeen* v *Jogat Pathal*, A I R 1930 All 400 *Vide* illustration (f) The plaintiff took a lease of land from the defendant, reserving to the latter the sporting rights Evidence was admitted of a collater destroy the rabbits nt on the point verbal agreement good consideration been given would have on the terms of the defendant performing his v *Griffith* L R 6 Ex 70; *Cockle Cas Ev* 343 "The verbal agreement in the case, although it does not affect the mode of enjoyment of land demised, is, I think, purely collateral to the lease It was on the basis of its being performed that the lease was signed by the plaintiff, and it does not appear to me to contain any terms which conflict with the written document" There is no rule that there shall only be one agreement upon any matter There may be two (or more) as in the above case, if they can consistently stand together and one may be written and the other oral If proceedings are may be given of the oral agreement agreement, although at first sight, it may above case was cited with approval K B 215=70 L J K B 53 ading case on the matter There r the lease of a house by the latter the plaintiff refused to hand over the counterpart that he had signed unless he received an assurance that the drains were in order The defendant verbally represented that they were in good order, and the counterpart was thereupon were not

tutes a warranty in law, or a mere representation? To create a warranty no forming

ins are in itisfy you? emphatic which led The next question is, was the warranty collateral to the lease so that it might be given in evidence and given effect to? It appears to me in this case clear that

the lease did not cover the whole ground, and that it did not contain the whole of the contract between the parties. The lease is entirely silent about the drains, though there is a covenant that the lessee during the term should do the inside repairs, and the lessor the outside repairs which would I suppose include the drains which happened to be inside or outside the house. There is nothing in the lease as to the then condition of the drains, i.e. at the time of taking of the lease, which was the vital point in law. Then why is not the warranty collateral to anything which is to be found in the lease? The present contract or warranty by the defendant was entirely independent of what was to happen during the tenancy. It was what induced the tenancy, and it in no way affected the terms of the tenancy during the three years which was all the lease dealt with. The warranty in no way contradicts the lease, and without the warranty the lease never would have been executed. Three cases were cited in which parol collateral agreements outside leases had been allowed in evidence and given effect to by the Court namely *Morgan* v. *Griffith*, L. R. 6 Ex 70; *Erskine* v. *Adeane*, L. R. 8 Ch. 756 in this Court, and *Angell* v. *Duke*, L. R. 10 Q. B. 174. The first two cases relate to parol agreement collateral to leases as to keeping down rabbits and ... to send in a ... were held collateral ... It was argued by ... agreements in the rabbit ... after the lease was taken ... warranty is that ...

both these cases the subject matter of the verbal undertaking was temporary and immediate, a matter which did not require to be dealt with amongst those permanent or continuous matters which are the subject of the covenants in the lease. ... matters to be periodically attended ... be far more difficult to induce the ... concerning such matters, as it ... to a collateral verbal arrangement where there is formal written transaction between the parties; on the other hand, it is most natural to omit from a lease an arrangement as to the immediate destruction of rabbits, or the condition of drains at the commencement of the tenancy. *Cockle Cas. Ev.* 311

But in order that parol evidence may be admissible to prove collateral agreement, it must ...
ment, the evidenc...
writing *Angell* v. ...
In that case the ...
and furniture there...
made at the ...
furniture. It ...
with the writ...
judgment said ...
allow a parol ag...
into I agree wi...
be instances of ...
is not the case he...
of the negotiati...

in writing it should not be added to it the written contract is intended to be the record of all the terms agreed upon between the parties; where there is a

collateral contract the written contract does not contain the whole of terms Here the lease expresses the whole terms, the defendant agrees to let, and the plaintiff to take, the house and furniture at a certain rent, there is said to have ... he negotiation, that the defendant for the same ren , how is this

But the general rule under discussion is not violated by allowing parol evidence to be given of the contents of a distinct valid, contemporaneous agreement between the parties which was not reduced to writing when the same is not in conflict with the written agreement *Burr Jones* § 439 Undoubtedly ... natter on which a written terms may be proved case it may be properly inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the ... connected with the ... where the writing ... complete legal obligation, without any uncertainty as to the object or extent of the agreement of t ... was reduced to writi ... ' where a writing, and is not intended by the partie ... define some of its terms, the ... uch parts of the actual contract a ... be established by parol' *Wood Ev* ... only criterion of the completeness ... the agreement of the parties in the writing itself ... complete expression of the whole agreement,—that is contains such language ... ligation,—it is to be presumed that the parties ... ial item and ter the agreement to which the

Jones § 440

Where a promissory note is silent as to interests this proviso does not preclude a party from setting up and proving a subsequent oral agreement to pay interest *Saudamonce* v *Spalding*, 12 C L R 163 But where a bond declares that money is to be repaid with interest at a certain rate, an oral contract to the effect that no interest is to be paid but the person is to be in possession of a certain piece of land and to pay himself the interest out of the usufruct cannot be proved *Kalee Deen* v *Jogdat* 1?2 Ind Cas 894—1930 A L J 1008=A I R 1930 All 440 Where there is a contract with a partnership and a promissory note signed by a partner in his own name and not in the name of the partnership, on evidence of such contract, all the partners will be liable The principle that only the maker of the promissory note can be held liable ... contract is alleged evidence as to the 168

In considering whether or not this proviso applies etc The principal rule applies only to formally complete contracts, for in such it is reasonable to suppose that the parties have set down all they intended, and omitted nothing This presumption becomes weaker and weaker as the document is found to be less and less formal *Beharee* v *Kaminee*, 11 W R C R 319 And in the ... that

S

v. B[illegible] 1 Strange 207. On this ground the section directs the Courts in considering whether parol testimony is admitted or not, to have regard to the formality of the documents. *Vide* illustrations (g) and (h). *Note* P. 276. Where a suit is based on a negotiable instrument which is a document of a formal character, the existence of a separate oral agreement as to any matter on which the instrument is silent cannot be proved under s. 92 of the Evidence Act, as proviso 2 to the section would not apply to the case. A *Shahjog Hundi* is an instrument of a formal character and where it is silent as to interest, a separate oral agreement for payment of interest cannot be proved by virtue of proviso 2 to section 92 of the Evidence Act. *[illegible] Chand* v. *Gurditta*, 165 P. L. R. 1911; *[illegible]* v. *Hem[illegible]*, 1 M. L. J. 2[illegible], *Lachmi* v. *Hemendra*, 18 C. W. N. 12[illegible], *[illegible]* v. *[illegible]lal*, [illegible] Ind. Cas. 242, but see *Govern[illegible] Sri Chandra [illegible]* v. *[illegible]*, 11 C. W. N. 105=29 A. 33=17 M. L. J. 35=1 A. L. J. 29=9 Bom. L. R. 1. Defendant mortgaged certain shops and their stock in trade to the plaintiff. The plaintiff alleged in the plaint that it was agreed that the mortgage should include the goods which might be brought into the shop subsequent to the date of the mortgage as well. It was found that the mortgage deed though registered was drawn up not by a lawyer, but by a petition writer. *Held* that in considering the degree of formality of the document the fact that it was not drawn up by a skilled lawyer was of much more importance than the fact that it was registered and that evidence of the alleged oral agreement was admissible under section 92, proviso, (2), of the Evidence Act. *Neelsh[illegible]* v. *Cha[illegible]*, 4 L. B. R. 240=11 Bur. L. T. 231.

When the informal and incomplete document is silent. Where the plaintiff's evidence proved that the written agreement about supply of consignments by defendant [illegible]
agreement. *Held* that [illegible]
that there should be [illegible]
sent when the plaint[illegible]
the defendant was [illegible]
Seth Laxmi Chand v. [illegible]
Where a deed of lease does not mention the place fixed for payment of rent, it is open to the plaintiff lessee to show that it was subsequently agreed between the parties that rent was to be paid at a particular place. *Onkar Prasad* v. *Badri Das*, 8 N. L. J. 61=89 Ind. Cas. 273=A. I. R. 1925 Nag. 281. Under this proviso the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. This proviso applies where the document is of an informal character. *Jodhraj* v. *[illegible]ram*, 7 N. L. J. 25=83 Ind. Cas. 309. Following on a contract for sale of goods, the vendee gave a *Varthanaman* reciting the payment of a sum of money, and the varying terms of the contract, i. e., the quantity of goods, its price and the term of performance. It was signed only by one of the parties [illegible]

[illegible]

evidence of the real meaning of the words used. *Jumma* v. *Abu*, 93 Ind. Cas. 193=A. I. R. 1926 Nag. 301.

Document is silent—and terms not inconsistent with the terms of the [illegible]

2. Where a sale deed was executed for a consideration of Rs 35,000 but in fact settled by oral contract to be Rs 35,000 and the discharge or a mortgage for Rs 1,000, *held* that the oral contract is inadmissible in a suit for cancellation of the mortgage or for damages for breach of the oral contract under proviso 2 or 3 of section 92 of the Evidence Act *Ramakrishna v Adityam Iyer*, 14 M L T 385=(1913) M W N 850=21 Ind Cas 463 A partition suit between two brothers was compromised and decree drawn up accordingly. The property was thereby divided between them in certain proportions The plaintiff alleged that part of the terms of the compromise was that he should receive a certain sum of money from his brother in order to equalize the lo s The compromi e

to pay the money was not a separate agreement, but part and parcel of the contract th ... under proviso (2) to section ... J 770=21 Ind Cas 305 ... with H) of the *promissory* ... ly agreed that his liability on ... evidence of such an agreem ... of the Act—being a separate agreement on a matter on which the promissory note was silent and not inconsistent with its terms *Motabhoy v Mulji*, 19 C W. N 713=28 M L J 589=13 A L J 529=39 B 399 Where a *hatchita*, on which a suit was brought, was virtually a memorandum of the loan without any mention of the rate of interest, section 92 sub section (2) of the Evidence Act did not ... the rate of interest agreed ... *Chandra v Debendra*, ... ment entered in a *bahi* to ... on 92 of the Evidence Act, and the existence of such an agreement is a question of fact which cannot be considered in second appeal *Bhan Singh v Gokul*, 53 Ind Cas 137 A mortgage bond contained the following stipulation for interest ' I have borrowed from you Rs 300 I shall pay ... for the aforesaid sum every year

... of the Evidence Act ... to pay a ... Instru ... -56 Ind ... payable ... If it is ... it does ... *a Mower* ... writing ... it was stated therein that whatever award was made by the arbitrators would be binding on the parties to the reference The award was made only by a majority of the arbitrators and it was sought to be proved that there was a separate contemporaneous oral agreement between the parties to the effect that the ... be binding on the parties *Held* ... section 92 proviso (2) of the ... O L J. 471=47 Ind Cas 960 The holder of a certain ... executed a registered deed by which ... not fit for ... here was ... dlord was ... dmissible ... to which ... *orcement*

Balal Ram v. *Jhalo*, 19 A. L. J. 810=63 Ind. Cas. 801. The interlineated words and figures in an *ekrarnama* were written after it had been signed by the defendant. The plaintiff's allegation was that there was an agreement made before the execution of the *ekrarnama* which justified the additions to the document which do not alter it in the least but merely explain it. *Held* the effect on the document would be as if no alteration had been made, and the plaintiff would be entitled to produce oral evidence of the oral agreement. *Ganga Prasad* v. *Mt. ...*, 68 Ind. Cas. 208=(1922) Nag. 191. It is open to a party to a partition to prove that a "share list" of properties is not the final partition but that it was orally agreed between them that a formal partition deed should be executed later on. If such agreement is proved the share list would be admissible without registration. *Sundaram* v. *Gundapanam*, 16 L. W. 784. A reference in a partition suit related to the matters in dispute in the suit. At that time there was no dispute whatever as to the method of division of the property. The only dispute was whether the family was joint and whether the several valuable properties held by the defendant first party were liable to be partitioned. When the actual method of partition came to be discussed, it was suggested that certain people who were already parties to the suit might be brought in for the purpose of division of the property and an arrangement was made to this effect by the consent of all parties. *Held*, that oral evidence was not inadmissible to prove the fact of this separate arrangement as to the method of division of the property. *Tulsi Ram* v. *Basdeo*, 21 A. L. J. 705=96 Ind. Cas. 731=A. I. R. 1923 All 567. Oral evidence is permissible under this proviso, to prove a separate oral agreement as regards interest where the bond is silent as to payment of interest. *Rozario* v. *Harballabh*, 103 Ind. Cas. 791=A. I. R. 1927 Nag. 195. An oral agreement between the endorsee and the endorser of a negotiable instrument that the endorsee will recover the amount of the instrument for the drawer only is admissible under proviso 2 to section 92 of the Evidence Act. *Sunderji* v. *Abigail*, 22 S. L. R. 249=105 Ind. Cas. [illegible]
between two brothers was com[illegible]
The property was thereby divi[illegible]
plaintiff alleged that part of the [illegible]
receive a certain sum of mone[illegible]
The compromise was however, for [illegible]
the defendant for that sum of [illegible]
oral evidence of the agreement, [illegible]
the property between the brothers was one of considerable importance and the alleged oral agreement to pay the money was not a separate agreement, but [illegible] ng, and the case did [illegible] *Abdul Hamid* v. [illegible]

PROVISO (3).

Scope of the proviso (3). This proviso is based on the English rule which does not exclude evidence of oral agreement, which constitutes a condition on [illegible]

[illegible] defendants could not [illegible] m, it was expressly [illegible]

Abernethy's approval being obtained, and th[illegible]
the machine. It was held that such evidence w[illegible]
written document was not operative. *Pym* [illegible]

2. Cas 318 *Tayer Cas* Ev 831. In delivering his judgment, *Erle J* said "The
the face of it, and
that had been so
it would have been forg. idence showed that
in fact there was never any agreement at all The production of the paper
at by a party with his signature attached, affords

that a jury should
if it be proved that
in fact the paper was signed with the express intention . . . should not be an
ree
an
iow
of no rule of law to estop parties from showing that a paper, purporting to be
a signed agreement, was in fact signed by mistake, or that it was signed on the
terms that it should not be an agreement till money paid, or something else done
agreement at all, and that the
the agreement;
does not vary an
agreement and is admissible" *Lord Campbell* . . . gree No addition
to or variation from the terms of a written contract can be made by parol; but
in this case the defence . . . entered into
Evidence to that effect was . . . case was
overwhelming" Another . . . S 369, in
which evidence was allowed of a verbal arrangement that a written agreement
for the sale . . . the consent of the landlord The
Court said . . . an escrow; it never
ncement of the obliga-
its opera-
parol
was
riod
oviso
aw of
and
ben,
ween
until
agree-
and
ill be
17 C.
370,
until
it all But
had not only
rtion of its
stipulation
was intended
words 'any
ict, and not
he contracts
nent signed
ies to operate as a present
e happening of an event
L J Q B 277; *Wallis* v
ain conduct or writing is

put forward against a party as his purporting act, no principle prevents him from showing that there never was a consummation of the act *Wigmore* § 2408 "The truth is that the rules excluding parol evidence have no place in any inquiry in which the Court has not got before it some ascertained paper binding and of full effect." *Per Wilde P J* in *Guardhouse* v *Blackburn* L R 1 P & D 109; *Wigmore* § 2408

"On the one hand", says *Prof Wigmore*, "it is well accepted that the handing of the deed to a third person is not necessarily final, the document may still be withdrawn, or (less correctly) 'revoked' On the other hand, the maker's retention of the document does not necessarily negative the act's finality, this too, may be deemed unquestionable law since *Mr Justice Blackburn's* masterly exposition *Doe* v *Knight*, 5 B & C 671" *Wigmore* § 2408. In *Zenos* v *Wickham*, 2 H L C. 296, *Blackburn J* said. "No particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it; the mere affixing the seal does not render it a deed, but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient" See also *Gudgen* v *Besset*, 6 E & B, 986 The true construction to be placed on this proviso is that the provisions thereof are inapplicable in a case in which any obligation under the written contract has attached and if the effect of the alleged contemporaneous oral agreement is merely to suspend the performance of the obligations contained in the written contract, evidence of such oral agreement cannot be admitted. On the other hand, it is permissible to adduce evidence of a contemporaneous oral agreement under which the parties to the written contract agreed that until the happening of a certain event no obligation whatever under the [illegible]

[illegible] agreed to postpone the enforcement of a promissory note. *Subramania* v *Narayan*, 90 Ind Cas 1020 = (1925) M W N 601 = A I R 1925 Mad 1240

[illegible] written contract to be varied by a contemporaneous oral agreement, but having regard to illustrations (*b*) and (*f*), the proper meaning of that proviso is that a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect at all, and that it was to impose no obligation at all until the happening of a certain event, may be proved Where an oral agreement purports to provide that the promise to pay on demand in a promissory note, though absolute in its terms, is not to be enforceable by a suit, until the happening of a certain event, or, in other words, that the legal objection to perform the promise is to be postponed, such an agreement does not fall within the proviso 3 of the Indian Evidence Act *Ramjibun* v *Oghore*, 25 C 401 = 2 C W N. 188, see also also *Jaimal* v *Nandlal*, A I R 1932 Lah 549 = 33 P L R 712

Where a certain property was sold by the defendant to the plaintiff for Rs 480 and it appeared that there was a separate arrangement between the

parties for the payment of a certain amount to the defendant which would be a condition precedent to the sale taking effect, *held,* that proof of such an agreement was not barred by section 92 *Maung Mon* v *Ma Kin Oh*, 5 Rang 636 See also *Lal Hia* v *Bharaduaja* 4 Bur L J 38 = 88 Ind Cas 336 = A I R 1925 Rang 256 Failure of condition precedent to written agreement as fixed by oral agreement can be proved but oral agreement as to getting off amount due to the executant of the promissory note on a separate account can not be proved *Ram Singh* v *Ibrahim* 18 S L R 39 = A I R 1925 Sind 136 The admissibility of an oral agreement contemporaneous with a written document will depend to some extent upon the way in which the case is presented *Anderson* v. *Walter*, 29 C W N 670 = 88 Ind Cas 435 = A I R 1925 Cal 860

Any obligation The true meaning of the words "any obligation" in this proviso is any obligation whatever under the contract and not some 'particular obligation" which the contract may contain *Irfan* v *Jogendra,* A I R 1932 Cal 708 = 36 C W N 451 = 59 C 1111, *Radhakishen* v *Durga Prosad,* 59 C 106 = A I R 1932 Cal 328

Escrow That specific variety of delivery to a third person which consists in naming a condition precedent to be performed and making the act final except for the happening of the condition—the usual meaning of *escrow*—, has

will be received to show that a deed was delivered in escrow, and when an agreement was without consideration and was delivered on conditions such conditions may be proved *Pym* v *Campbell*, 6 E & B 370, *Pattle* v *Hornibrook*, (1897) 1 Ch 25 'The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled in order to avoid its effect This is not to show any modification or alteration of the written agreement, but to show that it never became operative and that its obligation never' commenced ' *Wilson* v *Powers*, 131 Mass 537, *Burr Jones* § 971 It is not necessary that the restrictive delivery should be express all the circumstances of the [illegible]
Besset 6 E & [illegible]
Ev 7th Ed 561 [illegible]
riding power [illegible]
grantor's death [illegible]
Hospital v C[illegible]
in whose favou[illegible]
intended to o[illegible]
576, but see *Bell* v *Ingestre*, 12 Q B 317, *Watkins* v *Nash*, L R 20 Eq p 266; *London* v *Subfield,* (1897) 2 Ch 608, *Johnson* v *Clark,* (1908) 1 Ch 303, 319)

Parol proof as to execution and delivery and suspension of operation On the principle so often referred to that parol evidence is admissible to show that there never was any actual agreement it may, of course be shown that there was no proper execution or delivery of the apparent agreement (*Vide proviso 1*) When the execution of a deed is in issue, what was said and done at the time and by whom done are the very vital facts *Burr Jones* § 471 If a deed has never been delivered, or if a party to an instrument obtains possession thereof by fraud or in any improper manner this of necessity must be shown by parol; and such evidence is no cnotradiction of the writing The act and fact of delivery is independent of the language of the instrument Delivery consists of an act of the hand joined with a purpose of the mind It comes after the scrivener has done his work, and after signing of the paper Whether or not a deed was delivered is an issue frequently made in the Courts and has been [illegible] refute delivery [illegible] delivery rest[illegible] [illegible] shown that the [illegible]ll of the other party, or that by mistake of both parties a wrong paper was delivered *Burr Jones* § 471 A and B enter into a written agreement for the sale of an interest in a patent, and at the same time agree verbally that the agreement shall not come into force unless C approves of it C does not approve The party

interested may ... writing to tra ... agreed that ... transferring the farm A may prove the condition as to C's consent, and the fact that he does not consent *Wallis* v *Littell*, 11 Com B N S 369 = 31 L J C P 100 In a suit on a promissory note the defendant pleaded an oral agreement that plaintiff should discharge a mortgage that was subsisting on the property sold to him by the plaintiff before he could enforce payment of the amount due on the promissory note. *Held* that the agreement pleaded is not admissible in evidence under s 92, proviso (3) The proviso will apply to the case of a non attachment of an obligation under the written contract until the event provided for in the oral agreement happens and not to the case of a mere postponement of the performance of the legal obligation until the happening of the event. *Muniammma* v *Surappa*, 1 Mys L J 71 Where in a suit on a promissory note, the defendant pleads an oral agreement at the time to set off moneys due to the executant under some other account, the agreement is contrary to the nature of the document and is not admissible in

suit on a pronote, executed by P N in respect of which P H stood surety without mentioning the terms of the contract in the plaint P H contended that he was not a ... on the pronote could only be determ ... the executant, which was upheld ... Evidence Act, the oral evidence as to the surety's part in the transaction is admissible to ... the written and the oral agree- ... nt to the attaching of any liability ... curity and that it is not open to the plaintiff to treat the pronote as a separate contract and to enforce it without taking the whole contract into account *Maneckjee* v *Maung Po Han*, 2 Rang ... An attempt to show that the agreement reduced

135 It is open to a person who admits the execution of a promissory note to plead want of consideration therefor *Lallu Mal* v *Reoti Ram*, 45 A 679 = 21 A L J 669 = 71 Ind Cas 353 (1) In a suit on a promissory note the defence was that the promissory note in the suit was passed to secure the plaintiff mort-

... which the ... hich it was ... be proved ... *Ubhaya*,

Proviso 3 is intended to embod ... written contract being entered into it is ... that the written agreement shall not be of a ... ondition precedent has been performed, paro ... sible to show that the condition has not ... the written contr ct has not become binc ... there is in fact no written agreement ... 9 O L J 273 = 4 U P L R (O C ... 270 The proviso cannot help a defendant who wishes to prove a separate oral agreement, as to the rate of interest between him and the plaintiff, when the document provides for interest at a specific rate *Ibid* A person is not permitted to vary the terms of a written contract by proof of a contemporaneous oral agreement under this proviso; a contemporaneous oral agreement to the effect that a written contract was to be of no force at all and that it was to impose no obligation at all, until the happening of a certain event may

be proved It may be shown that the instrument was not meant to operate until the happening of a given condition; but it cannot be shown by parol evidence that the agreement is to be defeated on the happening of a given event *Ali Jauad* v *Kulanjan,* 44 A 421=20 A L J 247=66 Ind Cas 131

Under this proviso, a party is entitled to prove the existence of a separate oral agreement constituting a condition precedent to the attaching of any obligation under the contract and consequently, to show that the contract is to be considered as binding only when confirmed by the principals them elves *Dinanath* v *Metharam,* 33 C L J 577 In a suit on a promi sory note payable on demand, it is not open to the defendant to plead by way of defence a contemporaneous oral agreement where the plaintiff has agreed that he will not present the note although it is payable on demand until he has di charged certain incumbrances on the property he has sold to a stranger *Vishnu* v *Ganesh,* 45 B 1135–23 Bom L R 488=63 Ind Cas 673

478=50 Ind Cas 918

In a suit on two pro-notes, which contained the words "I promi e to pay you hereafter', the defendant pleaded that there existed a separate oral agreement constituting a condition precedent to the attaching of the obligation and that the word "hereafter in the two notes referred to that agreement *Held* that the alleged oral agreement was admissible in evidence under proviso 3 of section 92 *Kinlock* v *Asa Ram,* 51 P R 1877 Where the plaintiff purported to sell certain land to the defendants under a deed of sale, and there was an arrangement that the deed should take effect only if the defendants succeeded

the defendant tendered upon the understanding ondition precedent was is admissible *Kishen* v *Chandi,* A W N 1882, 93

PROVISO (4).

Scope of the proviso (4) Parol evidence is admissible to prove any subse-

document, enfoce of such B 127= ing the judgment of the Court, which consisted of *Taunton, Littledale, Parke* and *Patteson JJ*) said 'By the general rule of common law, if there be a contract which has been reduced into writing verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation so as to add to or subtract from, or in any manner to vary or qualify the written contract, but after the agreement has been reduced into writing, it is comp tent to the parties, at any time before breach of it, by a new contract not in writing, either

partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement. And if the present contract was not subject to the control of any Act of Parliament, we think that it would have been competent for the parties, by word of mouth, to dispense with requiring a good title to be

made to the lot in question, and that the action might be maintained But the Statute of Frauds has made certain regulations as to contracts for the sale of lands (So) we think the object of the Statute of Frauds was to exclude all oral evidence as to contracts of the sale of lands, and that any contract which is sought to be enforced must be proved by the writing only" This proviso deals with two points In the first place, it lays down that if a transaction has been reduced into writing, not because the law requires but because the parties find it convenient, then since there is nothing in general law, which prevents them from subsequently modifying it or rescinding it altogether by oral agreement, so there is nothing in the rules of evidence, which prevents them from proving the alteration or rescission But a matter which the law requires to be in writing can no more be altered by a subsequent than by a contemporaneous oral agreement, because the rule of law prohibits it *Markby Ev* 73 It was contended in a case that the word 'or' should be interpreted as "and" and as such oral evidence should be admissible in cases of documents which are not compulsorily registrable but which have been registered This contention however was negatived *Nocoor* v *Ashutosh*, 9 C W N ccxiv Under this proviso evidence of a subsequent oral agreement rescinding or modifying a contract, etc. in writing is not admissible but the proviso does not exclude a distinct subsequent new oral agreement superseding the old contract *in toto* *Lakhon Ram* v *Amir Khan*, 14 P R 1889 Under proviso 4 in certain cases a subsequent oral agreement to modify previous contract may be proved but this is not permitted where the law required that the terms of the contract should be [illegible] terms of the contract [illegible] evidence is entirely [illegible] *Collector of Estate* [illegible] 1193 But where the mortgagor pleaded a subsequent oral agreement whereby the mortgagee

[illegible]

proviso 4 to section [illegible] whether executed or executory [illegible] M 368 The provisions of this [illegible] evidence to prove the discharge and satisfaction of a mortgage bond [illegible] v *Gobinda* 4 C W N 301

Parol proof of subsequent agreement. The general rule under discussion however does not prevent the proof of the existence of any distinct subsequent oral agreement to rescind or modify any such contract grant or disposition of property, provided that such agreement is not invalid under the Statute of Frauds or otherwise *Steph Ev Art* 90, *Goss* v *Nugent*, 4 Barn & Ad 58 The general rule does not purport to exclude negotiations respecting written [illegible]

[illegible]

changed, that performance has been prevented or waived by the other party,

[illegible]

portion of the rent renewed under a *Kabuliat* by means of an agreement subsequent to the date of the instrument *Held,* that the acts and conduct of the parties were not admissible in evidence to prove that the terms of the agreement have been varied *Lakshmi* v *Kabaduip*, 116 Ind Cas 733=56 C 201=A I R 1929 Cal 437 So an agreement by conduct, or an equity arising from the circumstances though not amounting to an agreement, will

s. 92. have the same effect *Hughes* v *Metropolitan Ry Co*, 2 App Cas 439; *Morell* v *Studd*, (1913) 2 Ch 648; *Phip Ev 7th Ed* 564; *Roscoe Cr. Ev* 267; *Taylor* §§ 1141—1146 The expression "oral agreement" as used in this proviso is wide enough to include all written agreements whether they are oral or they are implied from acts and conduct of the parties *Kumau* v *Radhika*, 10 Pat L T 669=A I R 1929 Pat 717, *Mayandi* v *Oliver*, 22 M 261; *Radha Raman* v *Bhabani*, 12 C L J 439=6 C
12 C L J 646, see also *Morell* v *Studd*,
(1904) 1 Ch 305 (312), *Hughes* v *Metro R*
Sundari, 20 C W N 680=32 Ind Cas
is used in the sense of "not committed to
agreements whether come to by word
conduct of the parties *Mayandi* v *Olive*
regards the alternati ... not only
claiming the property
whereby she alleged
plaintiffs under thei
Evidence Act was no bar to an enquiry into the merits of the latter defence based on the agreement, for the object of the alleged oral agreement was not to rescind the original transaction, as affected between the plaintiffs and their vendor, but to transfer any right acquired by the plaintiffs to the defendant *Rakhmabai* v *Tukaram*, 11 B 47.

Parol proof of subsequent agreement, in case where the document has been reduced into writing The exclusion of evidence by section 92, is itself excluded by proviso 4, and a notification of a written agreement to submit matters in dispute to arbitration can be proved by oral evidence *Pyarilal* v *Ghanaram*, 83 Ind Cas 22=A I R 1925 Nag 203 In a written lease for a period of 5 years there was a condition that if the lessee desired a renewal he should give a written notice three monts before the expiration of the term of the lease The lessee alleged that one of the lessors had told his wife that there was no need to give a written notice as provided for by the lease ... alleged ... ssi ... h a ... or
rescission of the contract of lease within s 92 proviso 4 of the Evidence Act *Marz D' Cruz* v *Jitendra Nath*, 46 C 1079=30 C L J 94=53 Ind Cas 681 Under proviso 4, a party is entitled to prove the existence of any distinct subsequent oral
is neither req
the law in
parties, who have bound themselves by a written agreement, depart from what has been so agreed on in writing and adopt some other line of conduct, it is incumbent on the party insisting on and endeavouring to enforce a substituted ... terms on

5 Prior to the due ... 100
with interest, the ... an oral
agreement whereby ... priate l
towards the discharge of the bond debt In a suit by obligor, to recover the ... lieu, *held* that there was ... Act or in any provision of ... ty that he satisfied and ... *Thakur Rai* v *Gulan* ... gee) sold the mortgaged
property to the second defendant under the power of sale contained in the mortgage deed The plaintiff mortgagor sued for a declaration that the sale was

void and for redemption contending that, on the day before the sale took place, the first defendant orally agreed to give him four days' time within which to pay off his mortgage debt and to postpone the sale, and that the second defendant [illegible] a purchase *Held* that oral evid nce of [illegible] it did not fall within proviso 4 of section [illegible] being an agreement to modify any of the [illegible] *hagu in Das*, 26 B 318 Oral evidence of an agreement subsequent to the execution of a promissory note payable on demand varying its terms as regards its exigibility on demand is precluded under this section *Sheikh Jamu v. Muhammad*, 90 Ind Cas 378 Where a partnership is formed in 1921 between P and D to carry on certain business and under the terms of the contract which are reduced to writing and registered, the partnership is to continue for five years, an oral evidence to prove that the partnership had inspite of the terms in the contract, been dissolved in June 1922 and P was paid his share of the assets is admissible *Nurul Hasan v Imambux*, A. I R 1932 Nag 12

Parol proof of subsequent agreement in cases of transaction which is required by law to be in writing and registered Where the parties enter into a contract, they can substitute another in its place and the substituted contract is the one to be looked to, not the one which was first entered into If the law requires that the substituted contract shall be made only in a certain way and in compliance with certain formalities such as writing and registration then unless it is so made, it cannot take effect and the old contract subsists *U Kyo v Mg Pan Yo*, 74 Ind Cas 151=1923 Rang 102 So when an agreement modifying [illegible]

registered, it is not open to the defendant to prove by oral evidence that the lease was surrendered under a later oral agreement of the parties *Doda v Muttayya*, 2 Mys L J 124 An oral agreement to receive lesser amount than was due on a registered mortgage deed in full discharge of it cannot be proved under s 92 (4) of the Evidence Act and section 17 (b) of the Registration Act. In [illegible] *ayan v Supham*, [illegible] evidence of an [illegible] *Maung Myat v* [illegible] ang 322 Even though a tenancy has been created by a registered instrument the termination [illegible]

existence of a subsequent oral agreement is excluded not only in cases in which the original contract, grant or disposition of property is by law required to be in writing, but also in [illegible] has been registered *C* [illegible] nothing to prevent or [illegible] of a claim *Maung Pa* [illegible] A I R 1928 Rang 141 A contract of simple money debt is not required by [illegible]

merely an agreement as regards the mode of payment but an alteration of the character of mortgage itself such as changing the original mortgage which was without possession into a usufructuary mortgage, it is not admissible *Chandra v Akbar*, 110 Ind Cas 261 One of several mortgagors can enter into an oral

2. agreement with the mortgagee for the redemption of his share only of the mortgage and proof of the oral agreement under which money is paid for redemption is not precluded by section 92, proviso 4 of the Evidence Act The proof of oral *agreement and payment does not amount to a rescission* of the contract of mortgage bu ntract is discharged to that extent 537=A I R 1928 Mad 1050. age oral evidence is inadmissible R 1928 Bom 522, *Mahomed* v *Nanhe Mal*, 27 A L J 924=119 Ind Cas 197=A I R 1929 A 615 An oral agreement, between the mortgagor and the mortgagee where ie payment of the p in evidence a subsequent tered mortgage it has to be ction 92 of the =48 Ind Cas 158 In a led oral evid a lesser sur *Held*, that the evidence was inadmissible under section 92, proviso 4 of the Evidence Act, the defendant's or lesser sum given in full satisfactior on the mortgage. *Jagannath* v Ind Cas 689 Eve raiyat can orally surrender h y Act if it was not for a fixed v *India Seni*, 47 C 129 less than Rs 100 is created by a registered instrument it will not preclude the admission in evidence of an unregistered instrument to show that the interest has been relinquished A relinquishment for consideration may be recorded as a conveyance and in the view of a document by which an interest to immoveable property of the value of less than Rs 100 is relinquished does not require registration *Sorman* v *Molla*, 37 Ind Cas 949.

Under this proviso any variation of rent reserved by a registered lease must be made by a registered instrument, and oral evidence is inadmissible to prove such variation and an agreement is nonetheless oral because it is inferred from the conduct of the parties *Manindra* v *Durga*, 20 C W N 680=32 Ind Cas 185 Evidence that since the execution of the *Kabuliyat*, the tenant paid rent at a lower rate than that stated in the *Kabuliyat* is admissible to show that the intention of the parties was that the *Kabuliat* from the been a waiver of the *tri*, 20 C W N 680=32 mortgage or sale-deeds because at that time there was no law which required a sale deed of immoveable property to be in writing *Jangi Ram* v *Sheoraj Singh* 30 Ind Cas 234 This proviso precludes evidence of an oral agreement *Srinivasa*, 27 Ind Cas 269 mortgagee orally agreed to a by the deed The conduct of th ks at such reduced rate is in s 436=A I R 1930 Nag 235 Although a mortgage deed has been duly executed and attested and no obligation attaches thereunder till certain conditions have been fulfilled, upon fulfilment of the conditions, the obligation attaches from the date of its execution and not from the date of registration or delivery of the deed *Jadunandan* v *Kalyan Singh*, 15 C L J. 61=16 C W N 612=13 Ind Cas 653 Section 92 (4) does not exclude evidence of oral agreement substituting a new contract for a previous one in writing and registered That clause refers only to an oral agreement to rescind or modify such contract *Jagat Sing* v *Devi Ditta Mall* 169 P. R. 1883 In a suit for redemption of the mortgage, the defendant pleaded a sale of the mortgaged property *Held* that section 92, clause (4) does not exclude evidence of sale; for the new contract does not rescind or modify the former one which is merely

merged in the new one *Balkishen* v *Hira*, 30 P. R 1881 Evidence of conduct S.
... showing cancelment of a registered mortgage
... *Srinivas Swami* v *Athmaram*, 5 M L T.

A parol agreement between a mortgagee and the assignee of his interest, whereby the latter was to pay the consideration for the sale to a third party to the credit of the mortgagee, is a ...
law to be in writing, by a subseq...
(4) of the Evidence Act and ...
9 Ind Cas 310; see also *Kalika* ...
Where the lessee under a registered lease-deed contend that they were cultivating an additional area by virtue of an oral agreement. *Held* that evidence of a simultaneous oral agreement was barred by s 92 and that evidence about subsequ...
Man...
plaintif...
from th...
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tion of...
12 C L...
due for...
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... a
... 4
... ble
and the defendant was not bound to pay at the rate stipulated in the lease
... ge
... it
... nt
arrangement does not in any way affect the mortgage or where it does not modify or vary the terms of the mortgage, it is not inadmissible under this proviso *Kedar Singh* v *Sumer Singh*, 10 Ind Cas 196 An oral agreement to take less than what is due under a registered mortgage bond would be inadmissible ... But a discharge extin-
...
... to a party to a registered sale deed to prove an oral agreement by evidence either oral or documentary contemporaneous with the sale-deed, that inspite of a certain property, belonging to the vendor, being entered in the sale deed, title to it would not pass to the vendee *Kunwar Ram* v *Ananda Krishna*, 118 Ind Cas 589= A I R 1929 A 578, *Umedmal* v *Davu*, 2 B. 547; *Dwarka* v *Bhogaban*, 7 C L R 577

English law—'A contract required by law to be in writing, may whether before or after breach, be wholly rescinded by an oral agreement, even though the latter be not itself enforceable *Morris* v *Baron*, (1918) A C 1 (disapproving *Williams* v *Moss's Empires* (1915) 3 K B 242), *British and Benbingtons N. W Cachar Tea Co*, (1923) A C 48, *Goss* v *Nugent*, 5 B & Ad 58, 65, *Noble* v *Ward* L R 2 ... ioned or varied thereby (*Ibid*, *Stead* ... *Graves*, L. R 10 En 234, *Vezey* v *Ras*... be attempted, the original contract ... v *Ward*, sup, *Stowell* v *Robinson*, 3 ... t common law contracts by deed could neither be rescinded nor varied by parol (*West* v *Blakeway* 2 M & Gr 729; *Steeds* v *Steeds*, 22 Q B D 539) Now however following the equitable rule, (*Webb* ...
cannot technically be released, may ...
Ambegate Ry Co 17 Q B D 127, ...
Whether they can also be varied seem ...
Contracts 7th Ed p 599 and *Kelle*...
Ed 565

2

PROVISO (5)

Scope of proviso (5) Parol evidence of u age or custom i always adm sible where the object is to render intelligible to the Court the meaning in wh h partie have used language Nort Ev 277 So parol evidence may be g ven to prove in order that it may be a plied to the written transaction, unles it is Dalliso n 1 Sm L C 5?0= in th ca e which wa a case of an agricul of a cu tom whereby, contrary to the general law the tenant, on leaving at the en l of his term, was allowed to take away his 'way going crop that is to say, all the corn growing upon the said lard which hath before the expirat on of such term been own by su h tenant upon any part of such lands,' although the lea e was in writing and no ment on was therein made of such cu Lord Mansfield C J said The r contradict the agreement

hough not mentio ed v Magnine, (1801) utting of timber wa being taken to have Cas 352 So it to show that thing are by usage or custom in particular ca es treated as incidental and acce sorial to the principal thing Nort Ev 277 Thu , it may be shown that days of that a contract of hiring is hat the out going tenant shall always admi sible to prove er as to the obligation of the parties in such transactions as that in question, or as to the meaning of words or terms used, in order that it may be applied to the subject matter and bind the parties to a written transact on unle it is inconsistent with the writing Cockle Cas Ev 352 In Brown v Byrne 3 E & B 703=23 L J Q B 313—Cockle Cas Ev 352=Thayer Cas Ev 941 a bill of lading specified a certain amount as payable for freight Parol evidence was offered of a custom whereby three months' credit of discount was allowed for freight The evidence was held Court, Coleridge J said "The are perfectly clear, the d fficulty s Mercantile contracts are very merchants, the intention of the defeated if the world d in order as to the oceed with the tacit assumption of these usage , they commonly reduce into writing the special particulars of their agreement but omit to specify these known usages ev dence

or the dinary words lar in during idence only freight

on delivery at a certain rate per pound is it inconsistent with this to allege that, by the custom the ship-owner, on payment is bound to allow three months' discount? We think not. *Webb* v *Plummer*, 2 B & Ald 746, and *Hutton* v. *Warren*, 1 M. & W. 466, are cases which illustrate this principle In the first of these, by the custom of the country the outgoing tenant was bound to do certain acts, and entitled to receive certain compensation, but the lease which formed the written contract bound him to do the same acts in substance, and specially provided for his payment as to some of them, omitting the others and the Court held that the expression as to some excluded the implication as to the remainder, and the language of the lease was equivalent to a stipulation that the lessor should pay for the things mentioned and no more The custom therefore would have been repugnant to the contract But in the latter case, in which the former was expressly recognized, the Court held that a specific provision, as to a matter *de hors* the custom, left the custom untouched and in full force. [illegible] the contract [illegible] owed on the [illegible] have been well summarized by an eminent author, thus —(1) To annex incidents to contracts and Wills (2) To explain the meaning of peculiar or technical terms (3) To furnish standard of comparisons on questions of negligence, etc (4) To fix a party with knowledge or notice of this subject matter of the usage (5) To rebut a fraudulent intent *Cockle Cas* 351.

To annex incidents to written instruments Extrinsic evidence is admissible to annex incidents to a written instrument, where the inclusion of such incidents is consistent with the writing, and carries out the intention of the parties In such cases the notoriety of the usage makes it probable and reasonable that the parties intended it to be a term of their contract Thus, where a written contract contained a stipulation that a party should ' lose no time on his own account, and do his work well and behave himself in all respects as a good servant," extrinsic evidence was received to show that, by the custom of his trade such a party was entitled to certain holidays *R* v *Stoke Upon Trent*, 5 Q B 803, *Powell Ev* 190 In *Hutton* v *Warren*, 1 M & W 475, *Parke B* said, ' It has long been well settled that in commercial transactions extrinsic evidence of custom or usage is admissible to annex incidents to written

of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages' So in the case of mercantile contracts, the evidence is not confined to the explanation of the written terms Provided they are not inconsistent with the contract, it is allowed to supply

their pr[illegible] [illegible]ding the brokers [illegible] "Now, neither [illegible] [illegible]ivable to prove ar[illegible] [illegible]ubject to this condition, both may be received for certain purposes To use the language of *Mr Phillips*, (in Vol II, p 416, 10th Ed) —' Evidence of usage has been admitted as to contracts relating to transactions of commerce and trade, farming, or other business, for the purpose of defining what would otherwise be indefinite, or to interpret a [illegible] what was equivoca[illegible] mentioned in the co[illegible] out of them, and [illegible]

2. effect, as far as can be done, to the present intention of the parties' Now here the plaintiff did not seek by the evidence of usage to contradict what the tenor of the note primarily imports, namely, that this was a contract which the defendants made as brokers The evidence is based on this the usage can have no operation except on the assumption of their having acted as broker, and of there having been a contract made with their principal But the plaintiff by the evidence seeks to show that according to the usages of the trade and as those concerned in the trade understand the words used, they imported something more, namely, if the buying broker did not disclose the name of his principal, it might become a contract with the broker as principal, if the seller pleased Whether this evide[illegible] ... end of adding a tacitly implied inc[illegible] ... expressed, is not material ... it labours under the objection of introducing something repugnant to, or incon sistent with, the tenor of the written instrument; and, upon consideration of the sense in which that objection must be understood with reference to this question, ... material incident which is added tc ... what it appeared to be, and ... written contract without, y[illegible] ... two would seem to import ... Take a familiar instance by way of illustration On the face of a bill of exchange, at three months after date, the acceptor will be taken to bind himself to the payment ... bound to do so at ... ntry in which the ..., that the principle ... not set down on ... which were ... necessary to be dertermined in the particu[illegible] ... which of course might vary infinitely, ... standing all those general and unvarying ... would annex, and according to which they must in reason be understood to contract unless they expressly exclude them To fall within the exception ... ed on the written ... rrant bacon to ... *Yates* v *Pym* 6 ... to say, all not ... *surance Company* ... ugh the books ... expires ... the other ... reasoning ... usage ... on them, and moving in a narrow circle, and meeting each other daily, desire to write little and leave unwritten what they take for granted in every contract. In spite of the lamentations of Judges they still continue to do so; and, in a vast majority of cases of which Courts of law hear nothing, they do so without loss or inconvenience; and upon the whole they find ... ntageous ... of the ... grow out ... considered t ... contract is ... *Goodeve Ev* p [illegible].

So the true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intention of the parties, and to ascertain the nature and

extent of their contracts, arising not from expplications and presumptions, and acts of a dou Jones § 457 Hence it is that in respect

must be understood to contract, unless they expressly exclude them It is on this principle that, in a great number and variety of cases in England and in this country, parol evidence has been admitted of local or general usages of trade and commerce to ascertain the true meaning of written contracts *Southwell* v *Bowditch*, 1 C P, Div 374; *Fleet* v *Murton*, L R 7 Q B 126, *Humphrey* v *Dale*, 7 El & B 266; *Imperial Bank* ... *Smith* v *Wilson*, 3 B & Ald 728, *Brown* ... *epeyster*, Starkie, 210, *Bowes* v *Shand*, 2 App ... C W N 365, *K M P R Firm* v *Som* ... 299, *Parker* v *Ibbetson*, 26 L J C P 236; *Hutton* v *Warren* 5 L J Ex 234, *Gibson* v *Small*, 4 H L C 396 In a *doul kabuliyat* creating a tenancy for a term of years there was an express statement that the tenant had no right of sale, gift or transfer without the landlord's consent and the only right shown was an option in the tenant to take a renewal of the lease within one year after the expiry of the term at the rate of rent prevalent in the pergannah failing which the tenancy would pass into the landlord's possession *Held*, that the tenancy created by it was neither heritable nor transferable and that no evidence of custom was admissible on those heads *Mahomed* v *Prodyot*, 18 C 359=25 C W N 13=61 Ind Cas.

A L J 29=9 Bom L R 1

To explain the meaning of Peculiar or technical terms Peculiar expressions or terms are to be given the meaning which they have acquired in such business by common usage, unless, by the express terms of contract, such usage is excluded, or is inconsistent with the contract *Burr Jones* § 457 Proof of usage, say *Dr Greenleaf*, is admitted either to interpret the meaning of the

R v *Aewstead* Burr 669, *R* v *Sayer*, 10 B & C 486, *Myer* v *Sarl*, 3 E & E 306 Where in a mortgage deed, it was stipulated that the mortgage should not be redeemed "from 1287 to 1298 *Fasli*, for 12 years' alluded to was not the *Fasli* year as commonly understood, but agricultural year *Sheoboran* v *Bisheshar*, A W N 1892, 236 The question whether a specification of a

The usage must be known Closely allied to the requisite of long establishment of a usage, that of its being known is of equal and far reaching

importance Judicial notice is taken of the general custom of the country and there are certain commercial customs and usages of which every person in the community is deemed to be cognizant such, for example, as those belonging to the law merchant But the usages of special trades and those local usages which may be limited to certain communities cannot, of course, be presumed to be known to all *Sleght* v *Hartshore*, 2 Johns (N Y) 531 These have been called usages, as contradistinguished from the generally recognized customs of business *Clark* v *Baker*, 52 Mass, 186 In respect to these usages there should be either proof of actual knowledge on the part of the person to be affected, or proof of circumstances from which such knowledge may be fairly implied *Byrd* v *Beall*, 150 Ala 122, 124 If a usage is special, and confined to a particular business, or has reference to a particular place only, there is no such presumption and it is manifest that it would be unjust to admit it ... proof
in order
that both
by it E
particular places there is a presumption that parties who are engaged in ... trade contract in reference to the particular custom this presumption is at best but a *prima facie* one liable to be rebutted by proof that it was unknown to the party against whom it is set up, and, on that being proved, no weight ought to be given to it *Isaksson* v *Williams*, 26 Fed 642 The customs of an individual in his private business are not binding upon others unless known *Burr Jones* § 464, see also *Mana Vikaram* v *Pattar*, 2 M 275 The ... of trade applicable to the contract which the parties making ... admissible for the ... the instrument ... N 365 = 35 Ind

Cas 3

Custom ... contract Since evidence of usage is ... ing the true meaning of the contract, ... into their contract with reference to such usage it is clear that proof of the usage should not be received if it contradicts expressly or by implication the language of the contract A... ... may be admissible to explain what is ... what is plain" *Blackett* v *Royal* ... Tyr 266, see also *Indar Chandar* v ... *Nandalal* v *Gurupada* 51 C 558 ... *ones* v *Shand*, 46 L J Q B 561 ... *Mohan* v *Kaisri*, 9 M I A 260, ... Cas 268, *Macfarlane* v *Cun*, 8 B, ... App 1, *Morris* v *Panchanandi* ... r is expressed to be subject to cond... or custom which is repugnant or ... the documents *Khoo* v *Nanigram*

'The way and ... Salk 283 In ... had to turn to ... ing *Turley* v ... the land law in England, and those customs, which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience and for the benefit of trade and commerce, and when so adopted it is unnecessary to plead or prove them' *Barnett* v *Branduo* 6 M & E 630 But the usages of special trades, and those local usages which may be limited to certain communities cannot of course, be presumed to be known to all Such customs or usages, must be proved, either (*a*) by direct evidence of witnesses (which must be positive and not amount to mere opinion), (*b*) by a series of particular instances in which it has been acted upon (*c*) by proof of similar customs in the same or analogous trades in other localities *Cockle Cas* Ex 354

PROVISO (6).

Scope of proviso (6). "Th... have decided in an unreported case (Privy ... ecided on 5th May, 1924), *Venkata Sudhadrayy* ... 1924 P. C 162=80 Ind Cas 807=52 I A. 1=48 M ... that where a written contract was doubtful in its meaning, the surrounding circumstances existing at the creation of the contract and the subsequent matter to which it was designed and intended to apply could be looked into Again their Lordships held in another unreported case (Privy Council Appeal No. 10 of 1923, decided on 18th December, 1923) *Ma Thaung* v *Ma Than*, A I R 1924 P. C. 88=80 Ind Cas 1031=51 I A 1=51 Cal 374=5 Rang 173 (P C) that where a written contract was of doubtful import the conduct of the parties might be looked into to help the Court to obtain an explanation of the true meaning of the contract" *Per Mukherjee J* in *Nand Kishore* v *Behari Lal*, A I. R 1932 All 600=1932 A L J. 329. Upto a certain point, and apart from any question of ambiguity, extrinsic evidence would be necessary to point the operation of the simplest instrument Thus, were it the case of a deed conveying all the lands at A in the grantor's occupation until it was defined by proof what lands were in his occupation, the operation of the deed could not be known So, were it a case of a Will, and a bequest to the children, of a party, or even to the testator's own children, to give effect to the bequest it would be necessary to define who the children were *Goodeve Ev* p 385 "Some evidence" says *V C Wood* in *In the matter of Feltham*; 1 Kay & John 528, "is necessary in any case of a Will, that is to say evidence to show the subject and objects of the gift" *Vide also section 75 of the Indian Succession Act (XXXIX of 1925)* "The law" says ...

things to whic... requisite in cons... covered, which ... natural construction, but exhaust the whole of those words then the investigation must stop, you are bound to take the interpretation which entirely exhausts the whole of ... to go any furt... interpreting ... testator, with ... I am not, ... what were the intentions of the testator, as contrasted with, or extending or contracting the language which he has used" *Webb* v *Byng*, (1855) 1 K & J 580 (585) So in construing a written statement the situation of the parties must be looked at, and the deed must be construed with reference to the situation of ... ted *Rabutty Dassi* v ... rvations are only cited ... imperfection of the ... as to determining its meaning usually arises, and nothing is more settled than that evidence is receivable of all the circumstances surrounding the instrument, for the purpose of throwing their light on its interpretation It is indeed by these, as by a lamp, that the Court reads the document *Goodeve Ev* 386 This proviso applies whether a writing is required by law or not It proceeds upon a principle, which has been stated thus —that a person who has to interpret a document, ought to

24 B 510, 515 525 "As it is a leading rule," says *Dr Greenleaf* "in regard to written instruments, that they are to be interpreted according to their subject, it is obvious that parol or verbal testimony must be resorted to, in order to a certain the nature and qualities of the subject, to which the instrument refers Evidence which is calculated to explain the subject of an instrument is essentially different in its character from evidence of verbal communications respecting it Whatever, therefore, indicates the nature of the subject, is a just medium of interpretation of the language and m
just foundation for giving th
relatively, different from that
Thus, where certain premis s
and bounds, and the question was, whether a cellar under the yard, was or not included in the lease, verbal evidence was held admissible to show that, at the time of the lease, the cellar was in the occupancy of another tenant, and, therefore, that it could not have been intended by the parties that it should pass by the lease *Doe d Freeland*
mill, or a factory is conveyed, *eo*
and parcel thereof, and so pas
admitted" *Greenl Ev* § 286

So it is clear that extrinsic evidence of every material fact which will enable the Court to ascertain t
the instrument, or in other

donald v *Longbottom*, 1 E & E 9.., *Mumford* v *Getting*, 29 L J C P 105, *Chambers* v *Kelly*, I R 7 C L 231, *Mc Collin*, v *Gilpin*, L R 6 Q B D 516, *Bank of New Zealand* v *Simpson* (1900) A C 182 Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he
... ters
ject
rey
ble
..ee,
67;
be
lli
If
be
admitted to show what property is known by that name (*Ricketts* v *Turquard*, 1 H L Cas 472) *Taylor* § 1191 'But it is well settled that the terms of an unambiguous document cannot be controlled by the conduct of the parties As *Lord Halsbury* said in *North Eastern Railway v. Hastings* (1900) A C 290 no amount of acting by the parties can alter or qualify words which are plain and unambiguous, but it is otherwise when we have to determine the true construction of an obscurely framed document *Herbert* v *Purchas*, L R 3 P C 305" *Per Mookerjee J* in *Kiransashi* v *Ananda*, 32 C L J (18), *Nirod Chandra* v

different from what it appears to be Otherwise there could be no certainty as to the proper construction to be placed on a document which to all appearance is unambiguous *Motiland* v *Amrit Rao*, 19 B 662 = 27 Bom L R 951 = A

I R 192 ... v. *Maung Tun* 6 Bur L J. 195=105. S. Ind Cas ... *ajassa*, 107 Ind Cas 201=A I R 1928 ... , 117 Ind Cas 907 (2)=A I R 1929 Lah. 875 ... where the terms are unambiguous and clear, there can be no question that the evidence to prove that the terms of the contract were used in a different sense must be excluded under section 92; nor is the Court in such a case entitled to speculate as to the meaning of words in the contract But where the wording of the contract is capable of different interpretations the Court is justified to put a proper construction upon the terms of the contract and is justified in finding with what intention a particular expression was used as a matter of pure construction *Juran* v *Ram Mondal*, 55 C 808=A I R 1928 Cal 137. Parol evidence is admissible to prove that the name of the creditor was through mistake put down as K instead of R in a deed containing acknowledgment of liability *Ajfaz* v *Ram*, A I R 1931 Oudh 51=130 Ind Cas 317. Importation of extraneous matter is forbidden unless required to show relation of language to existing facts *Irfan Ali* v *Official Receiver*, A I R 1930 All. 837=1930 A L J 978 Oral agreement showing the nature of document is not admissible but the Court can take into consideration circumstances if document is of doubtful tenor *Lakshmaya* v *Murahari*, A I R 1930 Mad 517=31 M L W 516.

Application of the rule in Will cases The question has more often arisen upon Wills than upon other documents, and it is from cases on these, accordingly, that the law has mainly to be taken The law on the subject as regards Wills is contained in section 75 of the Indian Succession Act (XXXIX of 1925) That section is based upon the first paragraph of *Justice Wigram's* proposition V which is as follows "For the purpose of determining the objects of a testator's bounty, or subject of disposition, or the quantity of interest intended to be given by the Will, a Court may enquire into every material fact relating ... rty which ... testator, ... identify ... antity of ... K 602, *Wigram* s 10; *Dhanapala* v *Ananda*, 24 M L J 418, *Sher Bahadur* v *Ganga Baksh*, 36 A 101, *Kulasani* v *Khembai*, 13 L W 657 (P C); *Bhagobutty* v *Gooroo*, 25 C 112; *Indubala* v *Manmatha*, 41 C L J 258 "In considering questions of this nature, it must always be remembered, that the words of a testator, like those of *every other person, tacitly refer to the circumstances by* which at the time of expressing himself, he is surrounded If, therefore, when the circumstances under which the testator made his Will are known, the words of the Will do sufficiently express the intention ascribed to him The strict limit of exposition cannot be transgressed, because the Court, in aid of the construction of the Will refers to those extrinsic collateral circumstances, to which it is certain that the language of Will refers It may be true, that, without such evidence, the precise meaning of the words could not be determined; but it is still the Will which expresses and ascertains the intention ascribed to the testator A page of history (to use a familiar illustration) may not be intelligible till some collateral extrinsic circumstances are known to the reader No one, however, would imagine that he was acquiring a knowledge of the writer's meaning from any other source than the page he was reading, because, in order to make that page intelligible, he required to be informed to what ... about ... betwee ... in his Will and the introduction of extr ... of the testator as an independent fact ... only to a right understanding of the words used by the testator in his Will and as such it is explanatory only of the words themselves But the evidence which is introduced to prove the intention of the testator is quite a different sort of evidence In this section we are concerned with the former kind of evidence "It does not *per se* approach the question of intention It is wholly collateral to it It explains the words only by removing the cause of apparent ambiguity, where, in truth, there is no real ambiguity It places

2. the Court which expounds the Will in the situation of the testator who made it

111, *Lowell* v *Wall*, 104 L T 85; *Great Eastern Ry Co* v *Bristol Corporation*, 87 L J Ch (H L) 417, 424, 428, *Samuel* v *Ofner*, (1909) 1 Ch. 61; *Selwood* v *Mildmay*, 3 Ves 306 "The general rule is that, in construing a Will the Court is entitled to put himself in the position of the testator and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used now in the Will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words" *Per Blackburn J* in *Allgood* v. *Blake*, L R 8 Ex 160, *Re Skillen* (1916) 1 Ch 518, *River Wear Commissioners* v *Adamson*, 47 L J Q B 193, *Harrison* v *Higson*, (1894) 1 Ch 561 In *Boyes* v *Cook*, 14 Ch D 53 (56) *James L J* used the following expression 'You may place yourself, so to speak in his (testator's) arm chair" *Charter* v *Charter*, L R 7 H L 364 (377) The object in all cases is to discover the intention of the testator The first and most obvious mode of doing this is to read his Will as he has written it and collect his intention from his words But as the words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his Will, it is evident that the meaning and application of his words cannot be ascertained without all those facts and circumstances" *Per Lord Abinger* in *Doe d Hiscocks* v *Hiscocks*, 5 M & W. 363 (367), see also *Bernasconi* v [illegible] *100*, 25 C 112 (124), *Paton* v [illegible] 2 Ch 314; *Bhagabutty* v [illegible] *akram*, 14 B L R 226=2 I [illegible] : *Sher Bahadur* v. *Ganga Buks* [illegible] v *Hemangini*, 36 C 1, *Mathur* [illegible] 7 A 198; *Sukram* v *Ka* [illegible] s 973=24 M L J 418, *Meka* [illegible] a testator's, knowledge or acquaintance is also important In the words of *Lord Cairns L C* in *Craven* v *Errington*, 3 L T 338 (339), "In construing the Will of the testator we should put ourselves as far as we can in the position of the testator and interpret his expressions as to persons and things with reference to that degree of knowledge of those persons and things which so far as we can discover, the testator possessed' See also *In re Vaughan*, (1901) 17 T L R 278; *Martain* v *Harding*, (1907) 1 Ch 465 But this proposition must be accepted with severa[illegible] the Will The meanin[illegible] cannot [illegible] ill was [illegible]

but where a testator has left no uncertainty as to the person to be benefited or the property by which the benefit is to be conferred, then the Courts are precluded

from going outside the actual words used by the testator. Judges should not, ... ambiguity in its ... enquiry into those ... 30; *Lakshmibai* v. ... R 71, *Kulsambai* ... v. *Bamasundari*, 12 M I A 11;

... *Sheuakram*, 14 B L R 26, *Radha* v *Ram*, 85 ... 19 C L J 563 (P. C.)

...

the parties enjoyed when the contract was executed, and in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge the meaning of th... the language to the things described ... *d States*, 107 U S 437 (Am); *Burr J* ... *Tindal C J* in *Att Gen* v *Shore*, 11 Sim 592, 616, "The General rule I take it to be, is that where words of any written instrument are free from ambiguity in themselves, and ...

... elves; and that, in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible If it were otherwise, no lawyer would be ... nor any party in ... the clearest title ... rticular meaning ... in making the instrument or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself. The true interpretation, however of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that, where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning or the language may be investigated and ascertained by evidence *dehors* the instrument itself, for both reason and common sense agree, that by no other means can the language of the instrument be made to speak the real mind of the party Such investigation does, of necessity, take place in the interpretation of instruments written in fore... se of time ... a different ... ses where ... instances ...

common meaning, ha... idiomatic meaning, ... dwelling, or in the pa... he passed his life ... cases of the descrip... detailed" *Wigmore* § 2461 So in order to construe a term in a written instrument where it is used in a sense differing from its ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the word; but it is not admissible to contradict or vary what is plain" *Per Lord Chelmsford*, in *Beacon, L. & F, Ass Co* 1 Moore P. C 73, 98

2, It is frequently neces ary, in order to construe written instrument to receive evidence of other accompanying facts than those which serve to apply the instrument to the subject matter or the person intended Under some ... of the parties, but their acts, ... facts

it other terms than those are to ... e not only the relations of the ... property, but also the acts of the ... means of showing their ... d Worsted Co, 2 Cush ... under a lease as to ... or lessee, parol evidence of the subsequent dealings of the parties ... The purpose for which such evidence is received must always be borne in mind—to elucidate the meaning of the words used and not to import into the writing an unexpressed intention and in its admission, the line, which separates evidence which aids the ... from direct evidence of intention ... in view,—the duty of the ... ritten in the instrument not ... 3; 2 Phill Ev 277 : Greenl ... not admissible for the purpose of ... the parties Balkishen Das ... this section that ... iven in evidence, ... still a mortgage ... section excludes ... ence of conduct ... turn was due to ... v Hiras Mollah, ... d by s 92 of the Evidence Act (with which the provisions ... Act might be considered) from relying upon the evidence furnished by their conduct, which ... neraneous agreement, for the purpose of varying ... and out sale ... dar, 5 C ... missible ... note of ... ither per ... nsactions ... 864, 879 ... is really ... gomastah in favour of B ... ta Subia of B Suboodra v Ram Ruttan, Marsh 3=1 Hay ... ; ... 21 M 45=18 M L J 1 Parol evidence is admissible to prove ... transaction between the parties to a written ... R 515 An obscure pottah can be elucidated ... Urpoopoorna, 9 W R 566 But this proviso ... importing into a letter an acknowledgment which is not contained in it even by implication ... 84 Where the document is silent as to interest ... subsequent conduct is not barred as between ... 1929 Mad 590

... efendant ... gage of a ... mortgage ... two garhs of the taluka were ... m for decision was whether ... rhs were also mortgaged to ... the plaintiffs ... ble under section 92(6) and

section 98 of the Evidence Act, because it showed how the plaint document was related to existing facts and because the nature of the land tenures was a special matter which could not be stated off hand but required to be elucidated by a reference to the particular fact. *Raja Gour Chandra v. Rajah Muhunda Deb*, 9 C. W. N 710 Where a mortgage-bond

L R 768

The short exposition of the whole matter is, that the knowledge of the external circumstances of which their proof puts the Courts in possession, places the Judge in the position of the donor settler, or other party to the instrument, and it is upon the survey which that position affords him, that he exercises the office of an expositor *Goodeve Ev* 389 But *contemporaranea expositio* as a guide to the interpretation

with danger and great care must be taken

Lakshmairao, 16 C W N 1058 (P C) =

17 C L J 17=36 B 639 (P C) In *Macdon*

(Eng) the question arose on a c

the subject of purchase, was no

'Your wool" The contract was

to purchase—"Your wool, 16 per

another letter of the offer, and evidence was received to fix the quantity, the subject of the bargain "I am quite clear" said *Lord Cambell, C J*, "from the letters which were put in at the trial that there was a contract between the parties An offer was made, and was accepted, and the only question is as to the subject matter of the contract I am clearly of opinion that when a specific thing is the subject of a contract and it is doubtful upon the contract what the

The defendant says, I will buy your wool Now it is the universal practice

t-matter of a contract, as no Judge

defendant had been employed by the plaintiffs, who were tradesmen, as a traveller to solicit custom for them, over certain districts in which their commercial connection lay, and he having afterwards left their service, and travelled for other parties, contrary to his agreement with them they sued him on his agreement, which was in writing, to recover damages The agreement, however, was imperfect on its face, and it becoming necessary to explain the meaning of its expressions "your employ" and "the ground that defendant was to travel" parol evidence in explanation, though objected to was admitted *Earle C J* said "I am of opinion that the parol evidence is admissible in order to apply the contract to the matter in question It is not to alter or vary it The paroll evidence is admissible to show the circumstances under which the words were used" In the same case *Byles J* said "It does not appear from the face of the document what the employment was It does not appear what the 'ground' was The subject therefore, requires to be identified The contract is to be

2. is not admissible for the purpose of contradicting the terms of a document, but they may ... only for the ... of ascertaining and giving effect to the ... document itself *Narasingeerji* ... *han Rai* v *Chalown Singh*, ... plain, straightforward docume... in what manner the language of the document related to existing facts There may be cases where such extrinsic evidence is required and it will therefore be admitted But it can only be in such cases where the terms of the documents themselves require explanation and then evidence can be led within the restrictions laid down by proviso 6 to section 92 of the Evidence Act. Where a document has stood more than fifty years it is extremely undesirable to allow evidence to be led to show that the document is not what it appears to be on the face of it *Ganpatrao* v *Tukaram* 44 B 710=22 Bom L R 831=58 Ind Cas 576 Where a vend... agrees to sell land to several named persons and in drawing up the agreeme... of sale the name of one person is mentioned and without naming the rest th... word 'others' is used, there is nothing in the Evidence Act to prevent th... evidence from being let in a ... conveyance to be executed *Veda Murthi* ... W... 185=(1922) Mad 100 Whe... ...tity an... extent of the land leased, the Court cannot look at the correspondence th... preceded the lease *Sital Prosad* v *Badri Prosad*, 20 A L J 907=L R 3 A... 623 Where a promissory note recited that interest at the rate of 1¼ p c w... payable but it was not mentioned there as to whether the rate of intere... aforesaid will be per mensem or per annum *Held*, the document was therefor... ambiguous and under this proviso, no evidence could be given to clear up th... ambiguity *Sarju* v *Sukhi* 4 Pat L T 577 In an action for a declaratio... that certain alluvial accretions formed part of settled land antecedent document... are admissible under this proviso for the purpose of identifying the propert... demised but not for contracting the terms of the settlement *Tilakdhari* v *Kesho* 88 Ind Cas 103=27 Bom L R 819=48 M L J 611 (P C)=41 C L J 386 (P C) If in a deed of mortgage, the boundaries of the land mortgage... they should generall... the deed *Nga Clo* v ... A contract reduced t... ument itself, with onl... such extrinsic evidence of the circumstances as may be required to show th... relation of the written language to existing fact *Ebrahim Goolam* v *A M Chetty* 36 Ind Cas 597 Where the question is whether certain properties ar... indeed in the trust deed the conduct of the parties can be looked into i... construing the meanings of the expressions used therein *Subramania* v *Rajeswar*, 40 M 1016=38 Ind Cas 627 Where a deed of transfer raises a... ambiguity as to the nature of interest in the property it purports to convey extrinsic evidence (including evidence as to the course of dealing with th... proper... *Mannulal* ... 52 In ... Vol II ... 359 ... unde... this p... ...lati v *Venka*... I R 1925 P C 75 foll... ...ing circum... stances which will sho... relate... to existing facts is ... 101 Ind Cas 736 In the case of a registered mortgage deed, oral evidence cannot be let in that the property really meant as security is other than what appears in th... deed *Musi Karim* v *Haji Mutasaddi*, 90 Ind Cas 841 Oral evidence to show that one of the executants of a bond was to be regarded only as a surety is inadmissible in view of section 92 *Radha* v *Durga*, A I R 1932 Cal. 323=59 C... 106 Where at the time of the sale by the Government of a certain estate some ... ...fication the ... the lat... ...ming any ... 16...–... ...ntify the thing referred to in a written agreement, as for instance, in a contract to deliver a

quantity or grain (*galla*) at particular time, parol evidence is admissible under certain restrictions to show what kind of grain the contracting parties had in their view at the time the contract was made *Valla* v. *Sidoji*, 5 B H A C 87. Where a mortgage deed does not indicate by name the property mortgaged, evidence may be adduced to prove what property was mortgaged *Ramlal* v *Harrison*, 2 A 832.

Illustrations *Illustration* (a)—This illustration is based on *Western* v. *Fines*, 1 Taunt 115.

Illustration (b)—This illustration relates to proviso (3); vide also *Ramjiban* v *Ojhur Nath*, 2 C W N 188

Illustration (c)—"So where a deed conveyed the messuage and land called Gotton farm, consisting of particulars specified in a schedule, and delineated in a map drawn thereon, evidence that a close, not included in the map and schedule had always been occupied and treated as part of Gotton farm rejected' *Taylor* § 1152 citing, *Barton* v *Dawes*, 10 Com B 261; *Llewellyn* v *Ld Jersay*, 11 M & W. 183

Illustration (d)—*Vide* proviso (1)

Illustration (e)—*Vide* proviso (1)

Illustration (f)—*Vide* proviso (2)

Illustration (g)—*Vide* proviso (2)

Illustration (h)—*Vide* proviso (2)

Illustration (i)—*Vide* proviso (3); *Srimal* v *Naresh* A I R 1932 P. 332 = 13 P. L T 545.

Illustration (j)—*Vide* proviso (3)

93 When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Exclusion of evidence to explain or amend ambiguous document

Illustrations

(*a*) A agrees, in writing, to sell a horse to B for Rs 1 000 or Rs 1,500 Evidence cannot be given to show which price was to be given

(*b*) A deed contains blanks Evidence cannot be given of facts which would show how they were meant to be filled

Two sorts of ambiguities according to Lord Bacon 'There be two sorts of ambiguities of [illegible] *latens*, *patens* is t[illegible] ment; *latens* is [illegible] that appeareth up[illegible] out [illegible] *tas patens* is never holpen by [illegible] not couple and mingle ma[illegible] with matter of averment, which is of inferior account in law, for that were to make all deeds hollow and subject to averments and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed Therefore if a man give land to *I D et I S hæredibus*,' and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was the inheritance should be limited But if it [illegible] my manor of S to I F [illegible] upon the deed, but if [illegible] North S, this ambiguity [illegible] averment, whether of t[illegible] Another sort of *ambiguit*[illegible] spoken of before is, when one name and appellation doth denominate [illegible] things; and the second is, when the same thing is called by divers [illegible] As, if I give lands to Christ Church in Oxford, and the name of the [illegible] is *Ecclesia Christi in Universitate Oxford*, this shall be holpen by [illegible]

because there appears no ambiguity in the words for the variance is matter in fact But the averment shall not be of the intention, because it does not stand with the words For in the case of equivocation the general intent includes both the special, and therefore stands with the words, but so it is not in variance and therefore the averment must be a matter that doth induce a certainty, and not of intention as to say that the precinct of Oxford and of the University of Oxford is one and the same, and not to say that the intention of the parties was that the grant should be to Christ Church in the University of Oxford *Sir Francis Bacon's Maxim*, rule XXV (Works, Speding's edition 1861, Vol XIV p 273) Much has been said ' says *Dr Schouler* of latent and patent ambiguities in this connection, an expression borrowed from Lord Bacon, whose oft quoted cannon, though *Wigram* and *Jarman* has disputed it (*Wigram Wills* p 196, 1 *Jar Wills*, 429, 430) the Courts do not seem quite ready to discard This cannon regards ambiguities of words as of two sorts—patent and latent, the one where the instrument appears ambiguous, the oth[illegible] breed the ambiguity, since the [illegible] In a patent ambiguity the wr[illegible] in proof with the lower or [illegible] latent ambiguity (which in tr[illegible] to facts and circumstances) [illegible] removed by the same means [illegible] presently find that writings [illegible] rather uncertain) on their face with [illegible] such explanatory proof to make their [illegible] as we have just seen the latent ambigu[illegible] alike by merely explanatory proof, or [illegible]tter And again by ambiguity the idea is conveyed that words are capable of more senses than one but the use of extrinsic evidence must be taken in a broader sense and applied [illegible] all where it is insens[illegible] The argument mor[illegible] or equal quality [illegible] antedating as it doe[illegible] modern policy of [illegible] were good but practice carried the force of his rule beyond his own examples and his distinction of patent and latent though convenient in some respects can hardly serve as a criterion For in every case, as *Mr Jarman* has truly [illegible] entitled to be placed, [illegible] as possible in the [illegible] Our Courts to day [illegible] are patent where the uncertainty arises upon the words of the Will before any attempt is made to apply them to the object which they describe and parol evidence is not admissible to explain such ambiguities, but is admissible in case of a latent ambiguity whereon supplying the Will to the subject matter it is uncertain what is its meaning So extrinsic evidence may be admissible to determine the existence of latent ambiguities in the Will *Schouler's Law of Wills* § 925

[illegible] 's rule as to [illegible]ing, although [illegible] by *Ballurst* [illegible] present day [illegible] the general [illegible] not [illegible] the [illegible] to [illegible] been quoted in this [illegible] that "We sho[illegible] [illegible] philosopher if [illegible] be a complete disse[illegible] [illegible]pre-tation of legal [illegible]ame-diate subject both of the maxim and the commentary, is not evidence but pleading and although no doubt, the pleadings would guide the judge as to

the issue upon which evidence would be received, they would not necessarily determine the nature of the evidence admissible upon each issue" (F M Nichols *Extrinsic Evidence in the Interpretation of Wills 2 Jurl Soc Pap 35, 376, December, 1860*) *Phe Treat Ev* pp 425—126 So this rule cannot be relied on as a test of admissibility of evidence, for it is still commonly said that parol evidence may not be given to explain a patent ambiguity, yet this is not generally true *Watchman* v *Att Gen* (1919) A C 533, *Re May* (1912) 56 S J 111, *Phip Ev 7th Ed* p 590

Difference between patent and latent ambiguities A good test of the difference is to put the instrument in the hands of an ordinary intelligent, educated perso ... e is nevertheless an uncertaint ... but if he detects the ambiguity ... Thus in illus tration (b), the ... ould not be filled by parol testimony as to the intention of the parties, etc In the illustration to section 95 no one could detect any ambiguity from merely reading the instrument The ambiguity does not consist in the language, but is introduced by extrinsic evidence *Nort Ev* 279

Similar law Vide s 81 of the Indian Succession Act, (XXXIX of 19 5)

Principle The province of the Court is to interpret —not to make It is to construe ... others For ... from the na ... of construction, to insert in the blank the property or thing omitted, which of the sons was meant by the gift to one or who was the Lady—this would be to ... mits evidence to explain, it ... ice it is laid down that in case ... *Goodeve Ev* 392

... ain or unintelligible that they are incapabl ... hell ... to ... deed ... exampl ... Papers ... word ... impossible to comprehend and therefore to enforce cannot be deemed a jural act *Wigmore* § 2407 But even the above proposition sometimes too broadly advanced must be understood with a certain qualification So far as extrinsic ... r to bring out the ... was framed, there is ... ambiguity is called ... d *Abinger* in *Doe d* ...

language may be not only inartistic composition, and that in which it is one of omission of subject ma ... be not only inartistic but confused ... sible, or it may exhibit a capacity ... olution as to ... terms of art or terms otherwise not

ordinary rules of legal construction In a medium of total darkness the eye could not exercise its powers of vision and the mind would not be allowed to speculate on what he could not see In the latter case, the instrument may omit the very essence of its intended operation Thus blank may have been left for the subject or person to be dealt with or to take, say—in a deed the property intended to be passed —in a Will the legatee —in a contract the thing bought or if not a total blank what is tantamount to it as in a devise to one of the sons of J S a Lady—without saying what Lady He So parol evidence is in admissible in cas of these two classifications, indeed as beyond that of individual expressions admitting interpretation On the first, beyond assigning a meaning to expression extrinsic evidence could have no bearing, and it is unnecessary to discuss its admissibility From the second it would be excluded *Goodeve Ev* 391—392 ting is required by law If no writing is requir incomplete that its meaning cannot be asce case contemplated—it may be disregarded or used as an admi ion, and oral evidence given *Markby Ev* p 747b A mortgage document was very inartistically drawn up It was ungrammatical and could not be read literally so as to give any clear meaning In order to give the construction contended for by one party or the other some words had either to be supplied or removed *Held* that there was patent ambiguity in the document and no evidence could be given to supply the defect *Ram Ganesh* v *Rup Narain*, 80 Ind Cas 944=L R 5 A 542 Section 93 of the Evidence Act does not prevent evidence being given that the municipal number given in rent receip which is different from the present number of the holding was in fact the old number of the same holding *Golstaun* v *Profulla* 36 C W N 583

Rule as laid down in Colpoys v Colpoys *In Colpoys* v *Colpoys*, Jacob, 465 *Sir William Grant* says In the case of a patent ambiguity, that is one appearing on the face of the instrument, as a general rule a reference to matter *dehors* the instrument is forbidden It must if possible be removed by construction and not by averment. But in many cases this is impracticable where the terms used are wholly indefinite and equivocal and carry on the face of them no certain or explicit meaning, and the instrument furnishes no materials by which the ambiguity thus arising can be removed If in such cases the Court were to reject the only mode by which the meaning could be ascertained *viz*, the resort to extrinsic circumstances, the instrument must become inoperative and void As a minor evil therefore common sense and the law of England (which are seldom at variance) warrant the departure from the general rule and call in the light of extrinsic evidence The books are full of instances sanctioned by the highest authorities both in Law and Equity Where the person and the thing are designated on the face of the instrument by terms imperfect and equivocal admitting either or no meaning at all by themselves, or of a variety of different meanings referring tacitly or expressly for the ascertainment and completion of the meanings, to extrinsic circumstances it has never been considered an objection to the reception of the evidence of those circumstances th t the ambiguity was patent ... of the instrument ... istian name is ... that evidence ... t is ambiguous it has different meanings when used by a farmer and a merchant So, with a bequest of jewels, if by a nobleman, it would pass all; but if by jeweller, it would not pass those that he had in his shop Thus the same expressions may vary in meaning according to the circumstances of the testator ' See also *G W Ry Co* v *Bristol Cor* 87 L J Ch H L 414, 429 So not only in the case of an ancient deed or other document but also in the case of a modern document in which there is a latent ambiguity evidence may be given of user under it to show the sense in which the parties to it used the language which they have employed and their intention in executing the instrument as revealed by their language interpreted in this sense Such evidence can also be adduced for the same or a similar purpose where the ambiguities in the language of the instrument is patent and not latent as for instance where the description by boundaries,

of the property granted by the instrument conflicts with the description by acreage *Watcham v A G*, (1919) A. C. 533=(1918) 87 L J Pr Cr 150 **S. 9.**

Mr Starkie's classification of patent ambiguities "By patent ambiguity ...

principle on which the rule is founded is, that the intention of the parties should be construed, not by vague evidence of their intentions, independently of the expressions which they have thought fit to use, but by the expressions themselves Now those expressions which are incapable of any legal construction and interpretation by the rules of art, are either so because they are in themselves unintelligible, or because being unintelligible, they exhibit a plain and obvious uncertainty In the first instance the case admits of two varieties; the terms, though at first sight unintelligible, may yet be capable of having a meaning annexed to them by extrinsic evidence, just as if they were written in a foreign language, as when mercantile terms are used, which amongst mercantile men bear a distinct and definite meaning, although others do not comprehend them: the term used may on the other hand, be capable of no distinct and definite interpretation Now, it is evident that to give effect to an instrument, the terms of which though apparently ambiguous are capable of having a distinct and definite meaning annexed to them, is no violation of the general principle, for in such a case effect is given, not to any loose conjecture as to the intent and meaning of ... where either ... or being in ... are equally ... sic evidence ... d intention ... By patent ambiguity, therefore must be understood an inherent ambiguity, which cannot be removed either by the ordinary rules of legal construction or by the application of extrinsic and explanatory evidence, showing that expressions *prima facie* unintelligible are yet capable of conveying a certain and definite meaning." *Starkie on Evidence* p 653

Blanks and ambiguities "A document may be void for intrinsic indefiniteness of terms, or it may be, though definite impossible to enforce extrinsically, because there are no objects existing upon which its terms can operate These are simple principles, well established in their sphere; but in concrete application both of them require discrimination from the foregoing principle concerning equivocations Is a blank space an equivocation? It certainly fits two or more objects equally, and where it represents merely an insufficient term in an attempted description it may be treated as an equivocation, because the writer has fixed upon an object, but his words do not carry the description far enough On the other hand, where a blank space represents a failure to make a final expression of will, the act is incomplete, to supply declarations of intention would be to set up a rival Will; there can be no interpretation, for there is nothing to interpret It therefore depends on the particular do u... In *Bayl*... "to th... ... st, 'by month... was held to be ... *Mourmand* v ...

' this is only that th...
Page, 4 Ves Jr. 6 ...

93. L R 2 P D 66 (69) where an executor named as Percival of Brighton Esq the father" applied to *William Percival Boxall* who ...
Wigmore § 2473
legatee or devise
and the principle
or thing being be ... to give to—£1 000 leaves therefore no one who can claim the legacy, and to give to A B— leaves nothing to be claimed as a legacy, and in either case the testator likely enough had never resolved upon a gift definitely, though turning it over in his mind as to the subject or object *Miller* v *Traverse* 2 Atk 239 ...
1 *Jarm Wills* 441 But partial blanks may
construction not perhaps by direct parol

... be identified, and so too ... was given to A and other of £700 to B a third legacy of 600 to C might well be supposed to mean six hundred pounds Upon partial blanks on the other hand which leave the sense defective, no valid gift can be based *Mason* v *Bateson* 26 Beav 404 And if besides a blank there is an uncertain description the Will becomes doubly inoperative *Gill* v *C* (1909) P 157, *Hubbuck s Estate* (1905) P 129, *Harby* v *Wall* 1 B & All 103 Moreover a devise or bequest, wholly omitted by mistake is not to be inserted in a Will (*Newbough's Case* 5 Madd 364) yet some partial omission might not exclude a sensible constr...
extr...

... as Re 1 per cent per month and that it was due to a clerical mistake that the words per cent had been omitted from the mortgage deed *Held* that it was not a case of patent ambiguity as is contemplated by s 93 of the Evidence Act *Pari Bhorosay* v *Janki* A I R 193 Oudh 95=125 Ind Cas 175 This rule is not applicable where the amount of legacy is expressed by ...

Extrinsic evidence *Mr Wigram* lays down the following proposition Where the words of a Will aided by evidence of material facts of the case are insufficient to determine the testator s meaning no evidence will be admissible to prove what the testator intended and the Will (except in certain special cases See Prop VII) will be void for uncertainty (*Proposition VI—Vide Wigram* p 91) This proposition has been quoted by *Lord Russell C J* in *Re Stephens* (1897) 1 Ch 79 and is there well founded It establishes the right of every claimant under a Will to bring under the view of the Court, which is to expound it every material fact to which the Will expressly or tacitly refers, it establishes that Courts of law recognise that natural dependence which exists between language and the circumstances necessary to a right interpretation of the language, and consequently that a reference to such circumstances in expounding a Will is strictly consistent with the office simply of determining the meaning of the testator s words But if the testator s words aided by the light derived from the circumstances with reference to which they are used do not express the intention ascribed to him evidence to prove the sense in which he intended to use them is, as a general proposition inadmissible—in other words— that the judgment of a Court ...

S.

by ... e private instructions given to hi... a v *Haridas*, 17 Bom. L R 116 ... *Choudhury v Nalin Chandra*, 14 ... sued on a handnote executed by him in favour of the respondent for the sum of Rs 380 ' with interest at 2½ per cent', the stipulation as to interest stopping short at the rate and there being nothing expressly stated in the document as to whether the interest should be calculated annually or monthly or otherw... that the words used meant that the intere... Court observed 'In *Mahomed Samsoodeen* ... 379, it was held by this Court that where a note of hand promised repayment of a loan with interest at 5 per cent, without stating either per mensem or per annum, the construction that interest must be calculated without reference to time was contrary to all practice and the ambiguity was one which might fairly be explained by previous transactions between the parties and by custom This case, if it is any authority at all, is obviously in point, but, as the learned vakil for the Appellant has pointed out it was decided before the enactment of the Indian Evidence Act We believe however, that the Evidence Act made no change whatever in the law on the subject and we are of opinion that there is no sufficient reason for coming to a different decision in this case In our view the words 2½ per cent in the bond before us clearly means 2½ per cent per mensem.' See also *Mohamed v Zafar* 62 Ind Cas 702, *Indro Deb v Asgar*, 16 C W N 957, *Bissessur v. Bhagban* 5 A W N 41 In *Protal Chandra Sha v Mohammad Ali Sircar*, 19 C L J 67 = 41 C 312, a *kabuliyat* recited that interest would be paid by the tenant upon rent in arrears at the rate of one anna per rupee It did not expressly state whether interest at the rate was payable monthly or annually The only point in that case was whether evidence could be given as to what was intended In holding that under sections 92 and 93 of the *Evidence Act oral evidence is not admissible to show the intention of the*

before the Indian Evidence Act was placed in the Statute book . . It may be pointed out, however, that evidence of previous transactions between the parties or of the custom of the country may be admissible for a limited purpose, *Thus to take one illustration—it has been held that evidence may be allowed to* be given in anticipation of some obvious defence, for instance, evidence of prior

parties entered into this contract of tenancy they agreed that the interest would

blanks Evidence cannot be given of facts which would show how they were

dant denies his liability on the ground that he signed the document as an attesting witness, oral evidence to prove that the defendant was executant and hence liable under the terms of the contract was held to be admissible *Muhammad v Jaichand*, A. I. R 1930 All 700.

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nswered the description
ill for the name of a
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)00" leaves therefore no
one who can claim the legacy; and to give "to A. B—" leaves nothing to be claimed as a legacy; and in either case the testator likely enough had never resolved upon a gift definitely, though turning it over in his mind, as to the subject or object *Miller* v *Tra* ... Drew 19
1 *Jarm Wills* 441 But partia
construction, not, perhaps by
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six hundred pounds Upon parti
sense defective, no valid gift can be based *Mason* v *Bateson* 26 Beav 404 And if, besides a blank, there is an uncertain description, the Will becomes doubly inoperative *Gill* v *Gill* (1909) P 157, *Hubbucl s Estate* (1905) P 129, *Harby* v *Wall* 1 B & All 103 Moreover, a devise or bequest, wholly omitted by mistake is not to be inserted in a Will (*Newboogh's Case*, 5 Madd 364), yet some partial omission might not exclude a sensible construction of the gift with the aid of
term indicating the identity
employs an uncertain term
Ky 80 The Court may go further and where a person is partially described as beneficiary, but the
the description
5) P 129=92 L.
was found that
the rate of interest agreed upon was Re 1 per cent per month and that it was due to a clerical mistake that the words "per cent" had been omitted from the mortgage deed *Held* that it was not a case of patent ambiguity as is contemplated by s 93 of the Evidence Act *Ram Bhorosay* v *Janki*, A I R 1930 Oudh 95=125 Ind Cas 175 This rule is not applicable where the amount of legacy is expressed by cypher (*Kell* v *Charmer*, 23 Beav. 195), nor when property is conveyed by inconsistent description (*Both* v *Ratte*, 15 App Cas 183) Where there is a discrepancy between sums expressed in words and figures the former will prevail *Saundessar* v *Piper*, 5 Bing N 525, Phip Ev 591

Extrinsic evidence *Mr Wigram* lays down the following proposition "Where the words of a Will aided by evidence of material facts of the case, are insufficient to determine the testator's meaning no evidence will be admissible to prove what the testator intended and the Will (except in certain special case See Prop VII) will be void for uncertainty (*Proposition VI—Vide Wigram*
... *In Re Stephenson*
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larators of
his Will
private to
trustee no 1, out of the trustees, appointed by me, my trustees should entrust to Haridas Rs 5 000 that may be received from my life policy and the shares of Tata & Co also should be transferred to the person whose name will be disclosed

by Hardas." The evidence of Hardas as to the private instructions given to him by the testator was held admissible *Bagibai* v *Hardas*, 17 Bom. L R 115 =27 Ind Cas 916=40 B 1 In *Manmotha Nath Choudhury* v *Nabin Chandra*, 14 C W N 1100=14 C L J 97, the appellant sued on a handnote executed by him in favour of the respondent for the sum of Rs 350 with interest at

379, it was held by this Court that where a note of hand promised repayment of a loan with interest at 5 per cent without stating either per mensem or per annum, the construction that interest must be calculated without reference to time was contrary to all practice and the ambiguity was one which might fairly be explained by previous transactions between the parties and by custom This case, if it is any authority at all, is obviously in point; but, as the learned vakil for the Appellant has pointed out it was decided before the enactment of the Indian Evidence Act We believe however, that the Evidence Act made no change whatever in the law on the subject and we are of opinion that there is no sufficient reason for coming to a different decision in this case In our view the words 2½ per cent' in the bond before us clearly means 2½ per cent per mensem ' See also *Mohamed* v. *Zafar*, 62 Ind Cas 702, *Indro Deb* v *Asutur*, 16 C W N 957, *Bissessur* v. *Bhagban* 5 A W N 41 In *Protab Chandra Sha* v. *Mohammad Ali Sircar*, 19 C L J 67=41 C 312, a *kabuliyat* recited that interest would be paid by the tenant upon rent in arrears at the rate of one anna per rupee It did not expressly state whether interest at the rate was payable monthly or annually The only point in that case was whether evidence could be given as to what was intended In holding that under sections 92 and 93 of the Evidence Act oral evidence is not admissible to show the intention of the parties *Mr Justice Mookerjee* said "In view of the provisions of sections 92 and 93 of the Indian Evidence Act, it is plain that oral evidence was not admissible to show what was intended by

be payable at the rate of 1 anna per rupee per month

blanks Evidence cannot be given of facts which would show how they were meant to be filled" See also *Ram Ganesh* v *Rup Narain*, A I R 1925 All. 34=80 Ind Cas 944, *Sorju* v *Sukhu*, 4 P L T 577

Where a lease is ambiguous, evidence of user under it may be given in order to show the sense in which the parties used the language and their intention in executing

Prasanna v *Ma*

Watcham v *Att*

dant denies his

attesting witness

hence liable unde

mad v *Jaichand*, A I R 1930 All 100.

L R 2 P D 66 (69), ... Percival of Brighton E... the father" applied ... ho answered the de... he Will for the name of a ... *Wigmore* § 2473 The

resolved upon a gift definitely, though turning it over in his mind, as to subject or object *Miller* v *Traverse*, 2 Atk 239, *Taylor* v *Richardson* 2 Drew 19 1 *Jarm Wills* 441 But partial blanks may in a suitable case, be supplied construction, not, perhaps by direct parol evidence of what the testator intend but at all events where the context, with or without the aid of extrinsic cir stances, supplies a definite thing or per ... a legacy to "Mr B , or to 'John or to ... where one legacy of ... "600' to C, might ... unds Upon ... blanks on the other ... no valid gift can be based *Mason* ... sides a blank there is ... operative *Gill* v G ... *y* v *Wall* 1 B & Ald ... by mistake is not ... 361), yet some partial ... he gift with the ... of ... uncertain term of the devisee extrinsic ... The Court may such evidence is admiss ...

due to a clerical mistake that the words "per cent" had been omitted ... mortgage deed ... as is contem plated by s 93 ... A I R 193 Oudh 95 = 125 ... re the amount of legacy is exp ... 19... nor when property ... 15 App Ca ... 183) ... nd figures the forr ... 91

Extrinsic evidence *Mr Wigram* lays down the following proposition "Where the words of a Will aided by evidence of material facts of the case, are insufficient to determine the testator's meaning no evidence will be admiss... to prove what the testator intended and the Will (except in certain special case See Prop VII) will be void for uncertainty (*Proposition VI—Wigram* p 91) This proposition has been ... *In Re Stephen* (1897) 1 Ch 79 and is there we ... every claimant under a Will to bring ... expound it every material fact to which th ... between that Courts of law recognise t ... of the language and the circumstances necessary to a right interpretation ... language ... in expound ing a ... determining the meaning ... by the ... derived ... are ... express ... in which ... words— ... laratory of ... his Will ... entrust ... shares of ... & Co al o should be transferred to the person whose name will be ...

e private instructions given to S. ar v Harilas, 17 Bom. L R 115 Choudhury v Nabin Chandra, sued on a handnote executed by him in favour of the respondent for the sum of Rs 350 with interest at 2½ per cent the stipulation as to interest stopping short at the rate and there being nothing expressly stated in the document as to whether the interest should be calculated annually or monthly or otherw that the words used meant that the intere Court observed In Mahomed Samsoodeen 379 it was held by this Court that where a note of hand promised repayment of a loan with intertest at 5 per cent without stating either per mensem or per annum the construction that interest must be calculated without reference to time was contrary to all practice and the ambiguity was one which might fairly be explained by previous transactions between the parties and by custom This case, if it is any authority at all, is obviously in point, but, as the learned vakil for the Appellant has pointed out it was decided before the enactment of the Indian Evidence Act We believe however, that the Evidence Act made no change whatever in the law on the subject and we are of opinion that there is no sufficient reason for coming to a different decision in this case In our view the words 2½ per cent in the bond before us clearly means 2½ per cent per mensem See also *Mohamed v Zafar* 62 Ind Cas 702, *Indro Deb v Asmar*, 16 C W N 957, *Bissessur v. Bhagban* 5 A W N 41 In *Protal Chandra Sha v Mohammad Ali Sircar*, 19 C L J 67=41 C 31? a *kabuliyat* recited that interest would be paid by the tenant upon rent in arrears at the rate of one anna per rupee It did not expressly state whether interest at the rate was payable monthly or annually The only point in that case was whether evidence could be given as to what was intended In holding that under sections 92 and 93 of the Evidence Act oral evidence is not admissible to show the intention of the parties *Mr Justice Mookerjee* said "In view of the provisions of sections 92 and 93 of the Indian Evidence Act, it is plain that oral evidence was not admissible to show what was intended by from the language used by them in *Nath v Nabin Chandra*, (*supra*) is re who decided the case did not specify t interpret the instrument, they relie *Samsoodeen v Moonshee Abdool* (1864 before the Indian Evidence Act was placed in the Statute book It may

case before us no such consideration arises because the only evidence upon

Extrinsic Evidence when not admissible A district Judge held, that a contract, compensation for breach of which was sued for, was ambiguous on the face of it But he held that evidence was admissible to show the intention of the parties, and he acted upon such evidence *Held* this was in contravention of section 93 of the Evidence Act and illegal within the meaning of s 622 of the Civil Procedure Code *Joman* v. *Ah Yu*, 14 Bur L R 58 Under section 29 of the Contract Act, an agreement is void if its meaning is not certain or capable of being made certain, and under section 93 of the Evidence Act, where the language of a deed is, on its face, ambiguous or defective, no evidence can be given to make it certain *Deogil* v *Pitamber*, 1 A 275 Where the terms of a document are ambiguous on the fac ... to prove the intention of the executant A ...
ambiguities according to its own
not to enforce a contract made by the parties but to make a new contract for them *Berket Ram* v *Ananti Ram*, 31 Ind Cas 632; see also *Maharastraya* v *Byjulal* 71 Ind Cas 436, *Collector of Etwah* v *Beti Maharani*, 14 A 169, *Norsingerji* v *Penanganti*, (1921) M N W 819

94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Exclusion of evidence against application of document to existing facts

Illustration

A sells to B by deed, "my estate at Rampur containing 100 bighas' A has an estate at Rampur containing 100 bighas Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size

Scope of the section "The words of a written instrument must be construed according to ... acting by the ... So far as I ... insisted upon that ... must be construe ... of the instrument itself' ... *Hastings*, (1900) ... in an instrument ... of the language the parties have deliberately chosen to employ *Per Lord Macnaghten* in *ibid* So it is a rule of law that extrinsic evidence is not admissible to alter a written contract, or to show that its meaning is different from what it imports *Ram Lochun* v *Unno Poorna*, 7 W R 144 This section embodies the rule of law laid down by *Tindal C J* in *Shore* v *Wilson*, 9 Cl & F 565, where he said 'The general rule I take it to be, is that where the words of any instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to proper application of these words to claimants under the instrument, or as to the subject matter to which the instrument relates, such instrument is always to be construed according to the the strict, plain, common ... such case, evidence *dehors* the ... according to the surmised or ... is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party taking under it, for ablest advice might be co ... at some future period, parol e ... affixed to his words, or of his se ... the objects he meant to take ... vary the plain language of the instrument itself' See also ... *La Po Kuai*, A I R 1932 P. C 525=63 M L J 418, where it was approved.

In *Webb* v. *Byng*, 1 Kay & John. 580 *Vice Chancellor Wood* said, "The law has become so settled by numerous decisions, as to how far external evidence is admissible, and what that species of evidence must be, that I need only sum up

what appears to be the result of the authorities Of course in interpreting any instrument which purports to deal with property, some extrinsic information is necessary, in order to make the words, which are but signs, fit the external things to which those signs are appropriate In reality, external information is requisite in construing every instrument; but when any subject is thus discovered, which not only is within the words of the instrument, according to their natural construction, but exhausts the whole of those words, then the investigation must stop and you are bound to take the interpretation which entirely exhausts the whole of the series of expressions used by the testator, and are not permitted to go any further" So where

are the words which your Lordships have to construe, and I confess that it is to my mind absolutely amazing that any one can entertain the smallest doubt as to what those words mean I have read the words by themselves because in my view of the meaning of this instrument, they are to be read by themselves One does not doubt that, where you are construing either a Will or any other instrument, it is perfectly legitimate to look at the whole instrument—and indeed, you must look at the whole instrument—to see the meaning of the whole instrument, and you cannot rely upon one particular passage in it to the exclusion of what is relevant to the explanation of the particular clause that you are expounding" "The true construction of the agreement depends upon the ordinary meaning of the words used, and if those words are plain and

rently understood by the parties themselves and that the omission by the plaintiff and his predecessor for upwards of forty years to claim the rents now sought to be recovered is cogent evidence that such was the case I grant that if the clause were capable of this construction, one of which supports, and the other of which would defeat the claim, the omission would afford irresistible proof that the latter was the interpretation intended by the parties No such ambiguity, however, exists, and it seems therefore to me that, in the absence of any proof to the contrary it must be assumed that the parties knew and understood the language they were using and that in executing the agreement containing that clause they were truly expressing their intentions, and are bound by the writing they have signed Why the agreement was so framed—what were the considerations which induced it—and why the claim was so long allowed to sleep are mere matters of speculation, but one has no right to act upon speculation to set aside a deed or agreement which is on the face of it clear and definite" So a Court must construe a deed according to the plain, ordinary meaning of its terms, and must not import words into it from any conjectural view of its intention, which would have the effect of materially changing the nature of the estate thereby created *Mussamat Bhagubutti* v *Choudhry Bholanath*, 2 I A 256=1 C 101, *Millard* v *Bailey*, 1 Eq 378; *Gibson* v *Minet*, 1 H Bl 615 In cases contemplated by this section there is

intention of the makers of instrument, which must be gathered from the words they have used where those words are definite and unambiguous, and the Court must not travel outside the words used to found or confirm speculations as to their having in fact intended something other than what they have said" See also *Shambhuset* v *Sitaram* 3 Bom L R 768 *Rahim Baksh* v *Shajad* 19 C W N 1311 *Midnapore Zamindary* v *Jogendra*, 33 C L J 186 Evidence of the conduct of parties to a document subsequent to its execution is not admissible for the purpose of explaining its meaning *Chandra* v *Seualat* A W N 1882, 54

In cases of misdescription oral evidence is admissible *Mahabir* v *Muhommad*, 38 A 103=14 A L J 15=32 Ind Cas 174, see also *Saboji* v *Kaicab*, 104 Ind Cas 736 Where the dispute is not as to the existing facts but is as to what is intended by the parties to be done by them in future, s 94 does not apply and mutual mistake of fact can be proved *Dalip* v *Dalip*, A I R 1930 Lah 446=122 Ind Cas 493 Evidence to prove plaintiff's adoption by the deceased is not inadmissible in evidence under this section on the ground that the language of a document, on which the plaintiff has partly relied but to which he is no party, [illegible] of the fact of such adc[illegible] 57 P L R 1915=27 Inc[illegible] in cases where the words are ambiguous or capable of more than one interpretation that oral evi[illegible] *sho Ram* v *Thakur Das* 78 Ind Ca[illegible] given under s 97 proviso (6) where [illegible] applies accurately to existing facts G[illegible] *Mahabir* v *Marsiat ulla* 38 A 103

Document is plain in itself A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only, if found to be of uncertain meaning when persons of competent [illegible] 189 It must [illegible] "that a Will [illegible] If it is finally [illegible] meaning not [illegible] ng judicially at [illegible] deration, it is determined judicially that no interpretation can be given to it This dictum was quoted with approval by *Lord Davy* in *Higgins* v *Dawson* (1902) A C 1 at p 10

Intention Two opposing theories are maintained as to the object of interpretation The *first* and by far the most widely held asserts that the question is not what the writer meant but simply what is the meaning of his words *Phip Ev* [illegible] p 683 It is not the duty of a Court of Justice to search for the testator's meaning otherwise than by fairly interpreting the words he has used' *Per Lord Cranworth* in *Abbot* v *Middleton*, 7 H L C 68. In *Doe d Brodlett* v *Thomson* 12 Moo P C 116, *Turner L J* observed 'It is upon intention either expressly declared or collected by just reasoning upon the terms of the instrument or evidenced by [illegible] circumstances can be called in [illegible] Lordships feel bound to proceed' [illegible] instruments must be to ascertain the e[illegible] writer, the expressed meaning being equiva[illegible] in *Shore* v *Wilson* 9 Cl & F 575 [illegible] construction of written instruments, is not what was the intention of the parties, but what is the meaning of the words they have used' *Per Lord Denham* in *Hickman* v *Cartairs*, 5 B & Ald 663 see also *Doe d Templeman* v *Marten*, 4 B & Ad 783, *Grant* v *Grant* L R 5 C P 731, *Grey* v *Pearson*, 6 H L C 106, *G W Ry Co*, v *Bristol*, 87 L J Ch H L 419 424, 428, *Lovell* v *Wall* 104 L T 85, C A, per *Holmes* in 12 Harv L Rev 417 418 *Smith* v *Lucas* 18 Ch D 531, *Ingham* v *Taynor*, (1891) 2 Ch. 83, *Sanatun* v *Joggut*, 8 M I A 66, *Scale* v *Rawlings*, (1892) A C 342, *Srinibas* v *Monmohini*, 3 C L J 224, *Aghore* v *Kamini*, 11 C L J 461, *Mary Wilson* v *George Lakes*, 31 M 283, *Dinabai* v *Nusserwanji* 22 C W N 199=49 I A 323=49 C 1060 (P C), *Okeymonee* v *Nilmony*, 15 C 282, *Advocate*

General of Bombay v *Hormusji* 29 B 375; *Babu* v *Sitaram*, 3 Bom L R 768; S. *President* v *Chilakaman*, (1911) 2 M W N 238; *Velappa* v *Palani*, (1915) M. W. N 325=29 Ind Cas 201; *Manmatha* v. *Probodh*, 37 C L J 52 "As
...us to say
..., for the
rule laid
ordinary
...id to have
...e Courts,
...gal minds
...ained are
accustomed to jump at a conclusion as to what a person means by considering what they, under similar circumstances, think they would have done This is conjecture only, and conjecture on the imperfect knowledge of the circumstances of the case, because the facts known to the testator may not all be before them, and the testator's mind, as regards the attention to be paid to the claims of different parties dependent upon him, may not have been constituted as their minds are constituted, so that it cannot be concluded that he would have acted in the same way as they We therefore must construe the Will as we should construe any other document, subject to this, that in Wills, if the intention is shown it is not necessary that the technical words which are necessary in some instruments should be used for the purpose of giving effect to it' *Per Cotton L J.* in *Ralph* v *Carrick*, 11 Ch D 873 (878)=48 L J Ch 801 The *second* regards the intention of the writer as the chief object of concern, and the mere grammatical and lexicographical meaning of the words as not strictly interpretation at all, since it is only (it is said) after the meaning of the words has been ascertained as has failed to explain the meaning of the writer, that interpretation properly so called begins,—i e, that the gap left by the partial failure of language to express the intention has to be filled by an inquiry into other indications thereof *Phip Ev 7th Ed* 583. Indeed, that the object cannot be to

7th Ed 583 See also *Doe* v *Hiscocks* 5 M & W 363, *River Wear Commrs* v *Adamson*, 2 App Cas 743, 763 In the last mentioned case *Lord Blackburn* said: "In all cases the object is to see what is the intention expressed by the words used But, from the imperfection of language it is impossible to know what that intention is without enquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object appearing from these circumstances which the person using them had in view, for the meaning of the ...
they were used'
as follows "...
meaning of the
put in this
or the other
meaning of t...
It is not the meaning of the words in the abstract, for the meaning of the words varies according to the circumstances under which they were used, and not the meaning of the writer apart from his words, for the question is one of interpretation, and what he meant to
We must seek, the meaning of the
we must seek the meaning of the
as he used them, the meaning which
L Rev p 323 cited in *Phip Ev 7th Ed* 586.

Meaning to be ascertained from the whole document. In *Boston* v *Fitzgerald*, (1815) 15 East 530, *Lord Ellenborough* said "It is a true rule of construction that the sense and meaning of the parties in any part of an instrument may be collected *ex antecedentibus et consequentibus* every part of it may be brought into action in order to collect from the whole an uniform and consistent

sense, if that may be done" See also *Damodar Das* v. *Dayabhai*, 23 B 833=25 I A 126=2 C W N 417; *Gray* v *Minnethrope*, 3 Ves 105; *Re Venn* (1904) 2 Ch 52, *Kandarpa* ... *Lakshman* v *Tarangini*, 8 C L J 20; *Tagore* v ... 359; *Kalidas* v. *Kanhaya Lal*, 11 C 121 ... (69); *Shookmany* ... *Lal*, 24 C 834=24 I A 76; *Mahomed* v *Shei* ... *George*, 31 M 283, *Inderwick* v *Satchell*, (1906), 1 Ir R 649; *Brocklebank* v *Johnson*, 20 Beav 213, *Key* v *Key* 4 De J M & G 73, *Pande* v *Surja*, 25 C W N. 961 (P. C); *Grey* v *Pearson* 6 H L Cas 61

Evidence as to document unmeaning in reference to existing facts

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustration.

A sells to B by deed, "my house in Calcutta"

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed

These facts may be proved to show that the deed related to the house at Howrah

Latent ambiguity Sections 95 96 and 97 deal with latent ambiguity These sections correspond ... of 1925) In interpreting a ... the thus laid down by *Wigra* ... in subject of his disposition ... terms which are applicable indifferently to more than one person or thing evidence is admissible to prove which of the persons or things so described was intended by the testator" Latent ambiguity, in the more ordinary application of the term arises from the existence of facts external to the instrument; and the creation, by those facts, of a question not solved by the document itself ... may afford ... instances of ... open to the ... wever, to this class of cases we now advert, but to those in which the ambiguity is rather that of description, either equivocal itself from the existence of two subject-matters ... ought to bear ... Blackacre, may ... ing two sons ... all would be ... doubt (vide ... could be more ... a gift to my son John" The embarrassment is raised when it is sought to apply to the gift, and then the discovery is made which did not occur to the testator namely, that there are two estates Blackacre, or two sons John In either case accordingly, ... there ... ing ... ns, ... ct- ... ter subject or object in exact correspondence with it, so that it would be uncertain ... Thus, in ... had a ... title v ...)—C. ... red to ... cases

which created the uncertainty, and the question which extrinsic circumstances created, extrinsic evidence was admitted to clear up The distinction will be obviously between clearing up an ambiguity, and creating a subject *Goodeve Ev* pp 395-96

Principle The process of interpretation is a part of the procedure of
the completion
al must remain
empty mani-
festoes, must be enforced They must be applied to external objects Somewhere possession must be yielded, or goods delivered or money transferred; and in order that the law may enforce these changes in external objects the relation between the terms of the jural act and certain external objects must be determined, as an indispensible part of the process In short, the interpretation of the term of jural act is an essential part of the act considered as capable of legal realization and enforcement The only difference is that the actor alone creates the terms of his act, while the interpretation of it, being a part of the enforcement, comes into the hands of the law *Wigmore* § 2458 Every agreement must receive its construction from its own terms, without the introduction of any evidence *dehors* the instrument, unless there be some latent ambiguity" *Per Rooke J* in *Coler* v *Guy* 2 B & P 565, 569, see also the remarks of *Lord Eldon* in *Smith* v *Doe*, 2 B & B 473 (602) But where the words stand in *equilibrio*,
ier there it is
ouper in *Strode*
) "If you go
to explain such
C C 335, 341

This section has its origin in the maxim "*falsa demonstratio non nocet cum de*

1265—66

constr
the V
out of
Salk 234, *Lord Holt* said

depart from the Will to
Goodinge v *Goodinge*, 1
down much too large by *Holt*, for in several cases it is admitted it must be allowed,—namely, where the description or thing is uncertain, it must be

nued by *Lord Thurlow*, whose ruling in *Fonneren* v *Poyntz*, 1 Bro C C 492 was considered a dangerous innovation As late as the beginning of the 1800 s there were Judges who still thought that the only proper exception was an equivocation In *Doe* v *Chichester*, 4 Dow 65 93, *Gibbs C J* said "The Courts of law have been jealous of the admission of extrinsic evidence to explain the intention of a testator; and I know of only one case in which it is permitted that is, where an ambiguity is introduced by extrinsic circumstances" *Wigmore* § 9470

Application of the Section "The admission of extrinsic circumstances" says *Plumber M R*
cases an exception
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explained" In the sa
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same manner," Th

where the terms of a contract has been reduced to writing, no evidence shall be given in proof of the terms of the contract except the document itself, or, in certain cases, secondary evidence of its contents But this rule is subject to the ... nd 97. *Karuppa Gounden* v *Peria* ... 397 Parol evidence is admissible to ... son to whom, a written instrument applies or refers; and for such purpose to explain the latent ambiguities Such parol evidence may be of the surrounding circumstances, or apparently, of statements of intention made by parties to a document. *Doe* v *Needs*, 6 L J Ex 59 = Cockle Cas 355 In *Doe* v *Martin*, 4 B & Ad 770, 785 *Parke J* said: "It may be laid down as a general rule that all facts relating to the ... aid in ascertaining ... Court is at liberty to ... ed upon the mind of the persons by whom the deed or will (it matters not whether it was one or the other) was executed The Court therefore has not merely a right, but it is its duty to inquire into the surrounding circumstances, before it can approach the construction of the instrument itself" *Sugden L C* in *Att Gen* v *Drummond* ... nature of the claim ... prove that the claim ... under section 63 of the Contract Act, even though it is conditional and is not supported by consideration *Mathew* v *Lodge*, (1910) M W N 191 = 20 M L J 383 A compromise decree provided for interests at 2 per cent and the question arose whether the interest was payable at the rate monthly or annually *Held* that it was open ... as to the ... *Mahamud* v ... tract have to ... to be taken ... *opolitan Fi* ... 305 Where the plaintiff sued for a declaration that he was a mortgagee in possession of certain plots and alleged that the numbers entered in the mortgage deed were incorrect, *held*, that oral evidence was admissible under ss 95 and 96 of the Evidence Act to prove how the description given in the mortgage deed was relevant to the existing facts *Radha Lal* v *Augue*, 16 P C 230 = 21 Ind Cas 429 Where the description of property sold is such that one portion of it applies ... y to a portion ... to the whole ... sic evidence ... e description of the property taken as a whole ... hole house or only a portion of it *Abdul Gh* ... Ind Cas 442 But where a desc ... and the former part is sufficient to ... the ... the ... bject ... d by ... Where a mortg ... 6607 but it ... bearing Tauzi No 6607 but it was found that the mortgagor owned Tauzi No 9907, *held* that it was open to the mortgagee to prove by evidence what the property actually mortgaged was and that the mortgagor could not claim any exoneration on the ground of ... 1 Pat L R ... xtrinsic evidence ... transferred the ... nly the mortgage ... mentioned in the deed that the property stood in the *Khata* of the mortgagor and that there is an indemnity clause cannot justify the contention that only mortgage rights were intended; and if the absence of any assertion in the deed of absolute ownership on the part of the vendor mortgagee makes it possible to hold that the mortgagee's rights were sold, there is a latent ambiguity to remove which evidence can be given, *Daulat* v *Baliram* 118 Ind Cas 682 = A I R. 1929 Nag 267. Suit was brought by plaintiff as Receiver

appointed under an order of Court with authority to sue defendant for money due to a third party. The money was due under an agreement, dated 26th August, but by mistake the order referred to the money as being due under an agreement of the 25th October *Held* that the intention of the parties is immaterial in construing the order, and section 95 of the Evidence Act does not apply. *Binode Behary* v *Raj Narain*, 30 C. 699 = 7 C W. N 651 Where land with certain boundaries is sold and is wrongly described as containing a certain area, the error is regarded as a mere misdescription and does not vitiate the deed. The maxim *demonstratio falsa non nocet* applies Where in a sale-deed the land sold is sufficiently identified by the descriptions of its extent and assignment and the name of the registered *pattadar*, the addition of a wrong survey number may be disregarded and does not render it useless as a document of title *Karuppa Gounden* v *Peria Thambi*, 2 M L T 556 = 30 M 397. Under

A. I R 1930 Lah 414

General principle and scope of the section It is not necessary and it is not humanely possible, for the symbols of description which we call words, to describe in every detail the objects designated by the symbols The notion that description is a complete enumeration is an instinctive fallacy which must be got rid of before interpretation can be properly attempted For example, a devise of "the house owned by me at No 19, Theatre Road Calcutta" is obviously a mere shorthand indication of some simple but essential attributes of the house How many stories, rooms, doors, windows, closets, has it ? What is the colour of paper on the respective walls, the kind of carpet on the floors,

it with fair certainty from others Certainty in other words, is a relative term, it signifies that the few terms employed are the essential ones for the purpose Had they not been in themselves sufficient, we might even have looked at

term, we are to apply the devise to that house Just as we found that the omitted terms were not essential to applying the description, so we may find that some of the inserted terms are not essential We are doing it no violence by ignoring the non essential terms, for neither the omission nor the insertion of non essential terms alters its essence as a whole By conceiving clearly the

appreciate that
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Wigmore § 247
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y itself would have been correct , 19 W R 276, *Tarak* v *Joy* e of *falsa demonstratio non nocet* it is in lse demonstration appears It is , and qualify what has gone before that case *Lindley M R* observed 'I must protest against the way in which the doctrine was stated by the applicant's counsel—that the maxim *falsa demonstratio non nocet* only applies where there is some correct description at the end of the sentence That is whittling away the doctrine and making it ridiculous; it is a misapprehension'

Intention 'As soon as there is an adequate and sufficient definition with convenient certainty of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it" *Per Parke B* in *Llewellyn* v *Earl of Jersey*, (1843) 11 M & W 183 at p 189 description is treated as mere surplusage *utile per inutile non vitiatur* (Interpret in the description of legacies, like those be rectified by reference to the terms circumstances taken together *William's*

Application of the maxim in different classes of cases According to *Mr* s (1) where an plication to any *inning* v *Crans toun* 7 M & W 1; (2) where there is a complete description, but the testator goes on to add words for the purpose of identifying or elaborating the previous description, these words, if inconsistent with the previous description may be rejected *Armstrong* v *Buckland*, 18 Beav 204, *Sligsby* v *Grainger*, 7 H L 273; *Travers* v *Blundell* 6 Ch D 436; (3) where there is no continuous description, and there is something answering to part of it, and something answering to other part, but two together are inconsistent, the question is which are the leading words of description? *In the first class of cases under the head there is no repugnancy* between the general terms and the particular superadded description, in the second and third class there is a repugnancy between the two parts of a description *Theobold*, 7th Ed 140

Illustrative cases If a testator devise his black horse, having only a white one (*Door* v *Geary* 1 Ves Sen, 255) or devise his freehold houses, having only leasehold houses (*Day* v *Trig*, 18 P Wms 286; *Doe d Bunning* v *Cranstoun*, 7 M & houses in the other w subject intended is added description though false, introduces no ambiguity; and as, by the to any subject, the Court does by rejecting them. To such cases, with propriety be applied *Gynes* ns, 1 Ves Jun 266; *Dowsett* v *Sweet*, Amb 175; *Garth* v *Meybrick*, 1 Bro C C 30, *Stockdale* v *Bushley* 19 Ves 381; *Smith* v *Campbell*, 19 Ves 403; *Welby* v *Welby*, 2 Ves & B 191, *Richardson* v *Watson* 4 B & Adol 733, *Miller* v *Travers*, 8 Bing 244, *Doe d Smith* v *Gallaway*, 5 B & Adol 43, and this is the proper limit of that Maxim *Wigram 5th Ed* 61

Extension of the rule In the application of the principle in question the Courts have not confined themselves to cases which are strictly within its terms It is often found, on a disclosure of the facts of the case that of two

"house" in a particular place, or his "B estate", or the like, then although he adds a clause to the effect that the property is in the occupation of a particular tenant, or is situate in a particular country, street or other locality, and it turns out that such clause is true only of a part of the property, the entire subject may well pass, unrestricted by additional clause, if such a construction be in accordance with general interest of the testator *Jarman 6th Ed* 126, citing *Roe* v *Vernon*, 5 East 80, per *Lord Ellenborough* In *West* v *Lawday*, 11 H L C 381 *Lord Westbury* explains the maxim *falsa demonstratio non nocet* in the following terms 'where some subject-matter is devised as a whole

inaccurate enumeration of the particulars' In the case of *Travers* v *Blundell*, 6 Ch D 436, the testator was exercising a power given him by his father's Will over an estate called the Rigbby's Estate which his father had purchased, and *Sir G Jessel* after saying that the real question in cases of this description was which is the leading description, *held* that the words in the Will that part of Rigbby's Estate purchased by my father was the leading description although the enumeration of the closes, of which the Will said the estate consisted made no mention of the two clauses *Tribhovandas* v *Krishnaram* 18 B 283 (288)

Inaccurate description The testator made a bequest of my "portrait of X" to the National Gallery and the executors sent it on there being no doubt as to the identity of the thing, bequeathed The trustees of the National Gallery expressed doubts as to whether it was a portrait of X whereupon the executors claimed it back for the residuary legatee *Held* even assuming the description was wrong, the gift was valid and the portrait passed to the trustees of the Gallery *In re Milner, Gibson Cullum Cust* v *Attorney General*, (1924) 1 Ch 456, a testator specifically devised 'all my messuage farm lands and hereditaments in Bently and Bombay in Essex now in occupation of Thomas Girling purchased by him of Alderman Thrope' It was found that the testator had a farm in Bentley and Bombay called 'Welham's farms compounded of two small farms purchased by him of Alderman Thrope in 1881, and of another adjoining small farm and a field both purchased by him from *Mr Carrington* At the date of the Will and death of the testator the whole of the lands so purchased were in the occupation of *Thomas Girling* who found them as one holding *Held* that the whole of Welham's farm passed to the specific devisee *Norman* v *Norman* (1919) 1 Ch 297

Evidence as to application of language which can apply to one only of several persons

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Illustrations.

(a) A agrees to sell to B for Rs 1,000, "my white horse" A has two white horses Evidence may be given of facts which show which of them was meant

(b) A agrees to accompany B to Haidarabad Evidence may be given of facts showing whether Haidarabad in the Dekkhan or Haidarabad in Sind was meant

Principle "If you go to parol evidence to raise the ambiguity you cannot well refuse it, to explain such ambiguity *Per Lord Thurlow in Shelborne* v. *Inchiquin*, 1 Bro C C 338 341

Similar law *Vide* s 89 of the Succession Act (XXXIX of 1925)

Scope When there are two or more persons or things, and each of them exactly answers to the description in the Will, then all manner of parol evidence

is admissible, (*Charter* v *Charter*, L. R, 7 H. L 364), for the language of the Will is complied wit' ... ' ever thing passes under the beque ... Bing 244 *Tindal C J* said; "... *Verborum latens verificatione suppletur*) applies will be found to range themselves into two separate classes The first class is where the description of the thing devised, or of the devisee, is clear upon the face of the Will; but upon the death of the testator it is found, that there are more than one estate or subject matter of devise, or more than one person whose description follows out and fills the words used in the Will As where the testator devises his manor Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale, or where a man devises to his son John, and he has two sons of that name In each of these cases respectively parol evidence is admissible to show which manor was intended to pass and which son was intended to take. The other class of cases is that in which the description contained in the Will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular As where an estate is devised called A, and is described as in the occupation of B, and it is found, that though there is an estate called A, yet the whole is not in B's occupation; or where an estate is devised to a person whose sur name or Christian name is mistaken; or whose description is imperfect or inaccurate; in which latter class of cases parol evidence is admissible to show what estate ... pass and who was the devisee intended to take, provided there ... ntion appearing on the face of the Will to justif ... ence" "Where the object of testator's bounty or ... (i e the person or thing intended) is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator" *Wigram Proposition VII* at p 110 See also *In re Stephenson*, (1897) 1 Ch 80, ... W. 129; *Umesh* ... e given of every ... ment in which ... the language of ... more objects ... the case and of statements made by any parties to the document, and as to the intentions in reference to the matter to which the document relates" *Steph Dig Ev* art 91 This rule is applicable where two persons have got the same name as mentioned in the document, but one of them has got an additional name *Bennet* v *Marshall*, 2 K & J 740; *Doe* v *Allen*, 12 A & E 451; *Fleming* v *Fleming* 31 L J. Ex 419; *Webber* v *Corbet*, L R 16 Eq 515 In order to ascertain the intention of the parties to any instrument evidence of the conduct of the parties is admissible *Watson* v *Mohesh*, 24 W R 176 (177), *Cheetun* v *Chutterdhoree*, 19 W R 432

When an instrument appears, on the face of it, to be free from ambiguity, ... ted, ... two ... ... 09, ... ent comes to ... *nality* v *The* ... ase, as *Lord* ... and extrinsic ... of Lords in ... 87 L J. Ch ... purpose of ... he words are applicable was intended to be denoted Reference may in this connection be ... v *Jeffryes*, 15 M & W. 561 ... C. J in *Shore* v. *Wilson*, ... v. *Tennel*, 7 H L C 650 ... Co v *Marine Board of* ... *Cape*, ... A. C. 32, and of *Lord Atkinson* in *Watchhan* v. *Attorney General*, (1919) A. C 533=87 L J P. C. 150 The decision of the judicial

committee in the last mentioned case shows that the principle that when an

Co Ltd, 36 C L J 212=72 Ind
directly describes two sets
apply to both, evidence may
Ngacho v *Mi Se Mi*, 10 B
provides for the payment of
whether the parties meant the revenue as assessed at the date of deed or as it might be re-assessed from time to time evidence may be given under this section to show what was meant. *Farrand* v *Kanu*, 22 O. C 270=59 Ind. Cas 264.

Application of the rule T *Bovill*
C. J in *Grant* v *Grant*, L R 5 nd of
parol evidence is not admissib ng, or
altering the Will of the testator, but is admitted simply for purpose of enabling the Court to understand it, and to declare the intention of the testator according to the words in which the intention is expressed If such evidence establishes that the description in the Will may apply to each of two or more persons,

and there appeared by extrinsic evidence to be two persons answering such
d testator's state-
m *Doe* v *Needs*,
6 dgment of the
Court in the above-mentioned case observ
it is uncertain whether a devisor had selected
no evidence would have been admissible
certain individual such would have been a
the meaning of *Lord Bacon's* rule, which ambiguity could not be holpen by averment; for to allow such evidence would be, with respect to that subject, to cause a parol Will to operate as a written one; or adopting the language of *Lord Bacon*, 'to make that pass without writing which the law appointeth shall not pass but by writing' But here, on the face of the devise, no such doubt arises There is no blank before the name of *Gord* the father, which might have occasioned a doubt whether the devisor had finally fixed on any certain person in his mind The devisor has clearly selected a particular individual as the devisee

law, in certain special cases, admit extrinsic evidence of intention to make certain person or thing intended, where the description in the Will is insufficient for the purp

Doe v. *Hiscocks*, 5 M. & W. 363 (367) "which is by evidence of his declarations, of the instructions given for his Will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the Will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and when the devise is, on the face of it, perfect and intelligible but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in the Will), the testator intended to express Thus if a testator devise his mannor of S to A B, and has two manors of North S and South S it being clear he means to devise one only, whereas both are equally denoted by the words he used in that case there is what *Lord Bacon* calls 'an equivocation' i e words equally apply to either manor, and the evidence of previous intention may be received to solve this latent ambiguity" So "where one person accurately fulfils the description, and no one else does you cannot admit parol evidence to show that such person was not intended" *Per Mullins V C* in *Re Wolverton Mortgaged Estates*, 7 Ch D 199; *Re Raven* (1915) 1 Ch 673; see also *Doe* v *Westlake*, 4 B & Ald 57; *Webber* v *Corbett*, L R 6 Eq 515; *Horwood* v. *Griffith*, 4 D M & G 700 But the rule contained in this section is applicable where the gift is "to the four children of my cousin E B" and where in fact E B had six children, two by one husband P. and four by another husband B *Hampshire* v *Pierce*, 2 Weg 216; see also *Jones* v *Newman* 1 W. Bl 60; *Doe* v *Allen*, 12 A & E 451, *Grant* v *Grant*, L R 5 C P 727, *Nassey* v *Jeffry*, (1914) 1 Ch 375; *Bunderson* v *Bunderson*, (1905) 1 I R 353; *Re Baltic Wrighton*, (1920) 2 Ch. 330 This rule is also applicable to deeds and contracts *Wigmore* § 2472.

Ambiguity—Evidence of intention It is commonly said that extrinsic evidence is admissible in cases of latent ambiguities whereas such evidence is inadmissible in cases of patent ambiguities. "But upon examination the maxim proves not to be a universal guide; for, on the one hand, there are many recognised authorities for the admission of parol evidence to explain ambiguities [illegible]

of the words he has used It is to the admissibility of this species of evidence that attention is now to be turned To say that such evidence is admissible, [illegible]

[illegible]

family, or other circumstances, that ambiguity *may be removed by further* evidence of the same nature But in admitting this interpretation of the rule, all distinction between patent and latent ambiguities is lost, for in every case the Judge by whom a Will is to be expounded is entitled to be placed, by a knowledge of all the material facts of the case, as nearly as possible in the situation of the testator when he *wrote it*. A *patent* ambiguity it is true, may not be explained by any other kind of evidence and so far the first branch of the cannon is undoubtedly true But by our hypothesis to this precise extent, and no further, is the latter branch true also We come, therefore, to the conclusion either that the distinction taken by the cannon between latent and patent ambiguities is an unsubstantial one, or that the proposition does, in its second branch, assert the admissibility of evidence to show the testator's intention (as [illegible] words); and that, consequently [illegible] special class of cases It remains [illegible] is admissible. Suppose, then,

that evidence has been given of all the ... S. 9
case, and that these have ult...
existence of more than one object ...
applicable. The uncertainty as to which of these was in the testator's contemplation would if the investigation stopped here, necessarily be fatal to the gift. Under these peculiar circumstances, however, declarations of the testator or other direct evidence of his intention are admissible to clear up the ambiguity, pointing out (if they can) the actual subject or object of gift, among the several properties or persons answering to the description. Of this nature are the examples given by *Lord Bacon*, in illustration of the maxim, "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facit tollitur*"; and are styled by him as cases of equivocation." *Jarman 6th Ed.* 516 518.

Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration.

A agrees to sell to B "my ... and at X, but not in the occupati... Y, but it is not at X. Evidence m... ant to sell.

Principle. "The characteristic of all these cases is that the words of the Will do describe the object or ...
tions of the testator has not t...
whatever; it only enables ...
which the description in the ...
devisor understood to be sign...
Parke B in *Doe* v. *Needs*, 2 M. & W. 129.

Scope of the section. This section is the converse of the preceding one; in that there is language partially applicable to two sets of facts, but wholly applicable to neither. In this ...
admissible for discovering the ...
in section 95. *Can. Ev.* 286 ...
of the person or thing be p...
of the several subjects though ...
stances may be received for ...
subjects the language applies, ...
inadmissible. *Doe* v. *Hiscock* ...
... is found that ... exactly answers ... error appears ... evidence of the ... But according to *Prof. Wigmore* there is no danger in receiving declarations of intention, because the precise words of the document cannot be literally applied in any event, and there is thus no ...
utteran...
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give ef...
strictly logical course, I think, would be either to admit declarations of intention both in cases falling under paragraph 7 (= ss. 95, 97) and in cases falling under

Doe v. *Hiscocks*, 5 M. & W. 363 (367) "which is by evidence of his declarations, of the instructions given for his Will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the Will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and when the devise is, on the face of it, perfect and intelligible but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the Will), the testator intended to express Thus ... manors of North S ... equally ... calls 'an equivocation' i e words equally apply to either ... nce of previous intention may be received ... So "where one person accurately fulfils the ... nnot ... Cb ... 515, ... 4 D M & G 700 But the rule contained in this section is applica... children of my cousin E B" and where in fact ... ne husband P and four by another husban... eg 216, see also *Jones* v *Newman* 1 W. Bl 60; ... v *Grant*, L R 5 C P 727, *Nassey* v *Jeff* ... v *Hunderson*, (1905) 1 I R 353; *Re Baltic* ... rule is also applicable to deeds and contrac...

Ambiguity—Evidence of intention. It is commonly said that extrinsic ... whereas such evidence is ... in the maxim ... many recognised authorities for the admission of parol evidence to explain ambiguities appearing on the face of the Will, while, on the other hand, the existence of a latent ambiguity will certainly not, as appears sometimes to have been supposed, warrant the admission in all cases indiscriminately of parol evidence to show what the testator meant to have written as distinguished from what is the meaning of the words he has used It is to the admissibility of this species of evidence that attention is now to be turned To say that such evidence is admissible, ... the extrinsic facts, is to ... the evidence ... or the former is confined to developments of facts with reference to which the Will was written, and to which the language of the Will expressly or tacitly refers; and therefore, it lies within the strict limits of exposition ... denied that the latter transgresses T... support the proposition only ... ced, into an otherwise unambig... testator's family, or other circumstances, that ambiguity may be removed by further ... retation of the rule, all ... for in every case the ... placed, by a knowledge of all the material facts ... possible in the situation of the testator when he wrote it A patent ambiguity it is true, may not be explained by any other kind of evidence and so far the first branch of the cannon is undoubtedly true But by our hypothesis to this precise extent, and no further, is the latter branch true also We come, therefore, to the conclusion either that the distinction taken by the cannon between latent and patent ambiguities is an unsubstantial one, or that the proposition does, in its second branch, assert the admissibility of evidence to show the testator's intention (as distinguished ... uently ... emains ... them,

that evidence has been given of all the material facts and circumstances of the case, and that these have ultimately raised an ambiguity by disclosing the existence of more than one object or subject to which the words are equally applicable The uncertainty as to which of these was in the testator's contem-

examples given by Lord Bacon, in illustration of the maxim '*Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facit tollitur*"; and are styled by him as cases of equivocation." *Jarman 6th Ed* 516 518.

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Illustration.

A agrees to sell to B "my ... and at X, but not in the occupati ... Y, but it is not at X. Evidence m ... ant to sell.

Principle "The characteristic of all these cases is that the words of the Will do describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the Court, to reject one of the subjects or objects to which the description in the Will applies, and to determine which of the two the devisor understood to be signified by the description which he used in the Will." *Parke B* in *Doe* v *Needs*, 2 M & W 129.

Scope of the section. This section is the converse of the preceding one; in that there is language partially applicable to two sets of facts but wholly applicable to neither In th ... admissible for discovering the ... in section 95 *Cun Ev* 286 ... of the person or thing be p ... of the several subjects though ... stances may be received for ... subjects the language applies, ... inadmissible *Doe* v *Hiscock* ... of the California Civil Code sa ... there is an imperfect, description or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the Will or from extrinsic evidence; but evidence of the declarations of the testator as to his intention cannot be received" But according to *Prof Wigmore* there is no danger ... because the precise words of the documen ... event, and there is thus no competit ... utterance, it is simply a question which ... part of the description. *Wigmore* § 2 ... said. 'Conclusive as the authorities upon ... be presumptuous to express a doubt whether the conflict between a natural wish to fulfil the intention which the testator would have formed if he had recollected all the circumstances of the case, the wish to avoid the evil of permitting written instruments to be varied by oral evidence, and the wish to give effect to Wills, has not produced in practice an illogical compromise. The strictly logical course, I think, would be either to admit declarations of intention both in cases falling under paragraph 7 (= ss. 95, 97) and in cases falling under

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evidence, including expressions ...

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is not to establish
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... by outside circumstances, may be more
stator, in its entire scope, effectuated
eaning." *Wigmore* § 2474 In *Ryall* v
rty to *Elizabeth*, the natural daughter
of B B has a natural son *John*, and a legitimate daughter *Elizabeth* The Court may infer from the circumstances under which the natural child was born, and from the testator's relationship to the putative father, that he meant to provide for ... A leaves a legacy to his niece *Elizabeth Stringer*. At
niece named
hat *Eli abe h*
given by the
for a niece
Elizabeth Stringer, who had died before the date of the Will and that it was put into the Will by a mistake on the part of the solicitor. *Stringer* v *Gardiner*, 27 Beav 35=4 Deg & J 468. Critising on that decision *Sir James Fitz-james Stephen* said "Such a decision as that in *Stringer* v *Gardiner*, the result of which was to give a legacy to a person whom the testator had no wish to benefit, and who was not either named or described in his Will, appears to me to be a practical refutation of the principle or rule on which it is based Of course every document whatever must to some extent be interpreted by circumstances However accurate and detailed a description of things and persons may be, oral evidence is always wanted to show that persons and things answering the description exist; and therefore in every case whatever, every fact must be allowed to prove to which the document does, or properly may refer; but if more evidence than this is admitted, if the Court may look at circumstances which affect the probability that the testator would form this intention or that why should declaration of intention be excluded? If the question is, 'what did the testator say?' why should the Court look at the circumstances that he lived with *Charles*, and was on bad terms with *William*? How can any amount of evidence to show that the testator intended to write "*Charles*" show that what he did write means "*Charles*"? To say that '*Foster*' means '*Charles*,' is like saying ... why
nd what
'What
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I would
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pp. 186, 187.

... A agree to sell to B
I at X but not in the
it is not at X, evidence
Another common case
is wrongly described as
containing a certain area, the error in area is regarded as a mere misdescription

and does not vitiate the deed The maxim *demonstratio falsa non nocet* applies *Karuppa* v *Periathambi Goundan*, 30 M 397 (399) So where land is described in a document by boundaries and area is wrongly specified, the land within the boundaries will pass whether it be less or more than the quantity specified *Bhayalal* v *Dwarka*, 15 C P L R 163. In such a case the maxim *falsa demonstratio non nocet* applies, ar

v *Sandes*, 12 W R 439, *Eslim* v
18 W R 25, *Kazee Abdul* v. *Buroda*
tam, 18 B 283; *Subhoya* v *Mut*
Harimohan v *Rimesuar*, 64 Ind C
751; *Narain* v *Jawahar*, 50 P, I
L T. 245.

Wh

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house
is adm
of the property taken as a whole the intention was to convey the whole house or only a portion of it *Abdul Ghani* v *Ashiq Husain*, 66 Ind Cas 442=(1922) O

of an ambiguity in the description of land in a mortgage deed it is open to a party to show by other evidence what land was actually covered by the deed. *Ramchandra* v *Arshad Ali*, 43 Ind Cas 721

Whole of it does not apply correctly to either This section has application when the whole of the language used in a document does not apply correctly to either Because "if I have some land wherein all these demonstrations are true, and some wherein part of them are true and part false, then shall they be, intended words of true limitation to pass only those lands where all those circumstances are true' This rule is based upon the 13th maxim of *Lord Bacon* which is as follows,
trationem quae competunt in limitatio
is devised, and there are found t
and precisely corresponding to th
so completely answering thereto, the latter will be excluded, though had there been no other property on which the devise could have operated, it might have been held to comprise the less appropriate subject', *Jarman 6th Ed* 1276 A devise of lands described in a particular place and in the occupation of a particular per the occupation of that person l, 26 Beav. 202; see also *Tulsa* Ind Cas 791 'Where a testator has devised all his lands at any particular place, extrinsic evidence is not admissible f
other lands not situated
lands having been enjoyed
period of time, or of th
of his having been in the h
under one distinguishing name' *Per Baggally L J.* in *Homer* v. *Homer*, 8 Ch. 758 at p 774.

Evidence as to meaning of illegible characters, etc.

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

S.

Illustration.

A, a sculptor agrees to sell to B, "all my mode" A has both models and modelling tools. Evidence may be given to show which he meant to sell.

Principle "Where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for reason and common sense agree, that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in foreign language, in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed; in cases where terms of art occur;—in mercantile contracts, which, in many instances, use a peculiar language, employed by those only who are conversant in trade or commerce;— and in other instances in which the words besides their general common meaning have ac... culiar idiomatic meanin... m was dwelling, or in th... which he passed his life... the real meaning of th... language used in the instrument, in order to enable the Court or Judge to construe the instrument" In ... *Baron Parke*) said: "I apprehend ... two which bear upon the subj... admissible in every case for the purpose of enabling a Court to constr... written instrument, and to apply it practically. In the first place, there is no doubt that not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms, or indeed any expressions are used, which, at the time the instrument was written, have acquired an appropriate meaning either generally or by local usage, or amongst particular class. This description of evidence is admissible, in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves and without reference to extrinsic facts on which the instrument is intended to operate."

Scope of the section. In order to interpret or ascertain the meaning of a written document, parol evidence may be given of the meaning or sense in which not only words, but also signs, symbols, private marks, or nicknames, have been used. Such ev... ...ning of which is in ques... by the person... class of persons... *Ev* 362 So in order to ascertain the meaning of the signs and words ma... upon a document, oral evidence may be given of the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations, and of common words which, from the context, appear to have been used in a peculiar sense; but evidence may not be given to show that common words th... which do not appear from the ... fact so used *Stephen Dig* ... ible said *Lord Thurlow* in *S*... no instance where parol evidence has been ... into a more vulgar sense... have no idea of its ... have obtained a preci... that would, as ... In *Beacon L. & F. Ins. Co.*, 1 Moore P. C. N. S. 79, 98, *Lord Chelmsford* said: "In order to construe a term in a written instrument where it is used in a sense differing from its ordinary meaning evidence is admissible to prove the peculiar sense in which the parties understood the word; but it is not admissible to contradict or vary what is plain." See also *Per Malins V. C* in *Aslver's Trusts* L. R. 12 Eq 183, 186. *Prof. Wigmore* in his Law of Evidence in considering

both the theory and policy of the above rule said "That the *theory* of it is unsound, ought not to be doubted There can be in the nature of things, no absoluteness of standard in interpretation An advanced communism might conceivably bring men to such a level of intellectual uniformity that their thoughts would be expressed in invariably identical symbols But till that day comes the varieties of individual expression and sense must be unquenchable So long as men are allowed to grant and contract freely and so long as the law undertakes to carry out those acts by enforcement, just so long must the standard of interpretation continue to be mobile, subjective, and individual . The fallacy consists in assuming that there is or can be one real or absolute

Justice Bowen it is not so much a cannon of construction as a counsel of caution' (*Re Jodrell* L R 41 Ch D 590) The distinguished Master of the ... to counsel that 'no body could ... , and yet the Court of Appeals ... ter all convinced of that precise ... D 181) To say that it would ... vidence to fail to be convinced, ... that is very different from an ... idicial mind is legally not open ... eory nor in policy any basis for an absolute rule declaring that when a word has a plain meaning, *i e* by the popular standard neither the local nor the mutual nor the individual standard can be substituted, such a rule is still maintained by many utterances like those above quoted But its vogue is disappearing; . . " *Wigmore* § 2462

In *Brown* v *Byrne*, 3 E & B 703, *Lord Coleridge J* said "Neither, in the ... ll the ... linary

... orking ... lo not ... there ... ed. ... s own

Illegible Where the writing is that in ordinary use, but illegible, the ... *t Li* 281 So it is ... assist in deciphering ... *Masters* v *Masters*, ... § 2025 Illegibility ... peculiarity of character, ... riting Referring to a case of *cypher*, *Baron Alderson* observed "Words on paper are but the means by which a person expresses his meaning, and shorthand is in this respect, like long hand, and equally admits interpretation' *Clayton* v *Nugent*, 13 M & W. 206

of a foreign rule of law in general (*Vide* s 45). The question that involve the present ... the Court, may any ... doubts that the aid ... if necessary, ... in the text ... any time be ... Cl & F. 115; ... H. L. C. 640.

Wigmore § 1953 The translation of native documents in the High Courts will afford a familiar illustration on the point of language to that of the Court. *Goodeve Ev* 376 As regards construing a foreign document, *Lord Esher M. R.* said "Now, this writing was a business document, written in Brazil in the Brazilian law and custom, by a man of business carrying on business in Brazil. An English Court has to construe it, and the first thing, therefore, that the ... guage used in the docu... of trying to find out in ... the words of the docu-ment, a true translation is the putting into English that which is the exact effect of the language used under the circumstances. To get at this in the present case you must get the words in English which in business have the equivalent meaning of the words in Brazilian, as used in Brazil, under the circumstan... translator competent to translate ... ular ... say meaning ... what is that meaning Among those experts you might want a Brazilian lawyer—and a Brazilian lawyer for that purpose would be an expert. This is the first thing the Court has to do Then, when the Court has got a correct translation into English it has to do what it always has to do in the case of any such document—either a contract, or such an authority as this—that is to say, determine what is to be ... In wrote it, and what is to be ... urt ... our e ... had ... al, or ... translation ... veyed to ... *Ganga-* ... at these ... renders ... y verbal ... translations have ... other a ... advise ... transla... ded by ... trans... " As ... *Janga-dhar Lal*, 22 B 142, *Harris* v *Brown*, 28 C 621; *Queen Empress* v *Kali Prasanna*, 1 C W N 465, 479; *Mahalalu* v *Hakeem*, 10 C L R 293, 300 301

Obsolete expressions ... the case of *Walker* ... lern times to ... s to who were ... Holy Gospel', evidence was given from history, contemporaneous with the deed, of the existence of a particular sect assuming to themselves that denomination, and of the founder's connection with them *Goodeve Ev.* 376

Technical expressions It is obvious that the interpretation of the meaning of the document in respect to ordinary words, being a part of the function of the Court, is not for a witness to speak to But so far as the words are technical, and the witness speaks to technical usage or meaning, there is no prohibi-

S.

in each instance whether it needs any
-d or phrase in dispute *Wigmore* § 1955
be received, . but you cannot ask a
witness what is the meaning of a written document' *Kirkland* v *Nisbet*, 3 Macq
Sc App C 766 In most of the cases in this section the word or words may be

unless from other words it is very clear that the
Lord Redesdale in *Jesson* v *Wright*, 5 M & S

testimony to ascertain the technical and popular use of the word *Burr Jones*
§ 455

In mercantile contracts the question has often arisen on expressions denoting ti
1 Esp
turn t
which
and e
was understood to mean a package of
ockburn C J said "If the term 'bale' as
particular trade a signification differing
ence must be received on the subject,
ontract" So a bale of cotton may mean a

or locality, no matter how plain the apparent
reader. In *Smith* v *Wilson*, 3 B & Ad 728
prove that by the customary meaning of tl
applied to rabbits, meant '100 dozen In

ssels are named with 'and
elivered from either at seller's
"Yes, if you read it strictly
Lord Abinger, said "The
Court must look at each contract, and say whether in its whole spirit and meaning *and* did not mean *or* in the understanding of the parties" "Days" in a bill of lading, was held to mean "working days" *Cochran* v *Retberg*, 3 Esp 121 In *Grant* v *Maddox*, 15 M & W 737, interpreting the word 'year' evidence was admitted of the professional usage that actors were never paid during the time of vacation In *Myers* v *Sarl*, 3 E & E 306, which was a building contract,

'dark gray or black mohair," the goods had a dark appearance, and *Jessel M R.* declaring "that is a black selvedge and not a white selvedge," and that "no evidence would convince them that black was white", declined to give effect to the plaintiff's testimony that the plaintiff's selvedge "was what was ... ppeal,
this was ... r the
selvage is ... vage"
Wigmore ... " was
interpreted ... accor-
dance wit ... Parol

evidence was admissible to show that the term 'in the month of October' according to the mercantile usage, means a particular part of the month *Chat* ontext quali ming Whe re any and s and *quabi-jindad* held that the ladies obtained an absolute estate *Thakur* ... *Jamna Kuar*, 6 A L J 420, *Chunilal* v *Bai Muli*, 2 Bom L R 47=24 B 420 *Surjomoni* v *Rabinath* 30 A 84 *Kandarpa* v *Jogendra*, 12 C L J 391 *Lalitmohan* v *Chakl anlal* 23 C 834 ... N 458, *Raidas* v *Bargolap* 26 C 26 C W N 425 (P C); *Sulochana* *Ashutosh*, 27 C 44, *Sibnarayan* v *Tarangini*, 8 C L J 20

Local and Provincial expressions Of local usage a striking illustration is afforded by the case of a lease of a rabbit warren, where the lessee covenanted to leave on the warren at the expiration of the term 10,000 rabbits, the lessor paying for them ... that according to the loc meant 1,200 *Smit* usage of a trade the ordinary or popular sense of words, it remains merely a question for the particular case whether the parties have in fact spoken according to that standard Where all the parties are members of the same trade or other circle of persons, little difficulty can arise, the only requirement is that the special sense alleged should be in fact a usage, or settled habit of expression, and not merely the expression of a few persons or of casual occasions *Russian Steam Nav* v *Silva*, 13 C B N S 610 617 Where the usage is not that of a trade but of a locality, the form of it may be common reputation or commonly used documents *Wigmore* § 2464 Where in a deed words in use in a particular locality in a peculiar sense are employed, oral evidence is admissible under section 98 of the Evidence Act to explain the meaning of the words in question *Chiddu* v *Cheu*, 63 Ind Cas 138

Abbreviations Where initials or other abbreviation are to be interpreted the local usage or repute is of course receivable *Wigmore* § 2464 A wager contract to run one grey hound against another, concluded with the initials P P Evidence was received to show that it meant— Play or Pay, —that is to say,—win the match, or forfeit the stakes *Alderson B* said ' standing by themselves those letters are insensible, but the evidence confers a real meaning upon and that they were inse also *Baron Parke* said 'T It is like the case of a of a celebrated sculptor, 'mod—tools for carving ' is a familiar illustration on the part of terms of art The word ' mod was there contended on the one hand to mean modelling tools and on the other models, which latter were of great value, and evidence of sculptors and others was received in interpretation of the word mod ' *Goblet* v *Beechey*, 3 Sim 24, *Goodeve Ev* 377 On this case the illustration is based Put the case of shorthand writers' notes, which a Court unskilled in the art of stenography must have explained or interpreted before it can attach any meaning to the arbitrary signs *Kell* v *Charmer*, 23 Beav 195

Words used in a peculiar sense There is no reason in the nature of things, why th words in a particular sense, use what we are seek ng standard is merely taken in theory only a question of fact in each case whether the parties were using a special mutual sense The application of the principle has long been seen in the interpretation of descriptions in deeds, because there is there always some concrete and local object, fully known to the parties but unknown to the Court and in every such case it is obvious that the words used must be translated into things and facts, the parties to the deed almost always use terms of description which are peculiar to themselves *Wigmore* § 2465 *Doe* v *Burt*, 1 T R

701, 704, *Van Diemen's Land Co* v. *Marine Board*, (1906) App. Cas. 92; *Squire* v. *Campbell*, 1 My1 & C 159 "The purpose of all such evidence is, to ascertain in what sense the parties themselves used the ambiguous terms in the writing which sets forth
it manifest in what sense
the best definition to be app
The effect must be limited
the subject matter If so lim
the negotiations relates to the future, and consists in positive engagements on the part of the other party to the contract Their effect depends, not upon their promissory obligation, but upon the aid they afford in the interpretation of the contract in suit They are not the less effective for the purpose of explanation and definition because they purport to carry the force of obligation *Per Wells J* in *Stoops* v *Smith*, 100 Mass 63 In *Doe* v *Benjamin*, 9 A. & E 644, 652, *Coleridge J* said "The Courts have come to some inconsistent conclusions in cases of this kind, out from the main body of them

at the time, in order to see in what sense the words were used" *Wigmore* §§ 2465, 2467. In *Kell* v. *Charmer*, 23 Beav 195, a bequest was "to my son W the sum of ixx; to my son R C the sum of oxx, the testator having in the course of his business used certain private marks or symbols to denote prices or sums of money," this usage was resorted to, and showed that the sums of £100 and £200 were signified In *Re Ofner, Samuel* v *Ofner*, (1909) 2 Ch 60, a bequest was to "my grand nephew Robert O' There was no 'Robert O' but there was a "Richard O' Evidence of the memorandum of the testator showing that the testator called Richard "Robert" was admitted; see also *Erven* (v *Halston*, (1912) 1 Ch 135, *Wigmore* § 2467 Where a Hindu testator uses technical terms of English law in his Will and those terms have no accepted meaning in Hindu law the rule is that effect of the intention of such terms cannot be given *Jatindr* ... 317 P C = 18 W R 359, *Kristoromone* ... F O B means Free Bombay Harbour ... (519), see also *Jadu Rai* v *Bhabataran* ... *Jackeriah*, 2 Ind Jur 311

Who may give evidence of agreement varying terms of document.

99 Persons who are not parties to a document or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration

... otton, to be ... that three ... ween A and

Principle "The rule under consideration is applied only (in suits) between the parties to the instrument; as they alone are to blame if the writing contains ... contained It cannot ... prejudiced by things ... gnorance, carelessness, ... to be precluded from

proving the truth, however contradictory to the written statement of others *Greenl Ev* § 279, cited in *Taylor* § 1149, *Holt* v *Collyer*, L R 16 Ch D 718 Strangers have not assented to the compact nor can they be heard in a procee ing to set aside or reform it Hence they are at liberty to show that the written instrument does not disclose the true character of the transaction *Burr Jones Ev* § 449 To hold strangers bou
which were behind their backs,
cessat lex the rule therefore doe

Scope of the section This section being an enabling provision cannot be held to prohibit the reception of evidence as to a fact in issue or a relevant fact admissible independently thereof *Pathammal* v *Syed Kalai Rautar* 27 M 329, *Krishna Swami* v *Mangala Thammal* 53 Ind Cas 243 It is well settled that the word varying' in section 99 covers the same ground as the words
or subtracting from' in section 92 (*Ide*
9) No construction of section 92 can modify
which provides that persons not parties to the document or their representatives in interest may give evidence to show a contemporaneous agreement' *Krishna Swami* v *Mangala Thammal* 53 Ind Cas 243 see also *Maung Kyin* v *Ma Shwe* 15 C 320=22 C W N 257 P C So extrinsic evidence is admissible to show the real nature of the transaction, both as against and as in favo
evidencing the transaction irresp
be clothed *Baldeo* v *Puttu La*
evidence provided by section 92
itself, one to be used only as between the parties to the instrument or by th representative in interest *This section expressly gives a free* hand to persons
necessary implication when read with
ecutants of documents against such
R 115 Under sections 92 and 99 of
ven by the pre emptor to show the real nature of the transaction he being no party to the instrument *Chhutko* v *Jugga* 8 Ind Cas 501, *Khoidad* v *Nasar*, 127 P L R 1902 *Parmanand* v *Atrabat* 20 P R 1899 *Usman* v *Md Shafi* 1927 A 204=98 Ind Cas 99 Where A purported to make a gift of his lands to his daughter B it was open
vidence that the transac-
was, consequently liable
ined against him *Jugal*
plaintiff is not a party to
purported to be a
t a sale *Bageshri*
473, *Ishfaq* v
event
Syed 53 Ind Cas 961 The excepti
a fraudulent operation of the instrumen
of one of the parties may introduce
the fraudulent intent which accompanied and characterized the giving of instrument Similarly a person who is suing one of the parties to a sealed instrument upon a cause of action not arising out of the instrument may show that the instrument was in fact a mere device concocted to mislead outsiders dealing with one or the other parties to it and that it did not truly represent the relation between those parties It is to be observed however that the right of a stranger to vary a written contract by parol is limited to rights which are independent of the instrument *Brown Parol Ev* § 28 So when one, although not a party to the instrument has his claim upon it and seeks to render it effective in his favour as against the other party to the action, by enforcing a right originating in the relation established by it or which is founded upon it, the parol evidence rule applies *Burr Jones Ev* § 449 A person who does not claim through the settler is entitled to challenge the
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L 711

Saving of provisions of Indian Succession Act relating to wills

100. Nothing in this Chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865), as to the construction of Wills.

S. 10
& S.

and limits so far as relates to immoveable property situate within those territories
rules
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771

reversed in 22 C 788 (P C)

PART III.

PRODUCTION AND EFFECT ON EVIDENCE

CHAPTER VII

OF THE BURDEN OF PROOF.

Burden of proof

101 Whoever desires any Court to give judgment as to any legal right or liability dependent on the *existence of facts which he asserts must prove* that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person

Illustrations

(a) A desires a Court to give judgment that B shall be punished for a crime

in the

to be true

A must prove the existence of those facts

Burden of Proof—its origin and place in the law of Evidence "Whoever enters in a legal controversy needs to know with precision what is in dispute, in point of substantive law in point of fact, and in point of form All this he must know before he reaches the trial. The ascertaining of it belongs, properly, to the period when you state your case, the period of pleading *It* matters not what be the purpose of pleading, whether, as in the Roman system, it

1. be "to give notice to the parties respecting the facts intended to be proved or as at common law, ' to separate the law fro-
down to a single issue, with a view to a trial
Pl s 34)—the rules of correct pleading inv
preliminaries At any rate, they are not to
which has no precepts at all on these subjects
concerned with a later stage of the proceedings, the trial, and with the presen tation to the tribunal of evidential matter for enabling it to answer questions which should have been previously r
to be known The term burden of
part, belongs to this preliminary st
the duty of ultimately establishing any propo ition the principles which govern it belong wholly to that stage But the phrase is an ambiguous one, and its uncertainty runs into and perplexes the subject of evidence, so that the student of that subject needs to reflect carefully on these ambiguities to perceive the bearing on them and to have a clear mind about two or three familiar questions relating to the burden of proof, and two or three fallacies about it which are constantly pre enting themselves in the proper region of evidence He would do a great service to our law who should thoroughly di criminate and set forth the whole legal doctrine of the burden of proof The leading
an During
and pecul r
he jury came
rom tho e of
and strange
development of the jury system, and the irregular working of our common law pleading there has come into pro
that in other times and
remained hidden among
the working of our double tribunal of Judge and jury, and the constant neces ty of marking their respective boundaries and of reviewing in a higher Court not merely the instructions given by the trial Judge to the jury, but the whole conduct of the trial,—comes out into the region of judicial rules and precedents *Thayer Pre Treat Ev* 353, 354

Burden of proof—meaning of the term The expression ' burden of proof' has been used several ways (1) as meaning the duty of the person alleging
he one party or the other to
There is an undiscriminated use
of the two, in which it may
Treat Ev 355, *Chamberlayne's*

Burden of proof—whether it belongs to Law of Evidence—"*Burden of Proof*
or
nat
of
led
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arts in
akes it
determine the point to which evidence is to be directed, and who shall have the duty of producing it This is a very ancient function of procedure The precise reason why it is necessary to determine which one of two litigants in a forensic contest has the burden of proof

must be conducted Science, therefore, acknowledges no burden of proof **S.** In the same way, in legal proceedings *in rem*, where the personal element of litigation is in a measure subordinated to the social interest in the ascertainment of the truth regarding the status of persons, the legal relations of property and the like, the assignment of the position of a burden of proof is deemed of much less importance than in personal actions In the latter class of proceedings, however, both the mentally untrained nature of the jury and the limits of time which should be devoted to the trial of any particular case have united with the fact that the tribunal must sit, as a rule, at a particular place whither
iry that before the trial should
ue upon the truth of some definite
known as in the trial by battle,
which a defensive combat This
knowledge it was the appropriate and characteristic mission of pleading to furnish and upon the issue raised by the pleadings one of the parties had the burden of proof and the other had not. *Chamberlayne's Ev* §§ 930, 931

Duty of the person alleging the case to prove it The burden of proof in this sense means "the burden of establishing a case whether by a preponderence of the evidence or beyond a reasonable doubt (*Best Ev* p 268) or as *Prof*

it is a profitable object and not otherwise Here it is seen that the advantage is with B, and the disadvantage with A, for unless A succeeds in persuading M, upon the point of action A will fail and B, will remain victorious the burden of proof, or, in other words the risk of non persuasion, is upon A This does not mean that B is absolutely safe though he does nothing, for he cannot tell how much it will require to persuade M, a very little argument from A might suffice, or if M is of a rashly speculative tendency the mere mention of the proposition by A might without more effect M s action so that it may be safer in any case for B to say what he can on his side of the question, and thus in fact he as well as A, has more or less risk in the sense that there are always chances of A s persuading M no matter how trifling his evidence and argument

and constitute rights and duties
of pleading and procedure, which
ips of data and assign one or
requisites of the tribunal s action
the total facts that can in any
event be involved, and in the second place the law of pleading will further sub divide and apportion these facts *Ibid* If the pleadings consist of the allegation of certain facts by the plaintiff, and their denial by the defendant, the burden of proving the facts be they negative or affirmative, is upon

plaintiff has given *prima facie* evidence which, unless it be answered, will entitle him to have the question decided in his favour, *the burden of proof is shifted* on to the defendant as to the decision of the question itself. This con

that the jury, after considering the evidence, are left in real doubt as to which way *they are to answer the question put to them on behalf of the plaintiff*, in that case also the ... the defendant has been able, ... the minds of the whole jury ... satisfy the burden of proof

Burden of proof as meaning the duty of the one party or the other to introduce evidence. The party having the risk of non persuasion (under the pleadings or other rules) is naturally the one upon whom first falls this duty of going for ... act for him, and since wit ... no action; there is no ... ity thus falls first upon the proponent (a term convenient for designating the party having the risk of non persuasion). This duty, however, though determined in the first instance by the burden of proof in the sense of the risk of non persuasion, is a distinct one, for it is a duty tow ... it is the party if it is not satisfied ... found in an opinion of *Lord Justic* ... W R 50, 53. 'In order to make my opinion clear I should like to say shortly how I ... somebody must go on ... If he ...

... uccessful if no evidence at all was given at this particular point ...

... presumption of ... ther in every ... y person the ... calling ... hat in every

S.

which are rebuttable; by presumptions of fact of the stronger kind, and by

Muthura, 7 C 225

Burden of proof whether shifts "After all the evidence is in whether introduced by the plaintiff or by the defendant, it must appear that the person who had the burden of proof has a preponderance of the evidence in his favour, if he would win the case The burden of proof fixes upon the party who has the duty of first going forward with the case If he fails to introduce any

duced that he has proved his case If, however, he has introduced sufficient evidence to make out what is known as a *prima facie* case, then, in the absence of evidence to controvert such case, the jury would find—for the Judge would so instruct them—in his favour Right here we run up against that other sort of burden of proof noticed above, which is not really burden of proof at all, but only

Phip Ev 7th Ed p 30. Burden of proof means the burden of establishing a case as well as the duty or necessity of introducing evidence The burden of establishing remains throughout the entire case exactly where the pleadings originally place it It never shifts The burden of proof in the sense of introducing evidence may shift constantly as evidence is introduced by one side or the other, as the one scale or the other preponderates *Bhola* v *Bhagwant Rao* 13 C P L R 159, *Robins* v *National Trust & Co*, 101 Ind Cas 903=1927 P C 515; *R* v *Stoddard*, 25 T L R 612, *Radha Kishan* v *Jagahu* 80 Ind Cas 791 P C =47 M L J 329, *Yellappa* v *Tippana*, 33 C W N 238 P C, *Man Mohan* v *Mathura* 7 C 225.

Scope of the section Before the Court can proceed to hear a case, it is obviously necessary to determine which party shall begin, or upon whom the burden of proof of the whole case lies The general rule is that the party who alleges any matter in issue must prove it were only one fact in issue, but there is of proof of some one being on one party position is practically this, that the l against whom judgment would be given *Cockle Ev* 123 This section is based on the general rule that the burden of proof lies on the party who asserts the affirmation of the issue, or question in dispute, according to the maxim, *Ei incumbit probatio qui dicit non qui negat* (The burden of proof lies upon him who asserts not upon him who denies)—a rule which the common sense of mankind at once asserts, and which, however occasionally violated in practice has ever been recognised in jurisprudence *Best* § 269 So it is often said that the burden is upon the party having informed the affirmation of the allegation But this is not an invariable test nor even always a significant circumstance, the burden is often on one who has a negative assertion to prove, a common instance is that of a promisee alleging non performance of a contract It is sometimes said that it is upon the party to whose case the fact is essential This is correct enough, but it merely advances the inquiry one step, we must then ask whether there is any general principle which determines to what party's case a fact is essential The truth ... all the cases all the burden order claim, ... leaves ... the burden of proof upon the plaintiff If the defendant pleads ... fession and avoidance, admitting the plaintiff's allegation, but alleging further facts by way of defence, the matter ... but that of the defendant, if denied ... it is therefore upon the latter But if th... burden of proof of some is on one party and of others on the other party, i e, a distribution ... so even if question general p 121 ule that W N burden lence in , 11 Q , C A, ... uld Ind ... by n, upon serts the ie party ven if no ...

Supra; *Wakelin* v *London and South Western Railway Co* (1896) 1 Q B. 189 n, 196 n

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

On whom burden of proof lies

Illustrations

(*a*) A sues B for land of which B is in possession and which, as A asserts, was left to A by the will of C, B's father

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore the burden of proof is on A

(*b*) A sues C for money due on a bond

The execution of the bond is admitted, but B says that it was obtained by fraud which A denies

If no evidence were given on either side, A would succeed as the bond is not disputed and the fraud is not proved

Therefore the burden of proof is on B

Scope of the section The general burden of proof is upon the party who would be unsuccessful in the case if no evidence at all were given, and such party ... 465 In that case *Alderson B* ... by simply ascertaining on ... the proper test is, which party ... Now here, supposing no ... uld be entitled to the verdict,

what particular p...
from the defend...
former and so on
continues to be
... hich section 101 casts upon ... *n* v *Sahebulla Paramanik*, ... in the sense of the burden ... *Lale Daulata* v *Ganesh*, ... *Kali Parshad*, 23 W R.

owing to particular circumstances, the ... very slight evidence may suffice to dischar... side—"slight evidence" means evidence which does not go the whole length of proving a particular fact, but merely suggests it *Har Dyal* v *Raj Kristo*, 21 W R 107 The burden of proving the nature of the transfer is on the person whose success depends upon the substantiation of the case set up by him *Kashibai* v *Laduram*, S N L R 18... evidence of either side, that side must l... laid *Ghasi* v *Manga*, A I R 1930 ... 710, see also *Badri* v *Baijnath*, A I ...

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Burden of proof as to particular fact

3.

Illustration

(a) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C A must prove the admission

B wishes the Court to believe that, at the time in question, he was elsewhere He must prove it

Scope of the section The difference between this section and section 101, consists in this By section 101 the party has to prove the whole of the facts which he alleges, to entitle him to judgment when the burden of the proof is on him The present section provides for the proof of some one particular fact The illustration sufficiently points to the meaning The whole of the fact however numerous and complicated, which go to make up the prisoner's guilt must be proved by the prosecution If the prisoner wishes to prove a particular fact his *alibi*, for instance, he must prove it If the prosecutor wishes to prove the case, not by independent oral testimony, but by the isolated fact of the prisoner's admission, or if he wishes to throw that in as an additional fact, he must prove it *Nort Ev* 290 So the burden of proof of any particular fact is upon the party who alleges the affirmative of such fact It is only nece ary to add, and t ... the pleading is to be ... the Court be misled by ... o the burden of proof ... eason of their complexity or difficulty of proof, or by virtue of some statutory provision, the burden is cast upon the person denying the allegation *Cockle Cas Ev* 125 In *Soward* v *Leggatt*, 7 C & P 613, *Lord Abinger C B* said "Looking at these things according to common sense, we should consider what is the substantive ... not so much the ... e and effect of t ... if his pleading ... The plaintiff here says, 'you did not repair', he might have said 'you let the house become dilapidated' I shall endeavour by my own view to arrive at the substance of the issue and I think in the present case that the plaintiff's counsel should begin" Where the plaintiffs wished the Court to believe that there was wilful neglect or theft by railway servants, it lay on the plaintiffs under s 103 to give proof of the act *B B and C I Railway* v *Ramlal*, 43 B 769=21 Bom L R 779=52 Ind Cas 516 The plaintiff who comes into Court alleging that on the ... property accrued to ... ce of ... efore ... 1925) ... his ... tate ... his statement To cast the burden on the defendants would run counter the provisions of ss 101 and 102 *Subbarayalu* v *Venamma*, A I R 1930 Mad 712=123 Ind Cas 197

... le to make ... it affirm ... perly," the ... The proof ... e question, ... nce" He ... stated ... proof ... e fact ... state ... o th ... matter ... North ... The cases are somewhat co ... ting ... application of ... eight ... sorts ... ought

to be established, and which must be specially alleged in the pleading (2) Those which are merely implied from the allegation of affirmative facts, since the existence of such affirmative facts, precludes the negative thereof". *McKelvey's Ev* § 33 In an action for malicious prosecution, the plaintiff made two main allegations (1) that the defendant prosecuted him (2) that he had no reasonable cause f
The bu
is an e
fact by
fore th
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reas
tion of a negative, and we have been pressed with the proposition that, when a negative is to be made out, the onus of proof shifts. That is not so If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff The terms 'negative' and 'affirmative' are, after all, relative, and not absolute In dealing with a question of negligence, that term may be according to the definition adopte Whenever a person asserts affirmativ facts is present or absent, or that ular purpose, that is an averment which he is bound to prove positively As to the burden of proceeding —i e of introducing evidence—that at the start is with the plaintiff He must make a *prima facie* case on his negative proposition before the defendant need go forward with any evidence Of the second class of negative propositions, perhaps as good an illustration as any is found in a case where the plaintiff seeks to recover upon an express contract In his complaint he sets

contract—is upon him, the burden of proof still remains with the plaintiff He

where what is really being talked of is burden of proceeding *McKelvey's Ev* 33 The general rule of evidence is that if in order to make out a title, it is necessary to prove a negative the party who avers a title cannot be absolved from proving it *Moshiq Ali* v *Husunnissa* 114 Ind Cas 113 = A I R 1929 Oudh 20), *Pulin Behari* v *Watson* 9 W R 190 = B L R Sup Vol 901 (F B)

Burden of proving fact to be proved to make evidence admissible

104 The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations

(*a*) A wishes to prove a dying declaration by B A must prove B's death

(*b*) A wishes to prove, by secondary evidence, the contents of a lost document

A must prove that the document has been lost

Scope of the section The burden of proof in the sense of adducing evidence, applies not only to matters which are the subject of express allegation in the pleadings, but also to those that relate merely to the admissibility of

evidence or to the construction of documents Thus a party desiring to adduce a hearsay statement (*R v Thompson*, [1893] 2 Q B 12) or secondary evidence of lost deed, must first establish the conditions necessary to its reception, and if a document be ambiguous, the party tendering it has the burden of showing that his interpretation thereof is correct *Falck v Williams*, (1900) A C 176 181 (P C), *Halsbury* Vol 13, p 435 "The illustrations point the section which is but a rather verbose way of stating, that no person shall be allowed to give evidence before he has shown that he is in a legal position to do so *Norl Ev* 290

General principles as regards burden of proof The doctrine of *onus probandi*, only applies to a case when the mind of the Judge is in doubt as to the point on which side the balance should fall in coming to a conclusion As a case proceeds the *onus* ... *appa v Tippala* 56 I A 13 = 53 B 213 = 114 ... 8 = 33 C W N 238 The question on wh... is of very little importance when evidence has been given by both side *Sati Prosad v Gobinda Chander*, 33 C W N 227 = A I R 1929 Cal 325, *Meair v Abdul Bari* 119 Ind Cas 222 = A I R 1929 R 183, *Gopal Rao v Hiralal*, 83 Ind Cas 246 = A I R 1925 Nag 225, *Minabai v Yadro*, 103 Ind Cas 166, *Fez Din v Nawab Khan* 9 Lah 224 = 112 Ind Cas 89 = A I R 1928 Lah 432 *Sime Darby v Official Assignee* 30 Bom L R 290 = 107 Ind Cas 233 = 47 C L J 339 = A I R 1928 (P C) 77, *Sunder Mull v Satya Kinkar*, 55 I A 8 = 47 C L J 403 = 32 C W N 657 = A I R 1928 (P C) 64 = 54 M L J 127 (P C), *Jeoralhan v Mt Goura*, 95 Ind Cas 826, *Jnanendra Nath v Nalini* 87 Ind Cas 565 = A I R 1925 Cal 1269; *Gopal Rao v Hiralal*, 83 Ind Cas 246 = A I R 1925 Nag 225, *Paliram v Kamalji*, 78 Ind Cas 330 = 1924 Nag 363, *Saraswati v Yadorao* 78 Ind Cas 887, *Sonaji v Daulat* 75 Ind Cas 782, *Goverdan Das v Hari Lal*, 69 Ind Cas 541; *Mahomed v Mujubali* 27 C W N 328, *Nihal Chand v Gurditta* 1923 Lah 641, *Muhammad v Johanat* 9 O L J 404 = 1922 Oudh 774, *Sri Chidambara v Veerarama*, 45 M 586 = 43 M L J 640, *Almas v Majub*, 36 C L J 196 = (1922) Cal 461; *Bonamali v Lalu* 1 P L T 102 = 5 P L J 151 = 55 Ind Cas 841 *Sukan Sao v Ram Mahton*, 5 P L J 87 = (1920) P 131 = 54 Ind Cas 652; *Jharu Singh v Tolkaram*, 52 Ind Cas 860 Burden of proof depends on circumstances of each case *Dwarka Prosad v Nasir Ahmed*, A I R. 1925 Oudh 16 The placing of burden of proof wrongly is immaterial provided no party is prejudiced *Hem Chandra De v Amiyobala*, 52 C 121 = 84 Ind Cas 693 = A I R 1925 Cal 61 The question upon which party the *onus* of proving any particular point ... *Mahomed Taiz*, ... material ... *ommat* when ... *Ali*, 3 Lah L J 415 The term *onus probandi*, in its proper use, merely means, that, if a fact has to be proved, the person whose interest it is to prove such ... slight, upon which a Court could ... that he shall call all ... he lays ... e basis of a judgment and decree upon that ... *Girdhari Lal*, A W N 1898, 107 Mis-placement of the burden of proof is only a ground for remanding the case if the circumstances had been such that by placing the burden of proof on the wrong party, somebody has been misled or taken by surprise, or had no opportunity of adducing evidence *Hulal v Ramgati* 11 C L R 581 Where the *onus* is upon the defendant to prove a certain fact, but the plaintiff, without waiting for the defendant's evidence took upon himself to prove it, he cannot subsequently say that the defendant did not discharge *onus* *Sajan Kunwar v Joti Prosad*, 10 Ind. Cas 223 The burden of proof must be placed according to the pleadings and any preliminary examination of the parties, and, for the final decision of the case, the burden remains upon the same party When the party who has to discharge the burden of proof, has made out a ... of proof ... the shifts on to the other part ... fav... point at issue would be ... case When, however, the Judge has heard the whole case, he must weigh the

evidence for both parties, placing the burden of proof as it was originally placed. S.
Supposing the party upon whom the burden of proof lies makes out a *prima facie*

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Varjuandas, 8 Bom L R 025=30 B 018 Where the relevant facts are before the Court and all that remains for decision is what inference is to be drawn from them, the question of burden of proof is not pertinent and this is more so at the appellate stage *Trimbakdas* v *Mathabaj*, 27 N L R 75=A I. R 1930 Nag 225 [47 I. A 76=43 M 567 and 49 I A 286=43 M L J. 640 (P. C) and A I R 1922 Cal 160 Fol]; see also *Muhammad* v *Feroze*, A I R 1932 P C 228 In a case of two rival claimants to properties in the hands of stake holder, there is equal burden of proof upon both *Kallari* v *Karuppa*, 120 Ind. Cas 379=A. I R 1930 Mad 341

BURDEN OF PROOF—ILLUSTRATIVE CASES.

Abadi—stranger in possession Where a stranger is found to be in
pc
pc
cj
in
license were such as disentitled the proprietor from re-entry on the site *Bhagwan* v *Raghular*, 86 Ind. Cas 763=A I R. 1925 Nag 396

nt of account
sum to be due
but the *prima*
, 24 W. R 202

certain sum, which had been exceeded, the suit is not liable to be dismissed unless the defendants show that they were neither servants nor contractors for profit and l
as between
had receive
C. L J 245=A I R 1925 Cal 418 Where the accounts between the parties were settled and a balance struck, the burden is on the defendant to prove payment of the amount due *Indraj Mal* v. *Laje Ram*, 6 Lah L J 593=86 Ind Cas 383=A I R 1925 Lah 278 Every presumption is made against a person suppressing account books and on proof of a *prima facie* case the party suppressing has the burden of proving the contrary. *Venkataramayya* v. *Pitchammo*, A. I R 1925 Mad 164 Where a plaintiff sues for a specific sum of money due on a balance
Rutton
ken and
settled and a party alleges error in the accounts, the onus of proving it rests on that party *Kakoo* v *Nutha*, 47 P R 1866 The onus is not on the defendant to prove the contrary, but on the plaintiff to prove his allegation that he has in the account, dant, credited the defendant the plaintiff to have been made fact of payments by a banking firm being distinctly put in issue, the mere general statements of the banker to the effect that his books were correctly kept was held not sufficient to discharge the burden of proof that lies upon him, the books of the firm being at most corroborative evidence, particularly, if he has the means of producing much better evidence. *Boboo Gunga* v *Baboo Indrajit*, 23 W R 390 P C. be taken as a settleme en the parties at the time C W N 309 Where consideration is pleaded, the burden of proving that there was no consideration rests on N *Nihal* v *Dol Singh*, A. I. R 1932 Lah 135

Acknowledgment Where som

Acquiescence In case of acquiescence the onus is on the defendants to show (1) that they made a mistake as to their legal rights, (2) that they had expended money on the faith of that belief, (3) that the plaintiff knew of the laimed by the n belief in his lants in their his legal right.

Admission of liability Where a defendant admits a debt but pleads that it is barred, he has to prove his plea Where however there is no such admission, the plaintiff has to prove everything required to entitle him to a decree *Subbarayalu* v *Vengaua*, 123 Ind Cas 197=A. I R 1930 Mad 742

Adverse possession It is for prove possession prior to the alleged dis *raja Jagadindra Nath*, 10 C W N A 23=16 C 473 A co-parcener holding an item of property left undivided at a family partition is a mere co o property he must prove that to their knowledge *Vaiyapuri* v 929 Mad 27. The burden a proving title by adverse possession lies upon the person claiming to have acquired title by such possession *Kanhaiya Lal* v. *Girwar*, 27 A L J. 1106=119 Ind Cas 6=A. I R 1929 A 753; *Radha* v *English*, 7 C. L R 364 P. C.; *Jano* v. *Narasingh Das*, 117 Ind. Cas 803=A. I R. 1929 Lah. 549 *Nawab* v. *Gopinath*, 13 C L J 625, *Nayamtulla* v *Nana*,

13 B 424. If in a suit by a landlord, the tenant proves continuous possession for more than 12 years the zemindar has to prove which portion of the period did not count for the accrual of rights *Foria* v. *Kumar*, L R 4 A 185 In a suit for possession of lands which have re-formed upon the old site after diluvion, the defendant set up adverse possession for twelve years *Held* that the burden lay

in possession

of this suit *R*

Agent. The burden of proof is on the person dealing with any one as an agent, through whom he seeks to charge another as principal He must show that agency did exist, and that the agent had the authority he assumed to exercise, or otherwise *Assaram Bridican* v *Mathura Das*, L a suit to recover advances alleged who pleads acquittance, plaintiff is to prove the payment to and receipts from the *Gomastha Robert Watson* v *Sridhar*, 10 W R. 421. Agents entrusted to collect money on account of an insolvent estate are each of them, bound to prove to the ounts charged den of proof a suit against ius lies on the agent of the *Hathe Ram*

Agriculturists Law does not recognize the principle of giving benefit of doubt to a party on whom the burden of proof lies Burden of proving that ribe is on him, especially when entries in *Thacker Das* v. *Ghulam Mohammed*, 94 Ind

Alluvion and diluvion Where in a suit by plaintiffs to recover possession of alluvial lands on the allegation of dispossession, the defendants denied the plaintiffs' title and possession, *held* that the burden of proof, as to possession and dispossession, within twelve years prior to suit, lay on the plaintiffs *James* v *Dinanath*, 11 W R 566

Ante-dating The onus of showing that a document duly executed and registered was ante dated lies on the person who alleges it *Krishnamurti* v *Krishnamurti*, A I R 1925 Mad 933=49 M L J 252=(1925) M W. N 632=85 Ind Cas 882

Appeal In appeals the burden of showing that the judgment appealed from is wrong lies upon the appellant *Nabakishore* v *Upendrakishore*, 26 C. W N 322=20 A L J 22=35 C L J 116=42 M L J 253=24 Bom L R 346; *Taramani* v *Gopal Das*, 65 Ind Cas 182, *Firm of Probhu Dial* v *Dina Nath*, 65 Ind Cas 464, *Mustafa Husain* v *Saidul*, 99 Ind Cas. 255=A I R 1927 Oudh 66, *Lal Shah* v *Hiralal*, 106 P R 1917

Appropriation Payments of rent cannot be credited to arrears of previous years beyond the term of limitation Payments for rents are presumed to be for current years and surplus payments for past year *Taramonee* v *Kally Churn*, W R 1864 Act X Rul 14 Moneys paid by a tenant as rent without any specification may be credited by the landlord as he thinks fit. *Shurno Moyee* v *Kashee Kant*, 7 W R 511 Where transactions between two firms of bankers were renewed after an interval without any account of outstanding debts being drawn up, and in a suit for the old debts the defendants set up the plea that those were barred by limitation in as much as payments made after the interval were appropriated, by a special agreement, to the discharge of loans advanced thereafter *Held* that the onus of proving such special appropriation lies on the defendant. *Radha Kishun* v *Hiralal*, 31 C. W. N. 566=45 C L J 318 (P. C.)

Arbitration When a Court is affirmed that a suit has been instituted in contravention of an arbitration-agreement, it has a discretion to stay the suit, but the burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration, and not on the

4. defendant to show that no such reason exists *Vollart* v *Fateh*, 61 Ind Ca 322; *Ganesh Das* v *Durga Das*, 60 Ind. Cas 776.

Attachment claim Although where the assignee of a decree wishes to execute it, it is incumbent on him to apply under s 232 Civil Procedure Code 1882, yet, if at the date of the assignment, the judgment debtor's property is already under attachment, it is not necessary for the assignee to apply for a fresh attachment *Hafiz* v *Abdullah*, 16 A. 133 = A W. N 1894, 13

Auction purchaser The right of a purchaser at a revenue sale in getting rid of encumbrances is such that he is in many cases allowed to have the benefit of a certain presumption, and by virtue thereof to throw the burden of proof on his opponent, the presumption being founded mainly upon the principle that every bigha of land is bound to pay and contribute to the public revenue, unless it can be brought within certain known and specified exceptions *Nityanund* v *Banshi*, 3 C W N 341; *Forbes* v *Meer Mahamed*, 20 W. R 45

Avoidance of encumbrance A person seeking to obtain the benefit of s 12, Bengal Act VII of 1868 must give some *prima facie* evidence to show that the incumbrance which he seeks to avoid is an encumbrance falling within the terms of the section—that ... tenure by some one who previously held it ... 230 In a suit by the purchaser of a ... the Rent Act (Ben Act VIII of 1869), to ... the defendant on the gro ... by an autho ... plaintiff to ... plaintiff is ... *Reily*, 13 C 1

Award Any party wishing to set aside an award on the ground that the arbitrators in arriving at an unfair award either refused to hear somebody or heard the n ... e hearing undertakes the burden of satisfying ... happened *Gobind Sing* v *Bhirgu nath*, 82 In

Bailment ... the burden of proof l ... would have exer ... *Byau*, 74 Ind Ca ... by the plaintiff, it lies on the defendants to show that they took as much care of the goods as a man of ordinary prudence would, under similar circumstances ... t the loss occurred notwith ... *d Co*, 22 M 524, *Kashi* ... v *E I Ry*, 82 Ind Cas ... N 1887, 44

... n transaction is ... whose name the ...

... *Suleman* v *Meni* 25 C W N ...

Rati ... (P ... *Rad* ... *Ana* ... pro ... *Sar* ... Pat ... but ... him ... *Po* ... mar ... *Ma* ... lan ...

is not the true owner, the plaintiff can only rely on his claim as purchaser in good faith for value from a person who, by the act of the true owners had become the

plaintiff. *Rullo* S. 1
posses a receipt in
proving that the
ly on the debtor

Bill of exchange T
of a *hundi* to prove th to
non presentment of the *h* ep-
tional circumstances that the drawer could not have suffered any damage owing
to non-presentment *Bhikhi Mal* v *Raghubar*, 88 Ind Cas 915=23 A L J 861

Bond Where the consideration for a bond is disputed the burden of
proving repayment is *Manik* v *Narbassan*,
88 Ind Cas 251=A ontains stipulation
as to interest onus found its way into
the bond without his c I R 1925 Lah 64
Where an unregistered document, such as a bond or a receipt or an entry in an
account book the execution of which is admitted or proved contains an admis
sion or recital of the payment of consideration the onus lies on the person who
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n of
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1930 Mad 476

Boundary disputes The onus lies on the person setting up the plan to

of a boundary removed by one of the parties
general direction proved by the other party
lies on the party who removes it *Judoonath* v *Ranee Kristo*
Leelanund v *Mohesuar Singh*, 3 W R 19 P C=10 M I A 81 Where a
decision of the High Court fixing
Council would not interfere with the
s boundary was of the vague and
the allega-
It
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held that plaintiff should prove that lands are within his *talook* *Ganga Mala* v *Madhub Chunder*, 10 W R 413 In a question of boundary between a *lakheraj* tenure and
in favour of one or o
his case *Beerchun*
parcels of land alleged to have been comprehended in one plot, where the
one held by
burden of
part of the land held by
Nath, 12 W R 79 *khas* pos
alleging that the land by the tenant
beyond his proper bo lies on
the landlord *Rhiday*
recover a quantity of land by rectification of certain survey awards, which he averred demarcated erroneously the boundary between his zemindary and the zemindaries of the defendants, it was held, on a consideration of the evidence that his suit was rightly dismissed, because he failed to prove the position or existence of a stream, which he stated was the true boundary between the zem 13 W. R. P. C. 7
In ah, but situated
in failed to prove
the rights, were not
entitled to recover possession of any land which the drying up of the water way lay bare *Monohur Choudhury* v *Nursingh Choudhury*, 11 W. R 272

Carrier A common carrier in this country is liable as a carrier, that is he is responsible for the safety of the goods entrusted to him in all events except when loss or injury arises from the act of God or King's enemies But his liability may be raised by
contract common
carrier, on proof of
negligence 565=29
Ind Cas 716=17
C L J 639.

suit is barred under Order
Abdul Qadir v *Imamdin*
the plaintiff in a suit under
ablish the right which he
190=A I R 1929 Pat 579

In a suit instituted under Order 21, rule 63, the onus of establishing that the
good faith lies on the
to the rule
121 Where
of 1859, *held*
under s 235
by s 239
3 Plaintiff
nt made by
dant having
he plaintiff
who impugned that order by the present suit, to prove title under the purchase alleged by her by proving both the payment of the purchase-money and her possession since the purchase and the lower Court was therefore held to have been wrong in having thrown the burden of proof in the suit on the defendant *Govind Atmaram* v *Santal*, 12 B 270 On a claim being denied
the ordinary tests of
ain business
Vol. II, 230
to establish
having failed in
of proving
that he acquired property in good faith and for consideration lies on him *Narayan* v. *Bhisraj*, 2 N. L R 87. In a suit to set aside an order dismissing

a claim petition, the burden will be on the plaintiff to show that he was entitled to the property. *Nachaippa* v *Chinnian*, 4 L W 362=36 Ind. Cas. 794

... den of proving ... d. Cas. 1055=11 ... L J. ...

Confession In a cor... tion is that the confessic... confession recorded under ... v *Emperor*, A. I. R 1932 Sind 201.

Consideration Where it has been admitted or proved that an admission of consideration has been made or executed in a document, the onus of proving want of consideration rest ... *Paras Das* v *Suraj Bhan*, ... the execution of which ... of payment of consideration, the onus is upon the person executing the document to prove that he did not receive the consideration *Firm of Ganda Singh*, v *Nur Ahmed*, 96 Ind Cas 820=A I R 1926 Lah 653; see also *Ma Tin* v *Ramaswami Chetty*, 5 Bur L J 49=95 Ind Cas 384, *Pannun Ram* v *Ghulam* 27 P L R 463=7 Lah 297=96 Ind Cas 630=A I R 1926 Lah 494 Where a document was concluded in the following terms —The 'undersigned promised to pay to A the sum of Rs 1,000 payable during the period of one year without ...

it would have been if the suit had been brought against the mortgagor alone ...

Cas 732 ...

from the recital therein drew an inference that the bond was supported by consideration *Held*, that there was no error of law committed by the lower Court. *Jadu Mondal* v *Jogendra Nath*, 68 Ind Cas 303. Where a person

104. executes and delivers a conveyance of his property and also gets it registered and the sale deed contains a recital of receipt of consideration, the burden of proving want of consideration for the sale is on the vendors *J H Power* v *Dau Shue*, 1 Bur L J 22 In a case of a formally registered document in which the receipt of consideration has been recited, the *onus* of proving that consideration did not actually pass is on the party who alleges non payment. In the case of an entry in an account book, however, the onus is on the party alleging payment to prove it *Rulla Singh* v *Tunia Mal*, 60 Ind Cas 7?? Either party to a document may show that there was in fact no consideration though consideration was recited therein or that the consideration was in reality different from what was stated in the deed *Krishna Kishore De* v *Narendra Bala*, 34 C L J. 333 In a suit for redemption brought by the purchasers of the equity of redemption, the sale deed was a registered document and contained an admission of the executant that full consideration had been paid but the mortgagee contended that the sale was a sham and without consideration *Held*, that the burden was on the executant of the deed and on people claiming under him to prove that what apparently happened did not happen *Chhishane Ali* v *Jamna Parsad*, 48 Ind Cas 365 (P C) = 24 O C 272 It is the established practice of the Courts in India in cases of contract to require proof that consideration has been actually received, according to the terms of ... import that ... , however ... ke out a ... onsidera ... A 28? ... or er, the ... his plai ... on by the assignees of the equity of redemption, the *onus* of proving that the mortgagor did not in fact receive the moneys which he acknowledged by his execution of the mortgaged deed to have received, is *prima facie* on the plaintiff *Muhammad Ahahyar* v *Muhammad Samiuddin*, A. W N. 1887 245

Contract. The party who alleged that a contract is conditional on the happening of a certain contingency must prove the existence of such a condition by clear and unequivocal evidence. *Firm of Ganesh Lal* v *Firm of Debi* 10? Ind Cas 265 = A I R 1927 Lah 481 The ordinary presumption is in favour of the legality of a contract and it is for those who assert that it was not intended to perform the contract in the manner recited therein, to prove their assertion *The Firm Kanaai* v *Firm Ganpat Rai Ram Jiwan*, 7 Lah 442 = 94 Ind Cas 304 = A I R 1926 Lah 318 The burden of proving that there was an act which rendered a contract impossible of performance lies on the party to the contract who alleges it *Wuzeera* v *Mooroodeen*, 77 P R 1866

Contention. Where on the decree as passed, several defendants were made jointly and severally liable, in the subsequent suit for contribution by one of them, it was for any defendant ... able to pay the full share, to plead and prove it ... ing partner did not shift the *onus* from whe ... v *Karim Bakhsh*, 95 Ind Cas 1007 = A ... contribution for money admittedly paid by ... reasury, on account of defendant's share of the revenue, where the defendants plead previous payment to the plaintiff, the onus of proving such payment lay upon the defendants *Mahadeo* v *Laboree Misser*, 24 W R 250 Where in a suit between two judgment debtors to recover money alleged to have been paid in satisfaction of decrees obtained against them by J, who had been wrongfully ... that he entered into ... ains that the right of ... rden was held to l... v *Bahadur Singh*, 19 ... r recovery of excess ... co-sharers to share ... their shares ... *Jolu Si...*

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36 C L J 64 P C

Copy right—Infringement of Where in a case of *infringement of copy right* the complainant produces his certificate of registration and the book published at that time, and he further testifies that the book is not the same as that produced by his father the *onus* lies on the defence to show that matter contained in the complainant's book was also contained in the previous book *Emperor* v *Sheo Charan*, 131 Ind Cas 865=A I R 1931 All. 353=1931 A. L. J 304

Criminal cases Where the accused gave the deceased a beating the previous day and were seen by various persons on the occasion, it was highly impossible that they would murder the person the next day *Sheo Ram* v *Emperor*, 1923 Lah 430 It is the first principle of criminal law, that where a statute creates a criminal offence, the ingredients of that offence must be strictly proved, and that where the doing of an act without authority or without consent is made a criminal offence, and the statute does not expressly put upon the accused the proof of such consent or authority it is a necessary part of the case for the prosecution to negative by evidence such consent or authority *Brij Basi* v. *Queen Empress*, 19 A 74=A W N 1896, 178 In a criminal case the burden

Courts should presume the absence of such circumstances *Queen Empress* v *Prag Dutt*, 20 A 459=A W N 1898, 117, see also *Queen-Empress* v *Bai Mahakai*, Rat Un Cr C 820

involving a departure from the o
by the person setting it up *Guru*
27 I A 238=23 A 37 P C
must be proved by those who asser
318, *Latti Begam* v *Nawab Mo*
Mohanlal, 9 C P L R 47

Damages In a suit for damages for malicious prosecution the plaintiff
no
him
534;
332
193,

Debt and Debtor The burden of proving that a certain payment was made in full satisfaction of a debt is on the person alleging it *Barada Kanta* v *Jitendra Nath*, 49 C L J 560 It is elementary law that when a creditor sues the debtor for the payment of a debt and the defence is that the debtor paid

4. the debt to another person it is for the debtor to prove that the other person had or had been held out to the debtor by the creditor as having had the authority of the creditor to receive payment of the debt on behalf of the creditor *Muhammad* v *Les Taneries Lyonnaises,* 49 M 435 = A I, R 1926 P. C 34 = 31 C W N 1 When a debtor pleads tender of payment as a ground for not being ... *Ranee Shurut Soonduree* ... 69 If a debt is proved or ... debtor *Mobarik* v *Seca* ... against the son of a deceased ... proving the ... son *Mamraj* ... ndant pleaded ... f establishing his case by the fact of an admission of the plaintiff that the actual consideration was different from that described in the bond *Lal Singh* v *Chaitram,* 15 C P L R 24 The burden of proof that a creditor by agreeing to an arrangement whereby a firm indebted to him conveyed to two of the partners thereof certain property in trust to pay off his and certain other debts and thereby released the remaining members of the partnership lies upon the parties who were originally liable to such creditor *Kalaikhan* v *Madho,* 3 N W. P 129

Declatatory title In a suit for a declaration of title by plaintiff who had ... to establish ... fails to do so ... obligation to ... tory *Abdul* ... or immovable ... advantage of ... *Mega* v ... roprietor ... *arana,* 2 ... his own ... *hammed* ... as heir to his uncle's property and for the reversal of a deed of sale from that uncle set ... *Nath* v ... luce the ... to it ... ssion of ... to the ... ould be ... on the defendants the burden of proving the document by primary evidence or by secondary evidence on properly accounting for its non-production *Ram* v *Raghu,* 7 A 738

Dedication In a suit for a declaration that a certain property is *waqf* the onus is on the plaintiff, to prove that the property has been dedicated as *waqf* *Rahim* v *Channan,* 55 Ind Cas 210

Deeds In a suit to set aside an order of the Small Cause Court in which that Court had held that a certain *kobala* was *mala fide,* the onus is on the plaintiff that it has been executed *bona fide* *Ishan Chandra* v *Rakimuddin,* 2 B L R A C 326 N = 10 W R 412 Where it is found on the face of a deed creating a trust that the transaction is *bona fide,* it is for the creditors who impugn the *bona fide* nature of the trust to prove their plea *Kasheshurree* v *Krishna Kamini* 2 Hay 557 Where certain deeds are duly executed and ... ons lies ... C) ... 3 A ... ation towards another every ... ciary character towards ano... ... ntly, and *bona fide,* without influencing the donor, who has acted independently of him *Wajid Khan* v. *Ewaz Ali,* 18 C 545 = 18 I A. 144 (P C) The genuineness and due execution of a bond does not dispense with the necessity of proof

of consideration therefor *Baboo Ghansham* v. *Chulouree*, W R 1864, 197 S.
Where the executant of a mortgage deed denies receipt of consideration in a

the executant of the receipt of the whole sum in cash, where it is proved that
onus is on the
Lala Lakshmi

Easement Where in a suit for possession, the defendant claims a right of easement the *onus* is on him to establish it *Duni Chand* v *Nizamuddin*, 26 P. L R 301 Where in a suit for injunction, the defendant sets up that he had acquired a right of easement, the onus is on him to prove that he had acquired an easement *Bya Ram* v *Brij Lal*, 26 P L R 42 = A I R 1925 Lah 297. Where the right to have a way of water course over certain land is disputed by the owner thereof and an order under s 532 of the Criminal Procedure Code, has been passed by the Magistrate in favour of the person claiming the right, the fact of such an order having been made will not be sufficient to relieve the latter from the *onus* of proving the claim in a subsequent suit by the owner to establish his right to the exclusive use of the land *Obhoy Churn* v *Lukhy Monee*, 2 C L R 555 In an ejectment suit, the defendant in possession though a tresspasser, is entitled to require the plaintiff to prove that he has superior title *Kalu* v *Barsu*, 19 B 803 In a case where an easement is claimed over defendant
that he acquired it by grant or use
W R 281. In a suit to remove
allegation that plaintiff is entitled
plaintiff was bound to make good the
R 83

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32 C W
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proof of
he relies
valid one

Kumar, 91 Ind Cas 761 = A I R 1926 Cal 559 In a suit by the recorded
relation
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Isicar

Held that

to eject the defendant the latter sets up the existence of a tenancy entitling him to retain possession, the burden is upon him to prove the nature of his tenancy and his rights to remain in possession *Probodh Chandra* v *Birsinha*, 71 Ind Cas 319 Where the recorded tenant of a holding who has been paying rent

sets up a claim
them *Tulsi* v
prior possession
is primarily upon
period *Khedon*
suit in ejectment
where the ownership of the plaintiff is proved and the defendant sets up a right of permanent occupancy, the burden of proving such a right is on the defendant *Rangasami* v *Gnana Sambandu*, 22 M 264

Enhancement of rent In cases of enhancement of rent, onus lies on the landlord to show that he is entitled to such enhancement *Birendra* v *Ali* 33 C L J 605; *Hem* v *Kali*, 26 C 832; *Raj Krishna* v *Kali*, 6 B L R App 122 *Rama Nath* v *Jote Kumar*, 11 C. L J 1; *Surja* v. *Daneswar*, 24 C 251 But when in such a suit the tenant pleads that no enhancement should be granted on the ground that he is a tenant at fixed rate, the onus is on the defendant to prove that he is such a tenant *Gudar* v *Brijnandan*, 5 C W N 880

Execution Under section 102 of the Evidence Act when once the execu...

is admitted, the onus is on the ...
its terms, even if he is an illiterate ...
27 P. L R 641=97 Ind Cas 71=A I R 1926 Lah 692 Where in a suit on a mortgage bond alleged to be lost, the defendant denies execution ...

Ind Cas 803 A person to whom a decree is transferred must prove his title to execute it if his title be disputed *Ganesh* v *Chundee*, 6 W R Mis 126 Where, in execution of a decree, a share of an estate is sold, and the representatives of the purchaser absorb more land than belonged to that share and bring a suit to declare their rights, *held* that there should have been a clear finding as to what was the extent of the share originally purchased and that, in determining the claim of the representatives to the increase, the burden of a very distinct nature should be laid on them *Urnopoorna* v *Rajbullu*, W. R (1864) 151 Where a person denies to have signed a particular document the burden of proving that the document signed was not intended to be what it was expressed to be is initially on him *Ghasi* v *Rup*, A. I R 1937 Lah 602

Fraud. The burden ... ordinarily on the person ... *Nazafur* ... *Fatima*, 94 Ind Cas ...

that it was not registrable in the place where it was done and proves that there ... did not belong to ... fraud on the ... The person ... should prove ... suit against a purchaser to set aside a sale in execution of a decree on the ground of fraud, the onus lies upon the plaintiff to make out that the sale was fradulent *Ramjati* v *Imitari*, 1 B. L R S N 20 Where the defendant alleged that plaintiff's assignment was fraudulent, the *onus* was on him to prove that the transaction

was not *bona fide* *Lalbehari* v *Srinath* 3 B L R A C 73 Note Where a decree holder in a suit to establish his claim to certain property as that of his judgment debtor, al ... the defendant was fraudulently execut ... to prove the fraud ... c) = 10 W R 321 property thereby, it is for ... nd suing to recover the ... hose facts which constitute ... to bring the suit The mere fact ... vigorously ... the fraud ... it *Rahim* ... by a Court of Justice in finding out whether or not a transfer is fraudulent can only be furthered with propriety by the testimony of the vendor who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it The story can then be subjected in all its particulars to cross-examination It is an error to rely on the abstract doctrine of burden of proof *Mohideen* v *Mahomed*, A I R 1930 Mad 665 (44 I A 98 P C and 57 M L J 566 P C rel)

Good Faith The burden of proving the good faith and fairness of a transaction is on the person who claims benefit thereunder *Gunabai* v *Matilal* 89 Ind Cas 625 – A I R 1925 Nag 398

Government revenue In a suit for contribution for money admittedly paid by the plaintiff into the Government treasury on account of the defendants' share of the revenue, where the defendants plead previous payment to the plaintiff, *held*, that the burden of proving such payment was upon the defendants *Mahadeo* v *Lahore*, 21 W R 250

Guardian and Ward Where an alienation by a guardian is questioned by a minor after attaining majority, the onus of proving that the transaction was for necessity is not always and necessarily very heavy on the defence and if it is established that the consideration for the alienation impugned went in discharge of previous debts and there is evidence that some of such debts were contracted to save the minor's estate, the burden of proof, though in the first instance it lay upon the defence, is shifted on to the minor and it is he who must show that the alienation attacked by him was not for a purpose binding upon him *Krishna Rao* v *Arjasami Pantay* 21 Ind Cas 426, see also *Hanuman Pershad Pandey's Case*, 6 M I A 393, *Syad Lootf Hosseins Case* 23 W R 424, *Oomed Rai* v *Hira Lal* 6 S D R N W P 611, *Sardar Kirpal* v *Balwant Singh*, 17 Ind Cas 666 = 1 C W N 309 P C

Hindu Law—Adoption Where the plaintiff wants to have the adoption by the widow set aside as being without authority, the onus lies upon him *Hurdyal* v *Roy Kristo Bhoomick*, 24 W R 107 In a suit for possession of land by ... he fac ... as acq ... a me ... D s adoption because the case of a Hindu long recognized as an adopted son, there is a very strong presumption in favour of the validity of his adoption *Ramkrishna* v *Tiru Narayan* A I R 1932 Mad 198 = 62 M L J 116 But in ordinary cases grave and serious onus rests on persons seeking to displace natural succession by act of adoption *Balak Ram* v *Nanu Mal* A I R 1930 Lah 579

Hindu law—Alienation by Hindu widow ... validity of alienation ...

Nabakishore v *Upendra*, 26 C W. N. 222 (P. C); *Hari* v. *Kasi*, 19 C W N 370 (P. C); *Radhakishore* v. *Mirtoomoy*, 7 W R 23; *Debi Prosad* v *Golap Bhagat*, 40 C 721 (F B)

... to have been ... s upon the ... *Rimtaran* ... by a Hindu ... the charge ... t so charge ... was a competent act of the widow *Cavaly Veneata* v *Collector of Musulipatam* 10 W. R. 47 P C = 11 M I A 619 So in a suit by heir of a mortgagee against a Hindu proprietor's heirs, in possession after the death of his widow to enforce a mortgage by her, the burden of proving the money to have been advanced to ... *Maheshar* ... ham ... B ... ath ... on ... uch ... the ... *Rao* v *Ram Chunder*, 11 A 256

... Where a person after ...

... tly in a case of need or for the benefit of the estate (2) But where, in the particular instance, the charge is ... it the estate, the *bona fide* ... of the estate (3) The ... serted, or the benefit to be ... ng to be regarded. (4) The lender is bound to enquire into the necessities for the loan, and satisfy himself as well as he can, with reference to the parties with whom he is dealing that the manager is acting, in the particular instance, for the benefit of the ... stance of an ... ecedent ... bound ... e in the ... v

... The authority of the *shebait* of an ... to that of the manager of an infant ... 14 B L R 450 = 23 W R 253, ... C)

Hindu Law—Inheritance ... property by right of inheritance, in the ... must establish his descent and legi... Cas 220

... the *onus* clearly depends ... ot an invariable obligation ... It ... y rules of evidence ... pleadings but it frequently ... is true that the normal ... there is a presumption to ... ether in certain circum... ry weak and again it may ... party and be fixed on

the shoulders of another *Sarjoo Prosad* v. *Deadat Lal*, 1 O W. N. 958=105 Ind Cas. 410=A I. R. 1927 Oudh 499

Hindu Law—Partition Where in a suit for possession on the ground of a prior partition the plaintiff proves severance of interest, it will be on the defendant, who sets up a case of some of the brothers remaining joint to prove that plea *Challa Lakshnakka* v. *Bala Rangappa*, 91 Ind Cas 285=A I R 1926

57=38 M L J 521=22 Bom L R 59

Hardat v *Dhandhu*, 84 Ind Cas 1011; *Harnarayan* v *Suresh*, 1925 P 161; *Sircar's Hindu Law*, 312

Hindu Law—Stridhan A Hindu wife seeking to exempt property from responsibility for her husband's debts, must clearly prove that she had *stridhan*, and that she purchased the property with her self-acquired funds *Brojomohan* v *Radha Kumaree*, W R 1864, 60

1925 All 811

Husband an wife Where a deed of gift by husband to wife is attached as being colourable, person attaching the same must prove the allegation *Nabab Mirza* v *Nabab Fakar*, A I R 1932 P C. 13

Income tax When an assessee states that he has no income from a

In re Bishnu Priya Chaudhury 73 Ind Cas 303=50 C 907=A I. R 1924 Cal 337

Insolvency In a suit against an insolvent and the Official Assignee for

Insurance A claimant under a life-policy must prove that the age of the insured is correctly given *Oriental Government Assurance Co.* v. *Narasinha*, 25 M 201 But no such *onus* is cast upon the claimant where the age has been proved and admitted by the company in writing *Ibid*

Inventions It is for the person who claims an exclusive privilege under the Inventions Act to prove that the facts exist which entitle him to the privilege claimed *Elgin Mills Co* v *Muir Mills Company*, 17 A 490

Jurisdiction It is for the party, who seeks to oust the jurisdiction of the ordinary Civ ... do so *District Board of Tanjore* v *Konnuswami* ... *Ali Md* v *Halim*, 1928 L 121 (F B), *Rang* ... Cas 206

Lakhraj and rent free l... whether the land in question is within ... to ... the Zemindari of which *patni* ... that ... the lands are really within ... its ... claim those lands as *Ashkar Pirattar*, the *onus* rests on the defendants ... *Bari* v *Hrishikesh* 49 C L J 516 = A I R 1929 Cal 409

Land Acquisition Where a public body seeks to acquire, under the Land Acquisition Act, any portion of a block, which is structurally connected with the mai... show that the portion is not reasonably ... use of the house *Venkataratnam*, v *Coll*

Landlord and tenant In an ejectment suit the landholder came into Court with the allegation that the tenants had cut his *rabi* crops The tenants alleged that the c... ...ion of proof on the defendant ... the *rabi* crop was shown l... ...grown on ... in suc... cases the ... 562 In the case of ... is closed *Malo* ... praisement of crops ... larger amount for himself, the *onus* is on him to show what the actual yield is *Bhuneshwari* v *Sukhdeo* 6 Pat L T 419 = 85 Ind Cas 566 = A I R 1925 P 505 When a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the *onus* of proving that he has such a right is upon the tenant, and proof of long ... *Nainapillai* v, *Ramanatham* ... A L J 130, see also *Gopala* v ... 69 Where a tenant sets up ... the Revenue Records show hi... ... fact that the rent which he ... the cesses *Ram Das* v *Char*...

Legitimacy Where a person claims under section 112 of the Evidence ... born within 280 days ... the non access of the ... macy *Narendra* v ... days after the death ... his father lies on those who contest his legitimacy *Trilok* v *Luchmia*, 5 Bom L R 477 It is ... wants to bring ... cases no ... relations ... J 1=1 ... M L J 56

Limitation The burden of proving that a payment was made which would ... upon the plaintiff who claims ... *Jatindra Nath*, 49 C L J ... where limitation is pleaded, ... prior to suit *Bhiloo* v *Motu* ... 327; *Dinobandhu* v *James* ... R 67 In all actions for ejectment where the defendants are admittedly in possession, and *a fortiori* where they had been in possession for a great number of years, and un...

claim of title, it lies upon the plaintiff to prove his own title. *Mohima* v. *Mohesh*, 16 C 573=16 I A. 23 (P. C)

W R P. C 283

iarriage took place to bring marriage, when there is un inference can be drawn riends, the oral evidence . *Nabab Ali*, 5 C L J.

1 (P C)

Mercantile Usage Where a contract is alleged to be an "office dhara" and where the "office dhara" refers to the practice of certain firms as seen in printed forms used by them, a plaintiff relying on the term "office dhara" must produce and prove the printed forms above mentioned *Dassomal* v *Ram Chand*, 83 Ind Cas 364=A I. R 1925 Sind 80

Mesne profits Where mesne profits are claimed by a person out of posses-

20 N L R 52=75 Ind Cas 826=1924 Nag. 117

Minor. Where a deed is executed by a person who alleges himself to be a major at the time of execution, a heavey burden rests upon him or his representatives when they set up the defence of minority *Sadiq Lal* v *Joykishore*, 47 C L J. 628=32 C W N 874=A I R 1928 (P C) 152 The burden of proving that a particular deed is bad on the ground that its executant was a minor at the time of its execution lies on the person who makes the allegation *Munna Lal* v *Kameshor Dutta*, 114 Ind Cas 801=A I R 1929 Oudh 113 The burden of proving that the executant of a document is a minor lies on the person alleging it *Surja Prosad* v *Joti Prosad*, 87 Ind Cas, 445=L R 6 All 283=47 A 493=A I R 1925 All 681 In a suit brought on the basis of a contract, the burden of proof lies on the party who asserts that he was a minor at the time of contract *Khanhailal* v *Debi Prasad*, L R 6 All 219=87 Ind Cas 778=A I R 1925 All 99, *Suraj* v *Joti Prosad*, L R 6 A 283=87 Ind Cas 445=47 A 493=A I R 1925 All 681, *Narain Singh* v *Chiranji*, 22 A L J 161=79 Ind Cas 945 When the validity of a contract is questioned on the ground that the executant is a minor, it is for the plaintiff to establish by *prima facie* evidence that the contract was valid and entered into by a person who was cempetent to do so *Dachcha Lal* v *Hosan King*, 66 Ind Cas 811=(1922) All 210 It is on the executant of a deed, who pleads that he was a minor on the date of the execution of the deed to prove his plea *Kandhai* v *Mohammad*, 63 Ind Cas 525; *Niamutullah* v *Gopaj* 53 Ind Cas. 136=6 O L J 376

Mortgage Where a mortgage deed contains an admission of receipt of consideration before the Sub-Registrar, the onus is upon the mortgagor to disprove his admission *Govindappa* v *Sontal*, 109 Ind Cas 149 Where land is mortgaged without possession and possession is subsequently given to the

Cas 679 In a suit for redemption the *onus* is on the plaintiff to prove the mortgage he set up i e, that it was still subsisting *Binda* v *Sankata Prosad*, 95 Ind Cas 915 Where a mortgagor admits execution of a mortgage deed, it is for him to prove that he has not received the consideration recited in the deed *Jiwa Ram* v *Jhanda Singh*, 92 Ind Cas 316. Where land is mortgaged without possession and subsequently possession passes to the mortgagee, the burden of proving

that the transfer in which possession was given was an outright sale lies on the person alleging it *A T Chetty Firm v. Mahomed Kasim*, 3 Rang 277=90 Ind. Cas. 1011=A. I. R. 1925 Rang 277 Where the rate of interest is usually high the burden lies on the mortgagee to prove that there was necessity to borrow at so high a rate *Sagar Singh v. Mathura*, 87 Ind Cas 1035=A. I. R. 1925 Oudh 5 Ordinarily the *onus* is on the *quondam* mortgagee to prove the validity of the foreclosure proceedings It does not cease to be so simply because there was an entry in the register that mutation had been effected in favour of the mortgagee *Kullu v. Suran*, 26 P. L. R. 734. Where the execution of the ... a fictitious and merely a ... to it up *Chhidu v. D...* ... of proving a mortgage ... upon the mortgagor *Pamji v. Mohan Lal* 71 Ind Cas. 654=1923 All. 441 Where once a mortgage has been admitted the onus is on the mortgagee to show that the mortgage has been extinguished by subsequent sale *Wali Mahomed v. Mahomed* 57 I. A. 86=A. I. R. 1930 P. C. 91=51 C. L. J. 371 P. C.

Notice Where the defendant led evidence on the issue as to notice they cannot be said to have held back their evidence because of the imposition of the *onus* on the other side *Ladha Ram v. Jinda Ram* 1923 Lah 339 The burden of proving a purchase without notice of a prior mortgage or contract is on the subsequent purchaser and the rule is the same for moveable as well as immoveable property *Maung v. Bansi*, 75 Ind Cas. 325=2 Bur L. J. 63=1923 Rang 153 The burden of proof of the giving of notice of the inquiry into the conduct of a person lies on the authority holding such enquiry *Rangaswami v. Secretary*, 4 L. W. 611 Where there is an affidavit of the peon serving the notice of proper service thereof, the party who impugns the fact ought to prove that there was no service *Krishna v. Bhandar*, A. I. R. 1928 Cal. 722

Partition Where in a suit for partition defendants resist by setting up acquiescence in their permanent right of occupancy in a part of the land the burden of proving existence of those rights is on them *Subramanya v. Subramanya* 56 I. A. 243=52 M. 549=31 Bom L. R. 830=A. I. R. 1929 (P. C) 156 The *onus* is heavy on the person who desires to show that certain partition lists were not acted upon and the parties continued to be joint in spite of those lists *Venkata Krishnayya v. Rangayya*, A. I. R. 1925 M 865 In a partition suit among Muhammadans burden is on plaintiff to show that it was acquired by the help of joint fund. *Yusuf Mahomed v. Abubucker*, A. I. R. 1925 Sind 26

... on a document purporting to ... rdanashin woman, based upon a ... to give satisfactory evidence that the ... the lady *Aisha Bibi v. Muhfu...* Cas. 180=46 A. 310 *Ramanan...*

Partnership Where the title of a deceased person to certain properties is disputed and it is shown that those properties belonged to the partnership firm the onus lies on persons claiming through the deceased person to prove that those properties belonged to him at the time of his death *Ismail v. Tayabali*, A. I. R. 1929 Sind 182

Perpetual and permanent settlements If a person sets up as against the Government a permanent or perpetual settlement it is incumbent on him to make out that case *Prosunno v. Secretary of State*, 26 C. 792=3 C. W. N. 695

Possession In a suit for possession of land the plaintiff has to prove that the land lay within his holding and not for the defendants to prove that it lay outside *Sati Prosad v. Gobinda*, 56 C. 805=33 C. W. N. 297=A. I. R. 1929 Cal 395 The burden of proving a subsisting title to a land lies on the party out of possession and the fact that the party in possession is forced to institute a suit under Order 21 rule 103 C. P. Code, does not shift the burden of proof on to him *Rahman v. Fakir Mahomed* 82 Ind Cas 861=A. I. R. 1925 Sind 201 Where in a suit for recovery of possession of land or declaration of title the defendant in possession does not admit the title of the plaintiff but says that the plaintiff is his *benamidar*, it is for the plaintiff to prove that the defendant is not the owner *Lal Muhammad v. Ajudhia*

Sheikh, 57 Ind Cas 972. Where the plaintiffs who are in possession of a property before the institution of the suit ask for a declaration of their title and confirmation of their possession as against the defendant, who seeks to disturb the possession, it is for the defendant to show that he has a better title than the plaintiffs *Mahomed Husain Mia* v *Abdul Hamid*, 50 Ind Cas 131

Posting of letter The presumption is that if a letter properly directed is proved to have been posted, it reached its destination and was received by the person to whom it was addressed. *Kamkhya* v. *Khalil* 8 Pat L T 633=102 Ind Cas 821=A. I. R 1927 Pat 305

Pre emption It is a settled rule of law that a very slight proof will shift the burden to the vendees to prove the actual payment of the price entered in the deed. *Abid Ali* v. *Har Prosad*, 119 Ind. Cas 459=A I R 1929 Oudh

[illegible]

is on the vendee to prove that the consideration stated in the sale deed was really paid and there was an actual payment *Ahmadjekhan* v *Gulmir*, 75 Ind Cas 271.

Promissory note [illegible] the burden of proving [illegible] *Harihar Prosad* v *Mahab*[illegible] 632=A I. R 1931 Pa[illegible]

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on the defence to explain how document bearing defendant's thumb impression came into existence *Sahdeo* v. *Pulesar*, A I. R 1930 Pat 598

Railway Cases Where a Railway Company was sued for compensation [illegible] t prove loss of goods [illegible] prove wilful neglect [illegible] to the terms of risk-

Recital in a deed or other instrument Where a mortgage document was executed by the father of the defendant and contained a recital that the consideration had been received by the executant, the burden lay upon the executant or his representative to prove that the recital was untrue and to satisfy the Court how he became a party to a document which contained untrue recital of this description *Benoybhusan* v. *Dhirendra*, 38 C L J. 114=74 Ind Cas 178 The *onus* of proving that a document to which a person has affixed his signature does not contain a correct statement of the facts and of the intention of the parties is on the person who makes the allegation *Ramdas* v *Chandrabali*, 4 Pat. L W 237=44 Ind Cas 399 When a party to a contract alleges that it is different from what on the face of it, it purports to be, the burden of proving his case lies on him, since there is a presumption that a transaction is in substance what it is in form. *Eshoor Doss* v *Venkata*, 17 M 180 Where the vendor admits receipt of full consideration in the sale deed, the burden lies heavily on him to explain the admission and prove non receipt of considertion. *Johnstone* v. *Gopal*, 12 Lah. 516=A. I R. 1931 Lah. 419

Record of rights There being a presumption of the correctness of the entries in a rec[illegible] challenging the same to prove it *Parm*[illegible] T. 605=A I. R.[illegible] 87 Ind. Cas 741=[illegible] an entry showing a person as possessing occupancy rights, the person who wants to challenge it ought to show it is wrong The mere fact that he was holding

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to show that the property is sold for a price less than what is stated in the sale-deed Even slight evidence may be sufficient to shift the *onus* on to the defendant *Shiwaji* v. *Rotiram* 89 Ind Cas 768 In a suit for pre emption the *onus* is on the vendee to prove that the consideration stated in the sale deed was really paid and there was an actual payment *Ahmadjekhan* v *Gulmir*, 75 Ind Cas 271

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Railway Cases Where a Railway Company was sued for compensation for non-delivery of goods, *held* that the Railway must first prove loss of goods and on such proof the onus will shift to the plaintiff to prove wilful neglect on the part of the Railway or its servants, etc, according to the terms of risk-note *E I Ry Co* v *Piyara Lal*, A I R 1928 Lah 774

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Record of rights There being a presumption of the correctness of the entries in a record of rights ... the party alleging the same to prove it *Parmesr* ... L T. 805=A I R 19... 87=67 Ind Cas 741= ... ntain an entry showing a person as possessing occupancy rights, the person who wants to challenge it ought to show it is wrong The mere fact that he was holding

4. without rent is not sufficient *Gouri* v *Jhanda*, L R 4 A. 372 The entry in a record ... of the tenant ... 31 Ind Cas 56 ... favour of the ... recovery of possession of that land, and that ... holding, havi ... plot was part ... A I R 1930 ...

Registered deed Burden of proving that a registered deed was sham is on the person alleging when he was party to deed *Nagaraja* v *Vendathanni*, A I R 1933 Mad 18

Release In a suit to set aside a release deed on the ground that it was obtained by misrepresentation, and that there was no consent, when the defendant pleads that there was consideration and that the arrangement come to was reasonable, the *onus* is on him to prove it *Hem Singh* v *Bagaboto Singh*, 83 Ind Cas 67

Rent Where the rent has never been paid the burden of proof that rent was agreed to must surely lie on the person who asserts it, and that in this case lies on the defendant in the suit for ejectment *Sukdeo* v *Abdul*, L R 4 A 239

Sale Mere denial by the vendor of the receipt of the consideration acknowledge ... upon the v ... Where the plaintiff ... perfor mance and under which the defendant was in possession and enjoyment of the subject-matter, and in possession of the title deeds he must establish at least a good *prima facie* title to the relief he seeks *Rampal Ram* v *Subha Singh*, 4 Pat L J 17=53 Ind Cas 83

Sale for arrears of revenue In a suit by a ryot against an auction purchaser, claiming protection from ejectment under the proviso of section 37, Act XI of 1859, the *onus* of proving the character of the holding is on the ryot *Donmu* v *Pudnun* W R 1864, Act X 128 Where a taluk is sold at a revenue sale under Act XI of 1859, the burden of proving that under tenures in the taluk fall under any of the exceptions to s 37 of that Act, lies on him who alleges the under tenures to be within those exceptions *Rash Behari* v *Hara Monee* 15 C 555 The right ... incum brances is such that he ... proving the burden of proof on ... 1

Specific performance In a suit for specific performance of a contract if the plaintiff proves his prior contract, the burden of proving a subsequent *bonafide* transfer for value without notice under section 27(b) of the Spec fic Relief Act lies on the party alleging it *Ramdeni* v *Gumani*, 10 Pat L T 307 =119 Ind Cas 70=A I R 1929 Pat 300

... lading ... entered ... along ... value unknown, etc ... specification in the margin is co ... were according to specification ...

Vendor and purchaser ... agreement to sell his property ... is for the vendee to ... ice of the original ... I R ... person ... e had ... id an ... Cas

1— A person who derives his title through a purchase must prove that his vendor had a title in the property sold *Gulab Din* v. *Monji Ram*, 38 P. L R 1919=51 Ind. Cas 575

Wills 'In the Court of Probate" says *Baron Parke* in *Baker* v *Batt* 2 Moo P C 317 at pp 319, 320 "Where the *onus probandi* most undoubtedly

the deceased, he is bound to pronounce his opinion that the instrument is not entitled to probate For if the party upon whom the burden of proof of any fact

proved that a Will has been duly executed by a person of competent under

propounding the Will, and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator In all cases the *onus* is imposed on the party propounding a Will, it is in general discharged by proof of capacity and the fact of execution for which the knowledge of and assent to the contents of the instruments are assumed' *Barry* v *Butlin* 2 Moo P C 482 (484) *Brojesuari* v *Rasil* 85 Ind Cas 581, *Woomesh* v *Rashmoni* 21 C 279 *Surendra* v *Ramdasi* 47 C 1043=24 C W N 860, *Rajindar* v *Ramjaial* 5 Lah 263 *Mullabai* v *Waman* 69 Ind Cas 572, *Lala Singh* v *Kumar Bijoy Protap* 41 C L J 360 *Raj Bachan* v *Shabanni*, 5 O L J 519=47 Ind Cas 963 *Murad* v *Khalim* 12 Ind Cas 49=114 P W R 1911 *Prasannomoyi* v *Baikuntha* 25 C W N 779 *Rajdulari* v *Krishna*, A I R (1926) Pat 269, *Bindesuari* v *Ali Baisalha* 24 C W N 674, *Sorojini* v *Haridas*, 26 C W N 113 *Robins* v *National Trust Co Ltd* 101 Ind Cas 903 (P C)—A I R 1927 P C 515 *Rangayya* v *Sheshapppa* 101 Ind Cas 416 The *onus* of proving capacity to execute a Will lies on the person who wants to propound the Will *Mrtibai* v *Jamsetji*, 26 Bom L R 479=29 C W N 45—1924 (P C) 28 The burden of proving a Will lies on those by whom it was propounded *Bhagbhari* v *Khatun* 80 Ind Cas 118 The qualified admission of a party regarding the signature of a testator does not shift the burden of proving the non execution of the Will to him *Kesho* v *Vithal* 8 N L J 123=89 Ind Cas 468—A I R 1925 Nag 427

105 When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances

Burden of proving that case of accused comes within exceptions

Illustrations

(*a*) A accused of murder alleges that, by reason of unsoundness of mind he did not know the nature of the act

The burden of proof is on A

by grave and sudden provocation,

Code provides that whoever except in the case provided for by section 335 voluntarily causes grievous hurt, shall be subject to certain punishments

A is charged with voluntarily causing grievous hurt under section 325

The burden of proving the circumstances bringing the case under section 335 lies on A

Scope of the section The rule that every one is presumed to be innocent till he is proved to be guilty, is sometimes spoken of as if it was peculiar to the administration of criminal law In the Indian Evidence Act, s 101 illustration

(a) it is given as a particular instance of the general principle equally applicable to a suit for ejectment and to a trial of murder The rule merely means that a person who is accused of a crime is not bound to make any statement or to offer any explanation of circumstances which throw suspic on upon him He stands before the Court as an innocent man till he is prov d to be guilty It is the business of the Crown to prove him to be guilty, and he need do nothing but stand by and see what case has been ma le out agam t him As far as the case of the crown is concerned he cannot be called upon to take part in the proceeding except in so far, for his own protection the Court may question him under s 342 of the Criminal Procedure Code If there is a piece of evidence against the prisoner which might be cleare l up one way or the other by a word from him he is not bound to say that word He is entitled to rely on the defence that the evidence as it stands is incon clusive and that the Crown is bound to make it conclusive without any help from him Further in making out their case the prosecution have to get rid of every presumption against it, and to a certain extent there is a presumption in favour of innocence When the case for the Crown has clo ed it is for the prisoner or his adviser, to consider whether any case which he need answer has been made out against him This will depend on the nature of the charge The definition of every offence must be satisfied by proof and if th s proof fails as regards any necessary item the whole fails Assuming tl e min mum of proof to be supplied the Crown has offered evidence which may be sufficient for a conviction The question is whether it is sufficient It may be that the evidence is unworthy of belief, or that, if believed it is consistent with

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has vanished There is no presumption in favour of the existe ce of any particular fact which is necessary to make out innocence If it is necessary f r a man s defence to establish an *alibi* he must prove it [*Vide* section 103 illus

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Reg v *Stokes* 3 C & K 185 So under the provisions of this sec ion an answer setting up the right of private defence must be supported by evidence giving a full account of the transaction from which the charge against the accu ed person arises *In re Jamshear Sirdar*, 1 C L R 62 Unless a plea that the acts with which an accused person is charged as constituting an offence came within one of the exceptions named in the Penal Code is distinctly taken by the accused the Court is not competent to infer from the evidence in the case that any such exception exists in favour of the accused *Queen Empress* v *Chakhauri* A W N 1893 209, *Queen Empress* v *Sulha* A W N 1893 210 So this section is an important qualification of the general rule that, in criminal trials, the *onus* of proving everything essential to the establishment of the charge against the accused lies on the prosecution *King Emperor* v *Nga Ch* U B R 1906, Excise 7

This section is at variance with what was formerly the law in regard to those exceptions which are called special *Mark Ev* 81 General exceptions are those applicable to all crimes and are stated in Chapter IV of the Penal Cod Special exceptions are exceptions restricted to a particular crime Formerly ... of special except ons
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Indian Evidence Act (I of 1872) was thus stated by *Prinsep J* in, *In the matter of the Petition of Shib Prosad Pandey*, 1 C 121 (130) "The Penal Code contained a chapter of general exceptions to offences (Chapter IV), and for certain offences special exceptions were provided The Code of Criminal Procedure made especial provisions for these exceptions and the burden of proof to establish any of them The effect of ss 235 and 236, was that it was for an accused person to establish the existence of any of the general exceptions; while s 237 provided that if the charge denied the existence of any of the especial exceptions to an offence, the absence of circumstances constituting such exception was to be assumed This was the state of the law without Presidency towns until the Evidence Act I of 1872 and the Code of Criminal Procedure of 1872 were passed, when ss 235 and 237 were repealed with the rest of that Code, and in their place s 105 of the Evidence Act was enacted, which threw the burden of proof on the accused to prove the existence of any general or special exception" So far, then, as the Special Exceptions are concerned, an important alteration has been made in the law *Field I'v* 350 But in *Emperor* v *Wajid Husain*, 32 A 451 at p 456, the Court observed: The Evidence Act in laying down the principle set forth in section 105 has at times been said to have introduced something new and to have put the law regarding criminal cases upon a different basis than the one upon which it stood before it was enacted We are unable to take this view Undoubtedly, in criminal trials, the *onus* of proving every particular element, if we may use the term, which goes to the making of an offence lies upon the prosecution, and if the prosecution do not prove all such elements and room is left for doubt, [illegible] accused But there [illegible] ich satisfy us that [illegible] w principle, but put [illegible] ted upon *King* v. [illegible] ll on Crimes, Vol 3, p 407, *Reg* v *James Johnson*, (1902) 1 Q B 510 In the case of most general exceptions the circumstances which bring the case within a general exception are circumstances within the special knowledge of the accused person and lie within the rule that when any fact is specially within the knowledge of any person the burden of proving that fact is upon him" In *R* v. *Tuner*, 5 M & S 206, *Lord Ellenborough* said: "The question is upon whom the *onus probandi* lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer who denies any qualification, to prove the negative There are, I think, about ten different heads of qualification enu- [illegible]

[illegible]

& P 468, *Heath J* in *R* v *Stone*, 1 East 639, the Judges were equally divided on the point So even in England there has been some doubt whether if a statute creating a crime contains exemptions, exceptions, or provisos, the indictment should negative then [illegible]

under a plea of not guilty [illegible]

1 K B 510, an indictmer [illegible]

and chattels of her husband, [illegible]

nor that she had taken them when leaving or deserting, or about to leave or desert the husband It was contended that in as much as a wife cannot at [illegible]

105 was whether the exception was part of the enacting clause, or tacked on as a proviso or included in another clause of the statute *Russell on Crimes* p 10 In R ... 1907 ... the rule laid down in R v ... gamy by a British subj... at Gib ... ish subject, nor contain any reference to exemptions contained in 24 & 25 Vict C 100 ... negative any of them And it was held that the rule above stated applied equally to negative and ... 431, *Russel on Crimes* p 1 ... support the defence of an ... dence is believed and the jury have their ordinary duty of deciding a question of fact on the evidence before them *Mahomed* v *Emperor* 30 C 318 - 1903 ...

General exceptions Under this section the burden of proving the ex... of circumstances bringing the case of an accused person within any of the general exceptions in the Penal Code is on the accused and the Court shall presume the absence of such circumstances But this does not mean that the accused must lead evidence If it is apparent from the evidence on the record whether produced by the prosecution or by defence that a general exception would apply then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception *Anandi* v *Emperor*, 71 Ind Cas 6 9=... A 329 In a defence of insanity, the onus lies on the person alleging it ... the person charged *King Emperor* v *Sheodin*, A W N 1901 1 ... It is for the party setting up the right of private defence, to prove that he was within the exceptions stated in the Code *Veerananadan* v *Emperor* 1912 M W N 391= 11 M L T 251=15 Ind Cas 310, see also *Emperor* v *Gullu*, A W N 1904 113=1 Cr L J 497 Although this section places on the accused the burden of proving in a criminal trial that they have acted within their legal rights in exercise of the right of private defence of property, still this burden can be discharged by the evidence of witnesses for the prosecution as well as for the evidence for the defence on such plea being set up *In the matter of Kalachand Mukherjee* 11 C L R 232 Where an accused person has raised pleas ... sistent with the defence which would bring his case within one of the general ... exception ... within any ... be proved from the evidence given for the prosecution or to be found elsewhere in the record *King Emperor* v *Wajid Hasan*, 7 A L J 138 32 A 101=11 Cr L J 374=6 Ind Cas 559 ... circumstance bringing the case of ... thrown upon the accused *Aung Myat* v ... 207, see also *Emperor* v *Ali Raja* 26 Cr L J 310 When one man takes away the life of ... ng so If the ... him to show ... C W N 741 ... J 169=11 ... as 8 ... R 1930 Oudh 408 ... the burden of proof in certain ... ution has already performed ... ces from which such a plea necessarily follows it is the duty of the Court to give him the benefit of it *Mangal Ganda* v *Emperor*, 25 Cr L J 107=81 Ind Cas 901=1925 Nag 37

Special exceptions Under the Criminal Procedure Code 1861, it was necessary, in a charge upon a section of the Penal Code containing special exemptions to aver the absence of any special exception *In re* ... *Persad* 1 Cal 1... or general excepti... tence of circums... contained in any ... shall presume ... of such circumstances *Emperor* v ... Ind Cas 259=11 Cr L 612 The onus to show that any offence falls within a ...

S. 10

a general exception of the Gambling Act, is upon the accused and it is for him to show, in order to bring the case under s 10 of the Gambling Act, that the game played is a game of mere skill *Ram Newaz* v *Emperor*, 15 Cr. L. J. 276=23 Ind. Cas. 181 The burden of proving the exception of good faith is on the accused. A mistake of law does not make an exception under s. 79 of the

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the last part of section 11 of ... proceedings before Magistrate ... on or complaint in any such case shall negative any exemption, exception, proviso or condition in the statute on which the same shall be founded, it shall not be necessary for the prosecutor or complainant in that bel ... prove the affirmative thereof ... same" *Emperor* v. *A J* ... L T. 187=7 L B. R. 319 ... Penal Code means no more and no less than 'unless authorized, or not having

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Harbuston, 2 B. & Ald 40.

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itself. So in a defamation case, when once the complainant has proved that the ... putation, it rests with the accused ... *Abdul Razak* v *Gauri Nath*, 4 P. W. ... *Gowramma* v. *Veranna*, 6 Mys. ... has to regard the absence of grave ... ntrary is proved by the accused ... , 19 C W N 653=21 C L J. 377 =16 Cr. L J 561=30 Ind Cas 113 (F B)

Burden of proving fact especially within knowledge.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(*a*) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him

(*b*) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him

[illegible]

to injustice at least be production of expense and delay In order to prevent this, it has been established as a general rule of evidence that the burden of proof lies on the person [illegible] fact which lies more peculiarly [illegible] to be cognisant *Ph & An* [illegible] 6 T R 57; *Calder v Rotherford*, 3 B & B 302, *Sunderland Marine Insurance Company v Kearney*, 16 Q B 925; *Best Ev* § 274'

Not a general rule The characteristic, then, of the burden of proof (in the sense of a risk of non persuasion) in legal controversies is that the law divides the process into stages and apportions definitely to each party the specific facts which will in turn fall to him as the pre requisites of obtaining action [illegible]

or rule wh[illegible] neral test for ascertaining the incidence [illegible] ten said that the burden is upon the party [illegible] this is not an invariable test nor even [illegible] den is often on one who has a negative assertion to prove; a common instance is that of a promisee alleging non performance [illegible] the party to whose case th[illegible] y advances the enquiry [illegible] The truth [illegible]

careful or careless, in part on the fairness of putting the burden on one or the other, and this in part on the consideration which of the parties has the means of proof more available This last consideration has often been advanced as a special test for [illegible] proving a [illegible]

to be kept in mind in [illegible] proof in a specific case There is then, no one [illegible]

Scope of the section This is an exception to the general rule Where the subject matter of a party's allegation (whether affirmative or negative) is

peculiarly within the knowledge of his opponent it lies upon the latter to rebut such allegation *Phip Ev* 36, *Abrath* v *N E Ry Co*, 11 Q B D 440; *Powell* v *McGlynn*, (1902) 2 Ir R 154; *Hebbe* v *Ross*, L R 11 Q B 531, 541, 543. In *R* v *Turner*, 5 M & S 206 211, *Bayley J* said "I have always understood it to be a general rule that if a negative averment be made by one party, which is peculiarly within the knowledge of the other the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative" This rule is applicable, whether it be affirmative or negative, and in civil or criminal cases *Dickson* v *Evans*, 6 T R. 60 It is only reasonable that where one party can easily produce what holds him harmless and the other party have great difficulty in

[illegible]

equally within the control of each party, then the burden of proof is upon the party averring the negative, but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it, or upon his failure to do so, it must be presumed it does not exist, which of itself establishes a negative *Burr Jones* § 181 For instance where a carrier has undertaken to carry goods safely, fire [illegible] sound, except as to [illegible] of insurance, when [illegible] in contingencies It [illegible] within the knowledge of the defendant or prisoner, a general sense of convenience shifts the burden *of proof*; as for instance where a hawker or pedlar stands charged with trading, without a license it is easy for him to produce his license, and so end the discussion, whereas it might throw the most serious impediment in the way of the prosecutor [illegible] *Ev* 291 [illegible] is an impor[illegible] to be proc[illegible] fact lies on [illegible] it is provided by [illegible] particular person, [illegible] one side to the ot[illegible] shift the burden of [illegible] with respect to the[illegible] respectively" *Steph Ev* Art 96 Where the goods are solely under the control of the bailee the fact as to when loss, destruction or deterioration occurred is a

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of great difficulty, upon which there are conflicting authorities Ca es may be suggested of great difficulty on either side of the general question Suppo e under the English game laws an unqualified person is prosecuted for shoot ng game without the license of the lord of the manor, and after the alleged offence and before the trial, the lord dies and no proof of license, which may have been by parol can be given? Shall he be convicted for want of such affirmative proof or shall the prosecution fail for want of proof to negative it? Aga n suppose under the law of this commonwealth it was made penal for any person to sell goods as a hawker and pedlar without a license from the select men of some town in ' — ' ' ' ' - the penalty, and the indictment ne was not duly licensed To ' n of more than three hundred towns must be called It may be said, if the difficulty of obtaining proof is not to supersede the necessity of it, and enable a party hav ng the burden to succeed without proof This is true, but when the proceedings are upon statute an extreme difficulty of obtaining proof on one side amounting nearly to impracticability, and great facility of furnishing it on the other s de if it exists leads to a strong inference, that such course was not intended by the legislature to be required It would no doubt be competent for the legislature so to frame a statute provision, as to hold a party liable to the penalty who should not produce a license Besides, the common-law rules of evidence are ' and

to them to be considered as they ari e In the present case the Courts are o opinion that the pro ecutor was bound to produce *prima facie* evidence, that the defendant was not licensed, and that no evidence of that averment having been given, the verdict ought to be set aside The general rule is that all averments necessary to constitute the substantive offence must be proved If amounting y could not the affirma which there is a material or suspicious alteration, it lies on him to explain it, as a general rule though circumstances may arise which will exempt him, or even shift the burthen of proof on to the other side, as for instance if the facts concerning the alterations are more especially within his knowledge *Nort Ev* pp 29? 293 In *Elkin* v *Janson Alderson B* on the *dictum of Bayley J* in *R.* v *Turner* 5 M & S 206, 211 (*supra*) being quoted said 'I doubt, as a general rule whether those expres ions are not too strong They are right as to the weight of the evidence, but there should be some evidence to start it in order to cast the *onus* on the other s de' And in *R* v *Burdett* 4 B & A 95 140 *Holroyd J.* states in the most explicit terms that the rule in question 'is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged, but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him whether direct or presumptive, when it is unopposed, unrebutted or not weakened by contrary evidence which it would be in the defendant s power to produce, if the fact directly or presumptively proved were not true' *Best Ev* § 275

In R v H [illegible] on by ... stired ... this at the ... was ... ort of that both ... negat ve the point convict on *Turner* party who

is to sustain it The prosecutor, in general, is not called upon to prove negatively all that is stated in the information as matter of disqualification In *R* v. *Turner* all the learned Judges concur in that principle I concur in all the observations upon which the judgment of the Court in that case was founded; and I think every one of them is applicable in principle to this The general principle and the justice of the case are here against the defendant It is urged, that if we decide against the defendant we shall open the door to a great deal of inconvenience, that by no means follows, this man might have produced his license without any possible inconvenience, which would at once have relieved him from all liabilities to penalties Probably the whole enquiry before the Magistrate was as to the fact of selling the ale, and that nothing was said about the license, but however, I think by the general rule, the informer was not bound to sustain in evidence the negative averment that the defendant

negative, whether a book should be produced, or an examined copy, and many other questions of that sort whereas none can arise when the defendant himself produces his license This therefore, not being one of the excepted cases, but a case falling directly within the general rule I am of opinion that judgment must be given for the crown' *Apothecaries' Company* v *Bentley*, Ry & M 159=1 C & P 538, was decided upon the same principle. That was an action for a penalty, under the Apothecaries Act, 1815 (55 Geo III C 194), for practising as an apothecary without having obtained the certificate required by the Act. All the counts in the declaration contained the allegation that the defendant did act and practise as an apothecary, etc, "without having obtained such certificate as by the said Act is directed' No evidence was offered by the plaintiffs to show that the defendant had not obtained his certificate The plaintiffs having closed their case, counsel for the defendant submitted that there must be a non suit *Abbott C J* said "I am of opinion that the affirmative must be proved by the defendant I think that it being a negative the plaintiffs are not bound to prove it but that it rests with the defendant to establish his having a certificate' *Cf R* v *Harris*, 10 Cox 511, *Magdalan Hosp* v *Knotts* 8 Ch D 709 724 (C A) This section cannot be utilised to help persons who are representatives of other parties and who step into their shoes *Raghavendra Rao* v *Venkatasuami*, 1929 M W N, 752–30 L W 966=A I R 1930 Mad 251 Where a person is charged with having been a member of an association delared unlawful by the Government the burden of proof is not on the accused to prove that he discontinued his membership It is for the prosecution, *to prove that he continued to be a member even subsequently to the notification by* Government *Emperor* v *Sripad*, 55 B 484=33 Bom L R 90=A I R 1931 Bom 129.

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S. ... plaintiff to prove that the land was *lakheraj* village in *putnee* *Nubo Krishna* v *Pronotha* ... holding lands of considerable extent under a zemindar, it is a matter peculiarly within his own knowledge of what that holding consists, and if he alleges that one or two plots occupied by him are held under a different title, it is for him to show it *Ram Coomar Ray* v *Teejoj Gobind*, 7 W R 535 In a suit for pre-emption, where the pre emptor claims the ... that ... mentioned in the sale deed it *prima facie* ... se But very ... proof upon the ... ho mu t be n ... *gran Singh* v ... *Sheoporgash* ... ak, 29 A 613, v *Dhamraj* 9 A ... *Malkham* v *Jahan*, 16 A L J 533 But the date of the child's birth or death is not a fact specially within the knowledge of its father It is a fact which ...

A's wife that the purchase money ... 17 M L J 339 Where the defendant company intentionally ... perm ... respect of the goods to which ... and the plaintiff acted on such ... to deny that such cash ... as against ... prove that ... held that ... ment of goods, because it was a fact ... Mills v *Omademull* ... under this ... n a suit by a ... ncumbrance ... t sought to ... e *onus* shift ... be annulled is an incumbrance ... which being a ... on to the incumbrancer ... protected interest Th ... occupancy is a matter s ... and the *onus* under s ... 16 C W N 779 = 15 Ind Cas 30, see also *Jogesh* v *Roham* ...

... a tax imposed upon the ... averred that the tax had ... the plaintiff within the ... on the defendant Munici ... *airman of the Baruipur* ... order to apply this section ... in the nature of some... porations and individuals ... in v *Chairman, Ranchi* ... mortgage is contested by ... that the bond was executed and also asserted that the ... ff to prove his ... a contract if a ... it *Jodi Dhi* ... ailee the limits ... tract Act, for ... loss of fire, the ... the Contract ... ime of the loss ... f from proving ... ne part of the ... *tion Co Ltd* ...) = 1913 M W ...

In a case where the question is whether a particular act was or was not within the scope of an agent's employment the burden of proving the limit of the agent's authority is on the principal, in as much as the character of the authority is a matter specially within the knowledge of the latter *David M Bruce v Mg Kyaw Zin* 45 Ind Cas 822, see also *Sultan an v Behari*, 16 C W. N. 953; *Srikishen v Jodhari*, 45 Ind Cas 291; [illegible] 35 Ind Cas 81 *Madan v Pramnath*, 61 Ind [illegible] 64 Ind Cas 883, but see *Jinki v Thaker*, 2 I [illegible] *sicar*, 55 Cal 355=32 C W N 181, *Ishurmal* [illegible] 196

An accused person is always entitled to hold his tongue, but where the only alternative theory to his guilt is a remote possibility, which, if correct, he is in a position to explain, the absence of any explanation must be considered in determining whether possibility should be disregarded or taken into account *Smith v Emperor*, 43 Ind. Cas 605=19 Cr L J 189 The fact that a Muhammadan girl below the age of 15 years has attained puberty is a fact within her special [illegible] v *Khondakar*, [illegible] P Code lies [illegible] is mentioned [illegible] ircumstances Where all the circumstances go to show that the intention of the accused was to employ a girl as a prostitute as soon as she was physically ready for the purpose, the burden of proving that she intended to wait until the age of majority had been reached is on the accused *Khetramoni v Emperor*, 35 C L J 451=(1922) Cal 539 Where property is entrusted to a servant and such servant fails to return the property or to account for it or gives an account which is shown to be false and incredible it is ordinarily a reasonable inference that he has criminally misappropriated the property so entrusted to him and dishonestly converted it to his own use In such cases the Courts are entitled to draw hostile inferences and presumptions from the action and statement of the servant. The provisions of ss 106, 114 of the Indian Evidence Act, can be [illegible] *Sonameah v. King Emperor*, 2 [illegible] appraisement of crops, when the [illegible] arger amount for himself, the [illegible] If he is not able to show what it is, he can get only such amount as is admitted by the tenant But in cases where the landlord has never made an estimate or is prevented by the tenants [illegible]

[illegible]

received it at one time only, in a case where the accused is charged separately of

[illegible]

offering ... he be called upon to do so by th ... Parke B), and if the n ... ice (Freeman v Steggal ... e of a written instrument renders it suspicious it is only reasonable that the party claiming under it should remove the suspicion *Henman* v *Dickinson*, 5 Bing 183 *Clifford* v *Parker*, 2 M & Gr 910, *Lord Falmouth* v *Roberts*, 9 M & W 471 *Lord & Bright Ry Co* v *Fairclough*, 2 M & Gr 705, *Tay* § 1819

107 When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it

Burden of proving death of person known to have been alive within thirty years

Principle Where there is proof of the existence of a state of things and no evidence of its cessation, the presumption is that such state of things continues for a reasonable length of time Hence, if the question is as to the life or death of a person who has been once shown to be living, the burden of proving him dead lies at first on the party who asserts the fact *Wilson* v *Hodges*, 2 East 312, *Kekewich J* however denied this in *In re Aldersey* (1905) 2 Ch 186, *Powell Ev* 411 The presumption of continuance is often not so much an inference of fact as an administrative statement of the inertia of the Court *Chamberlayne's Ev* § 1090 Presumptions as to continuance of life are not legal presumptions, but presumptions of fact only, depending on the circumstances of each case *R* v *Willshire* 6 Q B D 336, *R* v *Lumeley* 11 Cox C C 274, *Lapsley* v *Grierson*, 1 H L C 498

Scope of the section In *Wilson* v *Hodges* 2 East 312 *Lord Ellenborough* C J referred to ... 461 where it was decided that ... n once shown to be living the p ... ts the death for the presumption is that the party continues alive until the contrary be shown This presumption of continuance is clearly one of the most practical importance It is frequently impossible to prove, for instance, the existence of a certain thing in a certain state or condition at the particular moment in question It is sufficient with the aid of this presumption, to prove such existence and state at such an earlier time that, according to the nature, it may fairly be presumed to have lasted to the moment in question *Cockle Cas Ev* 29 A person proved to have been alive at a former time is presumed to be alive during the probable period of life's duration, until his death is proved or a presumption of death arises *Lawson's Presumptive Evidence, Rule 30* The Mahomedan law presumed the death of a missing person ninety years ... ut the Hindu law ... d for 12 years, ... efore the passing ... "Presumptions ... or immutability ... absence of proof ... d corresponding ... ve been heard of ... sumption would be reversed, and death would be presumed What is the period which the ... as that of the duration of life has never been arbitrarily ... presumption might be affected by the particular case, such as state of health and so forth ... ive certainly been prescribed by high authority ... life Still even the attainment of a hundred ... is of occasional, and not over rare occurrence, while instances have been stated

S.

extending life to almost half a century further All ordinary experience, however certainly pointing to a period so rarely exceeding an age of ... indeed it would seem that this might be
would be only a presumption,
decision Indeed, the period app
all A presumption of death at the expiration of a hundred years is recognized, however, in both the civil and Scotch Law, and in a case so long ago as the time of *Lord Hale*, there is a dictum of his, that if feoffment be made to the use of one for ninety nine years if he shall so long live, and after the death to the use of another, this shall not be contingent, for it would be presumed that his life would not exceed ninety nine years *Weall* v *Lomer*, Poll 67" *Goodeve Ev* 628 "The life of a person once shown to exist" says *Justice Baldwin* in an American case, "is intended to continue till the contrary is proved, or is to be presumed from the nature of the case.... The witness, if alive is eighty years old; an age that we may admit is an advanced one,
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his being dead the presumption disappears, and the question has to be determined on the balance of proof *Mark Ev* p 83 Ss 107 and 108 of the Evidence Act should be read together, because the latter is only a proviso of the rule contained in the former, and both constitute one rule when so read together. *Dharup* v *Gobind*, 8 A 614

Inference of continuance of life is rebuttable The fact of life at a ...

death may fairly be based, the Court will not assume, in an administrative way, that the person in question is actually dead, i e, its inertia will not be overcome so as to enable it to act upon the basis of death until no further possibility of

07 offering it in evidence must explain its appearance, if he be called upon to do so by the issue raised (*Parry* v. *Nicholson*, 13 M & W 779, per *Parke B*), and if the instrument be not admitted by his opponent under notice (*Freeman* v. *Steggal* 14 Q B D 202), because, as every alteration on the face of a written instrument renders it suspicious, it is only reasonable that the party claiming under it should remove the suspicion *Henman* v *Dickinson*, 5 Bing 183 ... *Lord Falmouth* v. *Roberts*, 9 M & W 471 ... *Bright* ... 2 M & Gr 705, ... *Planter* v. *Mutchand* 4 M I A 121 (129) ... *Lamasuami* v. *Blaram*, 3 M H C R 2 ... 847 This rule is not applicable in cases of ... tion of a plaintiff's claim *Atmaram* v. *Umedram*, ...

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Burden of proving death of person known to have been alive within thirty years

Principle Where there is proof of the existence of a state of things and no evidence of its cessation, the presumption is that such state of things continues for a reasonable length of time Hence, if the question is as to the *life or death* of a person who has been once shown to be living, the burden of proving him dead lies, at first on the party who asserts the fact. *Wilson* v. *Hodges*, 2 East 312, *Kekewich J* however denied this in *In re Aldersey*, (1905) 2 Ch 181, *Powell Ev.* 111 The presumption of continuance is often not so much an inference of fact as an administrative statement of the inertia of *the Court* *Chamberlayne's Ev.* § 1090 Presumptions as to continuance of life are not legal presumptions, but presumptions of fact only, depending on the circumstances of each case *R* v *Willshire*, 6 Q B D 366, *R* v *Lumeley*, 11 Cox C C 2..., *Lapsley* v *Grierson*, 1 H L C 498.

Scope of the section In *Wilson* v *Hodges*, 2 East 312, *Lord Ellenborough* ... Rep 461 where it ... son once shown ... erts the death for the ... until the contrary be shown ... e of the most practical importar ... stance, the existence of a cet ... particular moment in question ... ption, to prove such existence and state at such an earlier time that, according to the nature, it may fairly be presumed to have lasted to the moment in question *Cockle Cas Ev* 29 A person proved to have been alive at a former time is presumed to be alive during the probable period of life's duration, until his death is proved or a presumption of death arises *Lawson's Presumptive Evidence*, Rule 39 ... ssing person ninety years ... years But the Hindu law ... been heard for 12 years ... before the passing of the Indian Evidence Act is th ... mptions ... utability ... of proof ... r a period corresponding ... not to have been heard of ... the presumption would ... is the period which the ... is never been arbitrarily ... affected by the particular ... of health, and so forth Three score years and ten have certainly been prescribed by high authority as an average limit of human life Still even the attainment of a hundred is of occasional, and not over-rare occurrence, while instances have been stated

evident proof of the life,' and that the Judge should 'direct the jury to give their verdict as if the person were dead'. But if the absent party should not really have died, provisio...
effect of this statute, then ...
into evidence, by a certain ...
The rule fixes, for the p...
facts, absence for seven ye...
particular inquiry, the same thing as death, it is its legal equivalent

'Now very likely, in practice, similar cases may have been brought within 'the equity' of the statute, as *Chief Justice Holt*, in 1692, is reported to have 'held that a remainder man was within the equity of that law'; but we hear of no suggestion of a general seven-year rule, such as we have now, before 1805. In the case *Doe d George* v *Jesson*, 6 East 80, there was a rule for a new trial, in an action of ejectment, which turned on the question whether the plaintiff's lessor had entered within the time allowed by the statute of limitations, which

presumption ...

ends at the exp...
to be living ...
was living at a later period, there was fair ground for the jury to presume that he was dead at the end of seven years from the time when he went to sea on his second voyage which seems to be the last account of him. This was supporting what ... justified, on the anal... even years; and more ... questioned upon this ... It was not laid dow... that they must; nor was any rule of presumption put forward; nor, as I say, was it on any such point that the ruling below was questioned in the Full Bench.

'In 1809, at *Nisi Prius* (*Hopewell* v *De Pinna*, 2 Camp 113) in an action against a woman on a promissory note, she pleaded coverture, and proved her

that it knows is that the party has been absent and unheard from for more than seven years. Upon ...
on evidence for t...
issue is upon the lif...
this presumption (...

constant change *Hyde Park v Canton, supra*; *In re Lewis Trusts*, L R 6 Ch 356, *In re Benjamin*, (1902) 1 Ch 723, *In re Waller*, L R 7, Ch 120 When the inference from experience as to the continuance of life has waned in probative force and even after it has departed the continuance of life remaining merely as an administrative assumption, additional facts may so strongly tend to establish an inference of death that the inertia of the Court will be overcome and affirmative action taken *Chamberlayne's Ev* § 1001

108 *[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is *(shifted to) the person who affirms it.

Burden of proving that person is alive who has not been heard of for seven years

Principle Where certain results would have followed if an act or an event had occurred (or not occurred) the absence of those results is some indication that the act or event has not occurred (or occurred) A common class of evidence of this sort is that of lack of news to show probable death of a person or the probable loss of a ship, for as it is usual for living persons to be heard from directly or indirectly, by persons having an interest in knowing, and for ship officers to leave word of their journey at the ports they touch or with the other ships they pass the lack of any such news indicates their non-existence *Wigmore Ev* § 158 This is a genuine presumption of universal acceptance, to aid proof of death It is generally said to arise from the person's continued absence from home for seven years, unheard of by the persons who would naturally have received news from the absentee *Wigmore Ev* § 2531 In ... There are several ... ought to take ... After what ... that a man is ... length of a ... pose Obviously ... dead? The ... have a distinct ... six or eight ... *James Stephen* on ... rule is a ... the 12th March, 187...

Origin and growth of the rule "It is a rule of presumption that, in the absence of evidence to the contrary, a person shall be taken to be dead when he has been absent seven years and not heard from That is a modern rule It is not at all modern to infer death from a long absence; the recent thing is the fixing of this time of seven years, and putting it into a rule The faint beginning of it as a common law rule, of general application in all questions of life and death, is found, so far as recorded English cases show in *Doe d George v Jesso* ... 1805 Long before this in 1604 the "Bigamy Act" ... exempted from the scope of its provision ... punishment of a felon (1) those who had married ... spouse had been beyond the seas for seven years, and (2) those whose spouse had been absent for seven years, although not beyond the seas,—'the one of them not knowing the other to be living within that time" This statute, it may be noticed, did not absolutely treat the absent party as dead, for it did not validate the second marriage in ... penalty Again, in ... inconvenience by want of ... themselves, upon ... and leases depend ... otherwise absent ... or or reversioner ... absenting himself ... 'sufficient and

* These words in s 108 were substituted for the original words 'when" and "on' respectively by the Indian Evidence Act Amendment Act (18 of 1872), s 2.

evident proof of the life,' and that the Judge should 'direct the jury to give their verdict as if the person ... were dead' But if the absent party should not really have died, provision was made for a subsequent recovery by him The effect of this statute then was to end in a specific class of cases, all enquiry into evidence, by a certain assumption, or, as it is otherwise called, presumption The rule fixes for the purpose of a particular inquiry, the effect of specified facts, absence for seven years, unheard of, is to be accounted, as regards this particular inquiry, the same thing as death, it is its legal equivalent

Now very likely, in practice, similar cases may have been brought within 'the equity' of the statute, as *Chief Justice Holt*, in 1692, is reported to have 'held that a remainder man was within the equity of that law'; but we hear of no suggestion of a general seven-year rule, such as we have now, before 1805 In the case *Doe d George* v *Jesson*, 6 East 80, there was a rule for a new trial, in an action of ejectment, which turned on the question whether the plaintiff's lessor had entered within the time allowed by the statute of limitations which

As to the period ...
the Statute 19 ...
also according to ...
the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living Therefore, in the absence of all other evidence to show that he was living at a later period, there was fair ground for the jury to presume that ... on his ... pporting ... on the ... ars, and ... ed upon ... not laid ... ey must; nor was any rule of presumption put forward; nor, as I say, was it on any such point that the ruling below was questioned in the Full Bench

'In 1809, at *Nisi Prius* (*Hopewell* v *De Pinna*, 2 Camp 113) in an action against a woman on a promissory ... marriage, but the husband had gone ...

... ars This was given, and the ... was to prove death; here, ... not assume life now, when all ... unheard from for more than seven years Upon the basis of these cases, there soon appeared in the text books on evidence for the first time in 1815, a general proposition that 'where the issue is upon the life or death ...
this presumption (namely, that a ...

S. which he thinks should find a place in the law of evidence *Stephen* published his Digest in 1876 Here, then, in seventy years, we find the rule about a seven years' absence (1) coming into existence in the form of a judicial declaration about what may or may not fairly be inferred by a jury in the exercise of their logical faculty; the particular period being fixed by reference to two legislative determinations in specific cases of a like question; (2) passing into the form of an affirmative rule of law requiring that death be assumed under the given circumstances This is a process of judicial legislation, advancing from what is a mere recognition of a legitimate step in legal reasoning to a declaration of the legal effect of certain facts" *Thayer Pre Treat Ev* pp 319-321 But the Indian Evidence Act, which found place in the Statute Book in 1872 went further and by s 107 it allowed presumption to be made of the continuance of life for a period of 30 years from the period when a person is last heard of But this presumption is not free from criticism

Scope of the section This section provides in effect that if it appears that a person has not been heard of for seven ... usually have heard of him if he had been alive, and ... probability of his being alive, the presumpt ... large *Marl Ev* 83 But sections 107 and 108 should be read together, ... latter is only a proviso of the rule contained in the former and both constitute one rule when so read together *Dharup Nath* v *Gobind Saran*, 8 A 614=6 A W N 239 The two presumptions are conflicting and the circumstances might be such that both presumptions were raised What is to prevail? It was in order to solve this question that the language of section 108 was changed ... of death would ... pon this ... e a er ... If the ... to find ... or seven ... cour e ... red and twenty years ago, so that according to the common course of natural events he could not be alive now (*Vide* section 114 *infra*); or he may prove that two years ago X went to sea in a ship which has not since been heard of But, in all this there is no shifting ... *Mark Ev* p 84 So also this presu ... left his home under circumstan ... mmuni cate with his friends *P* ... that he died at any particular ti ... & W 894, *Lord Denman C J* ... Bench, that the presumption of Law relates only to the fact of death, and that the time of death, whenever it is material, must be subject of distinct proof" The ... dings ... g he ... It ... It is quite clear, therefore, that when no such probability exists, the presumption cannot arise" *Per Sir John Stuart V C* in *Bowden* v *Henderson*, 2 Sm & G 360 ... the Evidence Act is a presump ... was raised, that is, at the date of ... v *Phekia*, 14 C W N 311= ... case *Stephen J* ... 1862 ten ... ince been ... een alive ... ase must ... evidence; and the question ... on 108 of the Evidence Ac ... f would shift, and instea ... ad at a given time, the de ... But we are constraine ... *Surya*

Kanta Ray Choudhury 35 C 25, it is expressely laid down by *Geidt J* that the presumption that arises on a man not having been heard of for seven years is a presumption that he is dead at the time when the question is raised, that is, in this case at the date of the suit and not at some antecedent date that is at the time of *Hilkari's* death in 1872 The judgment of *Maclean C J* seems on the facts mentioned in the judgment of *Geidt J* to be to the same effect A similar view was expressed by the Burma Chief Court in *Molla Cassim v Molla Abdul Rahim* and was accepted by the Privy Council (33 C 173) This is not the English law as may be seen in the judgment in the leading case of *In re Phene's Trust* (1869) 5 Ch App 139 and the cases therein quoted, and were the matter *res integra* we are not sure that we should attribute to the words of section 108 the effect that is given to them in the cases we have mentioned" *Mohammad Sharif v Pande Ili* 8 A L J 1052 (F B) This section of the Indian Evidence Act, 1872, according to its terms, does not require that the Court should hold the person dead at the expiration of the seven years therein indicated, but merely provides that the burden of proving that he is alive at the time of the suit is shifted to the person wh[illegible] The presumption is in [illegible] the death of a person he[illegible] L J 181 = 56 Ind C [illegible] showed that a person was unheard of and there was no other evidence to show that the person had not been heard of for 40 years the presumption as to death could be drawn *Tirapathi v Rangit*, A I R 1931 Oudh 40 = 130 Ind Cas 124 = 2 O W N 712 Where the nearer relations deposed that they had not heard of the person in question for seven years the presumption under the section should be drawn *Khan Chand v Mt Jawandi*, 1923 Lah 174 This section [illegible] sion [illegible] oper [illegible] the [illegible] L [illegible] *Re* [illegible] was presumed for probate as a matter of fact and not of law, before seven years *Phip Ed* 7th Ed p 653.

Circumstances may create presumptions at earlier period The legal [illegible] ven years, but the fixing this [illegible] would in no way preclude the [illegible] presumption of fact as the [illegible] n short of the seven years [illegible] *Neville*, Manning, 344, "that nothing could be more absurd than that there should be a presumption of life or death without reference to the age, circumstances, situation of life, and common habits of the party Can there be the same presumption as to a party who is one hundred, and one who is thirty five ? As to a party who was in good health [illegible] upon h[illegible] *Hubbock* [illegible] country [illegible] or other similar calamity, or again, the sudden unexplained cessation of his [illegible]

tent with the supposition of his continuing existence' *Hubbock* page 174; *Goodeve Ev.* 631. So death may be proved by reputation, by hearsay, or by

8. evidence of facts inconsistent with the theory of the existence of life The presumption will arise that the death of the absent e has occurred before the expiration of seven years where any of the following circumstances are shown to —(1) That within that time he was in a desperate state of health *Westoer* v *Birchmore* 13 Ves 362 In the above mentioned case "the health was very bad—the chancellor speaks of it as desperate" (2) That within that time he embarked on a vessel which has not since been heard of and is long overdue inquiries having been made at her ports of departure and destination *Lawson Presumptive Evidence*, rule 50, *Merritt* v *Thompson* Helt, 550 In the above case the Court, observed "The presumption of his death does not rest upon the fact that he has not been heard of for seventeen months, but upon the weightier circumstance that the vessel has not been heard of for seventeen months" In *Re Smyth* 28 L J (P & M) 1, *Sir Creswell Creswell* said "I do not find in the affidavit any statement that enquiries have been made at Barcelona or elsewhere about the crew The affidavits only state that neither the vessel G S, nor any of the crew have been heard of I should undoubtedly presume that the vessel has been lost, but it does not follow that the crew or some of them may not have been saved The case had better stand over until you have written to the agent of the ship at Barcelona and ascertained whether any of the crew have survived" Similarly in *Re Bishop*, 1 Sw & Tr 30?, the same learned Judge said "I think probably the vessel is lost, but it does not appear that any inquiries have been made at *Demerara* as to whether any of the crew have arrived there or have been heard of" (3) That at sometime within that period he has encountered a 'specific peril,' which includes not the ordinary dangers of travel or navigation, but some unusual or extraordinary danger *Eagle's Case*, 3 App Pr 220, *Lawson Presumptive Ev* rule 51 (4) That his habits, character, dom[illegible] ances other than those showing ex[illegible] within that period he [illegible] home or domicile or [illegible] rule 52 A son, after the death of his father and knowing of a provision to him in his Will, to take effect on the death of his mother, leaves home He is not heard of for many years He will be presumed to be dead *Karsten* v *Karsten* 15 N Y (S) 966 On March 25 1866, S left her home and was never heard of again She depended on an income payable in quarterly instalments She did not appear to claim the amount due in June, 1866 In a proceeding in 1875 the presumption is that she was dead after June, 1866 *Re Beasney* L R 7 Eq 498

[illegible] death at the ex[illegible] re it is improbable [illegible] ard of at or would [illegible] icile or where in [illegible] g been alive subsequently to the end of seven years *Lawson Pre Ev Rule 53* In 1829 R. left her family in England and went to Paris where she took a situation as governess She continued to correspond with her relatives In 1835 she wrote to her sister from Paris, saying that she was about to accept another situation and stating, that she had become a Catholic On receipt of this letter her sister replied in a letter of remonstrance reproaching her for her abandonment of the Protestant religion No reply was received to this letter, and she was not subsequently heard of There is no presumption that she died in 1842 *Bowen* v *Henderson* 2 Sim & G 360 In this case it was said that the principle on which the [illegible] dead based [illegible] im for seven years is [illegible] with some [illegible] have communicated [illegible] draw from [illegible] lusion which Courts [illegible] clear therefore, that when no such probability exists the presumption can not arise In this case all the circumstances tend to show that after what had taken place between L and her friends it was extremely improbable she would have entered into further communication with them She had abandoned her religion and her friends wrote to her a letter of remonstrance and reproach for doing so The reproaches were not calculated to encourage further communications I think this circumstance, taken in connection with the rather eccentric course of life which it

appears from her letters she could have
view it follows
of informa-
the lady were
Eq 1, it was
said "The circumstances of the present cases are not such as to render it safe to make that presumption at present *Hugh Morgan* left Ireland for America some time before the year 1859, resided there for some years, married there, came back to Ireland with his wife in 1859 for a temporary purpose only, he sold all his property in Ireland and after a few months returned to America, whither his wife and son followed him It is contended, however, that because he has not since been heard of by his sister, the only member of his family who remains in Ireland, I am therefore to presume that he is dead But suppose that an alien comes into this country and stays for a few months, or that a person who is not an alien, but has his residence abroad, comes here and, stays for a little time, and then leaves having—to put an extreme case—no relatives here, and not heard of for seven years, is the presumption, therefore, to be made of his death?
I [illegible] leaves
h [illegible] nding
t [illegible] that
in [illegible] *ndwell*
V C said "Here a girl of about sixteen or seventeen years of age, whose father was a farmer, chose, for some reason which does not appear, to leave her father's house and to go no one knew whither But it seems that in August 1814, she was at Portsmouth, and that she then intended to go abroad Therefore it is but reasonable to presume that all along she has been concealing herself, and that she never intended to return home The mere fact of her

1834 for seven years for a crime He last
n that year The records showed that he
resumption that he was dead in the year
507, *Lawson Pre Ev* Rule 53, see also *Re Ocean Co*, 2 I R 1.

Law Accord-
would appear
rooke's Digest
oo Lal, 2 Hay.
10 W R 484;
C 137 Note, *Bawnuddur* v *Ram*
W R 891, *Ghasee* v *Jasouddee*,
H C 1 It is only when the

S. 108 provisions of section 108 of Act I of 1872 will apply *Parameshwar Rai* v *Bisseswar Singh*, 1 A 53 (F B) Where a person claims another's property on the allegation that the latter was missing and has not been heard of for more than seven years, the question whether such person is to be presumed to be dead is one ... ance In such a case ... *Dhondo Bhik* ... 11 B 1 ... W N 1889, 239 *Balaya* v *Kistnappa*, 11 M 118, *Hari Chintaman* v *Moro Lakshman* 11 B 89; *Jayawant* v *Ramchandrao* 18 Bom L R 11=40 B 239=33 Ind Cas 181, *Ponduri* v *Jalaiah*, 71 Ind Cas 305=32 M L T (H C) 6 Under the Mahomedan ... share of a missing person cannot open, ... ty years have elapsed since his birth, ... *Ali* v *Maharban* 2 A 625; *Rahim Bibi* v *Rahat Bibi* 7 N W P 149 *Girdhari* v *Lado*, A W N 1882, 105 *Doulat* v *Khiya*, 2 Agra 59 But in a later Full Bench case of the same High Court those cases were *overruled* In that case *Mahmood J* said "The rule of Mahomedan Law that a missing person is to be regarded as alive till the expiry of 90 years from the date of his birth, is a rule of evidence, and not of succession or inheritance etc, within the meaning of section 24 of the Bengal Civil Courts Act" *Mirlar Ali* v *Buth Singh*, 7 A 297 (F B)=A W N 1884, 333 So the rule contained in section 108 of the Indian Evidence Act, applies to the case of a Mahomedan, who has been missing for more than seven years when the question of his death arises in cases to which under the provisions of section 24 of the Bengal Civil Courts Act (VI of 1871) the Mahomedan Law is applicable *Ibid*, see also *Imdad Ali Ghulam* v *Jilani*, 12 P R 1892; *Moolla Cassim* v *Moolla Abdul*, 2 C L J 236=15 M L J 317=7 Bom L R 892=2 A L J 798=10 C W N 33=33 C 173=32 I A 177; *Yusuf Ali Beg* v *Ayub Beg* 11 A L J 355=18 Ind Cas 920, *Miraj* v *Abdul*, 43 A. 673

Time of death Though under ss 107 and 108 of the Indian Evidence ... of seven years, ... he has ... n died ... on the presumption of death, nor on the other upon the presumption of the continuance of life *Rango* v *Mudi Yeppa*, 23 B 296 Whenever the question as to the exact time of death arises, it must be dealt with according to the evidence and circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to seven years *Dharup Nath* v *Gobind Saran* 8 A 614=A W N 1886, 239, see also *Guru* v *Larchmma*, 14 M L J 464 The law on the subject is thus stated by *Richards C J* in *Mohammad Sharif* v *Bande Ali*, 34 A 36=8 A. L J 1052 (F B) "They contended that it must be presumed that *Madad Ali* died sometime during the first seven years during which according to the evidence he was not heard of, and that upon the expiry of the first seven years it must be presumed that he was dead In my opinion this contention is not correct The mere fact that the evidence adduced by the plaintiffs went to show that *Madad Ali* had not been heard of for more than seven years raises no greater presumption than that *Madad Ali* is dead There is no presumption that he died in the first seven years or in the last seven years The presumption merely is that he was dead at the time ... dead arose, the burden ... if it was necessar ... *Nath* v *Gobind* ... on which the plain ... judge who delivered the judgment in the case, I think that he misinterpreted and misunderstood the passage from *Taylor on Evidence*, which he quotes The period of seven years which the learned author there speaks of is in my opinion the minimum period during which it is necessary for the plaintiff to show that the person whose life or death is in question has not been heard of and that if the evidence shows the person had not been heard of for 14 or 15 years instead of seven, the presumption would not be carried one bit further There would be merely the presumption that the man is dead; but there would be no presumption that he died at any particular moment of the period during which he has not

been heard of. In the last edition of *Taylor on Evidence* the passage is as follows· 'although, however, a person who has not been heard of for 7 years is presumed to be dead, the law raises no presumption as to the time of his death, and if any one who seeks to establish the precise period during these seven years at
that the
time, he
It seems to me that this argument proceeds upon the assumption that if *Dillar* had sued during his life time, the evidence as to the disappearance of *Mudal Ali* would have been exactly the same This would be a very rash assumption Seven or eight years ago there must have been many persons who might have heard of the existence of *Mudal Ali* who are now dead and gone Reliance was also placed upon the case *In re Phene's Trusts*, L R 5 Ch App 139 In that case the question was whether or not *Nicholas Phene Mill* had survived his uncle who died on the 5th January, 18(1, leaving certain property by Will to his nephews in equal shares *Nicholas Phene Mill* was one of his nephews *Sir G. M. Gifford L J* examined the authorities upon the question of presumption and finally decided that it lay upon the administrator of *Nicholas Phene Mill* to show by affirmative evidence that the latter had survived his uncle At page 151 the *Lord Justice* says "It is a general well founded rule that a person seeking to recover property must establish his title by affirmative proof This was one of the grounds of decision in *Doe* v *Nepean* and to assert as an exception to the general rule that the *onus* of proving death at any particular period, either within the seven years or otherwise, should be with the party alleging d

not of presumption but of proof, or with the real substance of the actual decisions, or the sound parts of the reasoning in *Doe* v *Nepean* or with the principles to be deduced from the judgment in *Underwood* v *Wing* The true proposition is, that those who found a right upon a person having survived a particular perio
will necessarily
the person asse
equal force to the case when it is essential for the plaintiff's claim that he should establish the death of an individual at a particular period Lastly, the appellants relied upon the judgment of *Karamat Husain J*, in the case of *Mussammat Akbari unnissa* v *Sayed Bashir Ali* S A No 486 of 1909 With great respect I think the learned Judge fell into the same error as the Judges who decided the ca
stood
of *Nc*
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11 C
is enacted by se
time of the suit, but there is no presumption as to the precise time of his death'

until the seven
the whole of th
presumed dead from the moment the seven years commenced But the contention was overruled, and *Lord Denman Chief Justice*, in delivering the judgment of the Court stated thus —"The absence of *Mathew Knight* abroad for seven

years, without having been heard of, is evidence from which a jury might reasonably presume, and in this case have properly presumed, his death This period has been adopted as the ground for such presumption in analogy to the Statutes of 1 Jac I C II relating to bigamy, and 19 Car 2 C 6, as to the continuance of lives on which leases were held, and the lessor of the plaintiff clearly proved the first of the points necessary to maintain the case But such absence abroad for seven years, though it naturally leads the mind to believe that the party is dead, and therefore is sufficient evidence to warrant a presumption of fact that the party was dead at the end of seven years, clearly raises no inference as to the exact time of the death; and still less that such death took place at the end of seven years Absence for the period has no tendency to induce the belief that life has ceased at that precise time; and no case has been cited, nor do we know of any, in which it has been laid down as a rule of law ... of fact, ... the other ... though the loss of a vessel in which a person sailed might be presumed, after having sailed on a foreign ... and so it might be ... the tim... ...ircum... ...time case on appeal in the *Exchequer Chamber* ... 'Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those ... last day is most improbable, ar... of death That pr... has been heard of; ... he should not be heard of In other words it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed If you assume that he was alive on the last day but one of the seven years, then there is nothing extra ordinary in his not having been heard of on the last day, and the previous extraordinary lapse of ... reason of the ... of death ... ne con... ... when a question is raised before a Court as to whether a person is alive or dead These sections do not lay down any presumption as to how long a man was alive or at what time he died *Band Veeramma* v *Gangala*, 16 Ind Cas 43; *Poomaloori* v *Chelakapatai*, 33 M L J 295=(1917) M W N 722=6 L W 633, *Mairaj Fatima* v *Abdul* 19 A L J 713=63 Ind Cas 286; see also *Re Phene's Trusts*, L R 5 Ch 139, *Re Lewe's Trusts*, L R 6 Ch 356; *Re Rhodes*, 36 Ch D 586, *R.* v *Lumley*, L R 1 C C R 196, *Lalchand* v. *Mahant*, 42 T L R 159; *Punjab* v *Natha*, A I R 1931 Lah 582 (F B)=133 Ind Cas 889, *Meher Khan* v *Salhi*, A I R 1932 Lah 45=134 Ind Cas 97, *Gudri* v *Jangi*, 124 Ind Cas 25; *Jangi* v *Gudri* A I R 1932 All 365=1932 A L J 175, *Jewan* v *Kuar Redti*, A I R 1930 All 427=1930 A L J 469 The earliest date to which the death can be ... the date when the suit was filed *Jeshankar* ... Ind Cas 525; see also *Basharat* v *Naje* ... 0; *Faquir* v *Dan Bahadur*, 21 O C 143=46 Ind Cas 803, *Mohonar Lal* v *Chuni*, L R 3 A 393, *Muhammad* v. *Abdul*, 64 Ind Cas 468, *Rekhab Das* v *Mt Sheobai*, 45 A 466=21 A L J 393=7... *Fateh Ali* v *Ahmad Din*, 100 ... 00 Ind Cas 446; *Mahadeo* ... h 13, *Jagannath Singh* v ... r v *Mahadeo*, 115 Ind Cas 626 If a person has not been heard of for seven years that is a presumption of law that he is dead but at what time within that period he died ... g that the ... es upon the ... s essential ... A. 24=30 ... 289 (P. C),

see also *Ganesh Das Awora, In the goods of*, 13 C L J. 578=97 Ind. Cas. 247= A I R 1926 Cal 1056

By persons who would naturally have heard of him "Persons who would naturally have heard of him" is not confined to a particular class; they may be relations or strangers *Lawson's Pre Ev* Rule 15; *Doe* v. *Deakin*, 4 B. & Ald 433 A wife, who left her husband and is in keeping of another is not one of the persons who would naturally hear from him if he were alive *Kantabai* v *Umabai*, 117 Ind Cas 209=A I R 1929 Nag 127.

Not been heard of "Not been heard of" means that none of the "persons'

an action was brought on the policy in 1874 and the question was whether N was then dead He had left his home in England for Australia in 1867, and

as follows: A niece of
man on the street
e passing crowd
o her mother and
all thought her
d been 'heard of'
ble grounds, then
Assurance Co v.
Edmonds, 2 App
that not being
thing about him
was dead, added 'you cannot say that a man has never been heard of, when in the first place one of his nearest relations comes and says she saw him alive and well within three years; still less can you say that he has never been heard of when every member of the family states that they heard that which is now stated" On appeal this was held to be an error "The direction," said *Lord Chancellor Hatherley*, "seems to me to come to this In the first place, if the jurymen believed Mrs C's assertion to be correct, and thought she had seen him alive and well, of course that ends the case But then he adds:

member of the
n, as far as that
for the jury-
them whatever
t on as arising
when every member of the family had heard what she said, because, be it true or be it not true, the fact of their having heard it would prevent the assumption arising I think that would be the reasonable inference from that language,

other hand
presumption that he is dead,—that is, that he has never been heard of by any of his relations for the space of seven years,—when you find that every one of the relatives has come forward, and every one of the relatives heard that he was alive" Therefore it appears to me that the Lord Chief Baron plainly and distinctly directed the jurymen that they had no evidence before them at all

came to the conclusion that Mrs C's story was not to be believed On the contrary, it seems to have been laid down in clear and precise terms, that if every member of the family has heard of him, whether by a credible story or not, then there is a probability of his being a[illegible] ment on of death would not arise And *Lord Blackburn* in [illegible] had failed in proving the actual death of [illegible] n the rule of law which is generally laid down [illegible] man has not been heard of for seven year[illegible] it he is dead It is generally so enunciated I [illegible] orrect way of enunciating it, but I think it may be fairly enough put in those words for this purpose I think, having regard both to the reason of the thing and the decisions we must take 'not being heard of' in a certain sense There was seldom or never a man who had reached the age of forty with regard to whom it would not be easy to call scores of people to say, 'I was at school with him, I knew him perfectly well, and I have not heard of him for the last seven years' But that would not be enough to raise a presumption that he was dead because if ever so much alive, those people might not have heard of him My lords, it appears from the case of *Doe* v. *Andrew* (15 Q B 751), that it [illegible] a presumption that there should have been an [illegible] he was alive, would [illegible] nalogy, but it is something like the case of a search for documents; before you are allowed to give secondary evidence of a document, you must search the places where the document would in the natural course of things be, if it were still in existence, and having proved that you have done that, you may then give your secondary evidence In like manner, in order to raise the presumption that a man is dead from his not having been heard of for seven years, you [illegible] amongst those who if he was a[illegible] of him [illegible] ld [illegible] een such [illegible] k [illegible] is dead [illegible] ie [illegible] who said so, but afterwards said [illegible] [illegible] that Mrs [illegible] had seen him' in Australia, but that he did not [illegible] a report would hardly [illegible] witness saying he had not [illegible] posing the jurymen had [illegible] n, would or would not the [illegible] a seven years' absence [illegible] I think certainly they would It seems to me that when she said, 'I have seen the man in the streets [illegible] arising from the relative, including [illegible] and it turned the *onus* the other [illegible] might have been proved that the man [illegible] but somebody else If that had been proved it [illegible] had never made that statement. When [illegible] d all the others had heard it from her, [illegible] statement affected the *onus*, yet [illegible]

[illegible] think many lawyers themselves,—would be under the [illegible] seven years, commonly enunciated rule about a man's not being heard of for seven years, [illegible] that there has not been a physical hearing of him, and that if the [illegible] seven years [illegible] and [illegible] it the [illegible] think [illegible] was [illegible] hat it [illegible] hat in [illegible] that [illegible] ot see]

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een no more' I do not
because I think, though
shift the presumption,
yet the facts might be m
reasonable doubt was not
able person came and s

be said, after it was proved that the man who told them that had been cheated into the belief that he had seen the brother, could it be said that evidence, so explained, put an end to the presumption arising at the end of seven years? I apprehend not, yet the wording of the Lord Chief Baron in the first line might have led the jury to think so; and I must acknowledge that when I read the whole through, I think it did lead the jury to think so, whether so meant or

Robert Nutt has been heard of, no matter how or where, and even you are satisfied that the hearing was founded upon a mistake, that mere fact of hearing is enough That I think would be misdirection"

Presumption of survivorship When two persons, and especially when two relatives, have perist
conflagration, it often
of succession to estate
Greenl § 29 Direct proof, however, can seldom be procured in these cases,
Law and in several other codes, recourse is
er the particular circumstances connected
n These presumptions are based on the
from strength age and sex *Ibid* The common law however does not attempt to ascertain, in the absence of any evidence on which to go the survivor of a common catastrophe Strictly it may be said that the common law presumes neither that one survived nor that all perished at the same moment *Lawson Pre Ev* p 298 But by leaving the matter as one unascertainable, "the practical consequence", as has been said ' is nearly the same as if the law presumed all to have perished together at the same moment It, is, in fact, exactly the same where two persons (whether of the same or different ages, sexes or physical conditions) perish in an accident ship wreck or battle, and there is no evidence to show which one of the several survived, the law will not raise any presumption from the fact that one was younger or stronger, or of the more hardy sex, that he survived an older or a weaker or a less hardy victim The party alleging that one survived the other must prove it, the *onus* is on him
the survivorship of one to prove
1 Meriv 307; *Wollaston* v *Berke*
Re Wheeler, 37 L J (P & M) 40,
Wing v *Argrave*, 8 H L C 183; *In re Benyon*, (1901) P 141, *In re Fisher*, (1915)
General,
1 Hag
im Wynne
said
fair and
reasonable in these unhappy cases to cons
same instant of time than to resort to any f
on account of the degree of robustness" I
Court said "Instances have occurred wher
question has been, which of the two survived

it has generally been taken that both died at the same moment" *Re Murray* 1 Curt 596 In *Taylor* v *Deplock*, 1 Phill 261, *Sir John Nicholl* said "There is no evidence direct as to this point; some inferences have been deduced It is stated that the two bodies were found together This tends to show that they were in the same situation at the time of death Upon the whole I am not satisfied that proof is adduced that the wife survived I assume both perished at the same moment " See also *Sutherthwaite* v *Powell*, 1 Curt 703; *Underwood* v *Wing* 4 Deg M & G 657; *Re Wainright* 1 Sw & Tr 257, *Re Ewart* 1 Sw & Tr 257, *Durrant* v *Friend* 5 De G & Sm 315, *Scutton* v *Patullo*, L R 19 Eq 375 *R* v *Hay*, 1 W Black 616, *contra* *Sillick* v *Booth*, 1 Y & C C C 117 "Where two persons" said *Lord Chelmsford* in *Wing* v *Angrave* 6 H L Cas 183, "are at one and the same instant washed into the sea, and disappear together and are never seen any more, it is not possible for any tribunal called upon judicially to determine the question of survivorship to form any judgment upon the subject which can be founded upon anything but mere conjecture derived from age sex, constitution or strength of body or mind of each individual, and as our law has not established any rules of presumption for these rare and extraordinary occasions, the uncertainty in which they are involved leaves no greater weight on one side or the other to incline the balance of evidence either way If, therefore, it is necessary for W W to establish his claim under the Will of Mrs U, that he should prove that she survived her husband he must altogether fail" There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by *the one and the same cause nor is there any presumption of law that all of them* died at the same time But the question is one of fact, depending wholly on evidence and if the evidence does not establish the survivorship of any one the law ... probable is ... 341 = 3 C ... (1907) 1 Ch ... L R 7 Ch ... 3 Beav 3... namely (1) ... succes... d each likely ... of exposure ... survivorship ... to all who

(2) And the one of several in a common danger which prove ... was last seen or heard alive within the operation of the cause of death, is presumed to have survived the others *Lawson's Presumptive Evidence* Rule 55, 56

Cause of death With regard to the cause of death, accident rather than suicide will be presumed *Harvey* v *Ocean Co* (1905) 2 Ir R 1 C A, *Phip Ev* 7th Ed p 654

Death without issue There is no presumption of law that a person died without issue (*Re Jackson* [1907] 2 Ch 351), but where the deceased, when last heard of, was unmarried, he may be presumed as a matter of fact though not of law to have died unmarried and without issue *Re Callan* 39 Ir L T Jo 372, *Phip Ev* 7th Ed 651

109 When the question is whether persons are partners, landlord and tenant, or principal and agent and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand to each other in those relationships respectively, is on the person who affirms it

Burden of proof as to relationship in the cases of partners, landlord and tenant, principle and agent

Principle Here the presumption arises from the probability of the continuance of things once shown to exist *Price* v *Price* 16 M & W 232 *Nort Ev* 295 The presumption of continuance is clearly one of the most practical importance It is frequently quite impossible to prove for instance,

the existence of . . . moment such exis may fair Ev 29 generally thought it . . . presuming, that a tenancy or a . . . until the contrary is proved . . . C 72 (79).

Scope of the section When the existence of a person, or personal relation, or a state of things, is once established by proof the law presumes that the person, relation, or state of things continues to exist as before, till the contrary is shown, or t . . . in question . . . shown to exis . . . *Taylor Ev* § . . . or object, or relation, or state of things, is shown to have existed at a given . . . d In reality, however, a genuine rule of . . . e rulings usually declare merely that certain . . . sufficient evidence for the jury's finding" . . . of s 109 of the Evidence Act cannot be over- . . . *Mi Keyan* v *Mi Ein*, 8 Bur L T 292=33 . . . umption that the several persons mentioned in *naforgats* are predecessors in interest within the meaning of s 223, Berar Land Revenue Code *Ramchand* v *Ratnanath*, 98 Ind Cas 674=A I R 1927 Nag 99

Partners This section . . . presumed to continue until the c . . . partnership brings an action . . . not partners It is proved that . . . presumption is that they continue to be so *Anderson* v *Clay*, 1 Stark 405, . . . *Clarke* v *Alexander*, 8 Scott N R 161; *Clarke* . . . sumption finds legislative sanction in section . . . gards that section *Cunningham* said. "By . . . burden of proving that persons who are shown to have been acting as partners have ceased to stand in that relation to each other is thrown on the person who affirms it, and by this section the further presumption is created, that the relations of such persons continue to be governed by the terms of the original contract which has expired, so far as they may be applicable to a partnership determinable at will The same rule within the same limitation, obtains in the case of a tenancy which is continued after the expiration of the term limited by the lease" *Cun Contract Act Notes* under s 256 'The evidence of a joint interest in the plaintiffs was sufficient *prima facie* It was shown that they were partners in business two or three years previous The witness stated that he had frequently done business with

. . .

held that the partnership could be dissolved only by a special notice, and that,

. . .

Bursh, 11 1 R 1837.

0. Principal and Agent An authority to do an act, once shown to exist is presumed to continue until the contrary is proved *Pratler v Palmer*, 1 Ark 456, *Law on Pre. Fi* Rule 3 ... case of principal and agent *Rayan v La* ... agency is terminated in any of the way ... Act the agent or the third person concerned is affected by the termination only from the date when it becomes known to him The same rule applies where it is by notice by death, or by insanity that the agency is terminat *Cun Fi* p 41 see also Contract Act ss 182 238 If a man were on several occasions to author... his mistress to order goods from a tradesman on his credit, the jury would be amply justified in finding him liable for articles supplied after the termina... of the connection in the absence of any proof that the trade man had rece... notice of such termination *Ryan v Lambe*, 12 Q B 460

Landlords and tenants When once the relation of landlord and ten... is admitted or proved to exist it will be presumed to continue until it is sh... by affirmative proof that it has ceased to exist. *Mohun Mahto v Mar Shem* 21 W R 5, *Maung San v Maung Tiru*, U B R (1897 1901) Vol. II, 114, *Tiru v Sangudien* 3 M 118, *Iameshar v Dilpun*, 7 C L J 202, *Dattatraya v Sridhar*, 17 B 736 Mere non-payment of rent though for many year, would not affect the landlord's right to ... of landlord and tenant once existed *Rama Charan* ... L J 72, *Bungo Lal v Abdool*, 4 C 314 ... *Premsukh v Bhujia*, 22 A 517 (F B); *Ivaneshwar v Gobordhan*, 7 C L J 202 *Dadaja v Krishna*, 7 B 34 Failure of payment of rent by the tenant to the landlord does not alone operate to create in favour of a tenant a title by adverse possession *Reajuddi v Chand*, 24 C L J. 453, *Maung Lin v Maung Shue*, U B R (1892-96), vol II 363; *Troylukho v Mohima*, 7 C L R 400; *Tiru Charna v Sangudien*, 3 M 118; *Madan v Kumar*, 7 C L J ... So where a tenant holds over after the expiration of the term, he impliedly holds subject to all the covenants in the lease which are applicable to his new situation *Tomiano v Young* 2 Camp 50, *Thomas v Parker*, 1 H & N 6... *Tay* § 197, *Chatur v Mukund*, 7 Cal 710, *Baij Nath v Raghu Nath*, 16 C W N 496, *Kishori Lal v Administrator General*, 2 C W N 503, *Jamal v Chatterdhari*, 16 W R 185; *Beni v Raj Kumar*, 6 C W N. 589 See also section 116 of the Transfer of Property Act and section 51 of the Bengal Tenancy Act The rel... is proved to have ceased *Dealra* ... Ind Cas 555 Where it is proved ... ant was a tenant of the plaintiff at one time, it is for the defendant, under s 110, Evidence Act, to show when the relationship of landlord and tenant ceased and possession became adverse *Charali v Tullusee*, 28 M L J 361=27 Ind Cas 84

110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Burden of proof as to ownership

Principle Where title to land becomes material, the fact of present possession alone may serve to create a presumption of ownership, the emphasis ... on the document ... to the opponent the ... contrary *Wigmore* ... so, because it is ... obviously applies ... *Hari v Dhanh* ... in some lawful ... only made in order to support possessory ... is forthcoming ... is resorted to ... *Sumner* in *Syed* ... C L J 340 ... most common muniments of title to real

estate is the presumption, from long possession, that such possession is lawful rather than unlawful,—in other words, that it is supported by a grant It has become a well established rule that the peaceable possession of real estate is presumptive evidence of title until the contrary is shown The title which adverse possession gives is one in fee simple, and consequently its acquisition must be safeguarded and all the avenues of approach to it watched with the argus-eye of the law that no one is wronged Theoretically, at least possession is the primitive mode of acquisition of all property, and constitutes the ultimate foundation upon which every title rests It constitutes also the only means of enjoyment of property Hence it is necessarily the conspicuous badge or sign of ownership This is a principle firmly imbedded in all common law jurisprudence *Burr Jones* § 75 It is held that the presumption arising from possession is a presumption of seisin in fee Bull N P 103, 109, *Asher* v *Whitlock*, L R 1 Q B 1=35 L J Q B 17; see also *Jayne* v *Price*, 5 Taunt 346; *Dainty* v *Brocklehurst*, 3 Ex 207

S.

Scope of the section The fact of possession, in the eye of law, suggests always ownership, and whether it is put in Latin as *potior est conditio possidentis*, or in colloquel Anglo-Saxon that "possession is nine points of the law" it goes without saying that proof of the possession of property is *prima facie* evidence of title to it both with regard to moveable and immoveable property Indeed it may be said that the presumption has attained its full growth *Pollock* says "It has been said that there is no doctrine of possession in our law The reason of this appearance, an appearance capable of deceiving even learned persons, is that possession has all but swallowed up ownership, and the rights of a possessor, or one entitled to possess, have all but monopolized the very name of property" *Webbe's Pollock on Torts* 417. The same learned Judge, in comparing the status of owners in olden time and now, says that the "owner in possession was protected against disturbance, but the rights of owner out of po session were obscure and weak To this day it continues so with regard to chattels For many purposes, the true owner of goods is the person and only the person, entitled to immediate possession" *Ibid* 416 This presumption of owner
theory that such possession is rightful
assigned for this presumption are the
principles of law to suppose until the contrary is shown, that possession is lawful rather than u lawful that since the rightful owners of property are not likely to consent that their property remain in the continued possession of others

(U S) 109 *Burr Jones* § 74 Possession affords *prima facie* presumption of ownership, for men generally own what they possess *Webb* v *Fox* 7 T R 397 Thus it is sufficient to maintain trespass on real property against a wrong doer *Elliot* v *Kemp*, 7 M & W 312 *Nort Ev* 295 "If a person is in actual possessio
show that
at least
C & P 5
to the first point made in this case on the part of the defendant ,, that the ownership alleged was not sufficiently proved, it was proved by the captain in the ordinary way, that the owners by whom as such, he was appointed and employed, were the persons in whom the ownership is by the declaration averred to be And though it afterwards appeared by his answers on cross examination, that the ownership was devised to those persons under a bill of sale executed by himself as attorney to one *Laurence Williams* the former owner, it did not on that account become necessary for the plaintiffs to produce that bill of sale, or the ship's register, or to give any further proof of such of their property, the
prima facie evidence of
roof or title deeds on the
necessary in support of
de, in consequence of the

adduction of some contrary proof on the other side" *Robertson* v *French*, 4 East, 130. In *Jones* v *Williams*, 2 M & W 326, *Parke B*, said. "Ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment of the law itself" Possession, therefore, has a twofold value: it is evidence of ownership and is itself the foundation of a right to possession *Hori* v *Dhondi*, 8 Bom L R 96 Under this section, possession when long and continued upto a recent date, leads to a presumption of title This section refers to the presumption to be made of ownership based on the circumstance of such possession, and allows the plaintiff with such *prima facie* title to claim a decree where no superior title is proved on the other side. *Per Ranade J* in *Hanmantrao* v *Secretary of State*, 2 Bom L R 1111 = 25 B 287; see also *Ma In Lun* v *Ma ... Hla*, L B R (1893 1900), 85 Where there has been continued possession in assertion of a right, the right should be presumed to have lent a legal origin, if such a legal origin was possible and this presumption applies even if the alleged right in its inception rests on a foundation invalid in point of law and the Court will presume that the performance of all acts and the existence of all circumstances necessar ... shown to be more consistent with the ill ... v *Venkatagin* A I R 1930 M ... es is in possession under an ... pul only registrable, a subsequent mortgagee under a registered instrument must be presumed to have had notice of such possession, and could not claim any priority over the unregistered instrument *Bhikhi Rai* v *Udit Narain*, 25 A 366 = A W N 1903, 81 Under this section, possession short of the statutory period which may give a title by presumption, ... presumption of ownership, and shift the burden of proving t ... iere neither side can show title, the possessio ... i of ... r ... *acie* right ... *enamidar* cannot maintain a ... ius of proving that he is ... *mada*, 24 Ind Cas 801 A ... Specific Relief Act when first dispossessed, can, after the summary relief under that section is proved by limitation, rely in a regular suit for ejectment on s 110 of the Evidence Act *Haradhan* v *Isuar Das*, 2 Pat L J 61 = 38 Ind Cas 797 Where nothing else ... to be the owner ... ir L T ... be user ... W 245, ... s ess on ... us oppo ... umption ... *Madon* ... ed that ... icts, the ... some ... *erpool* different object the ... (1900) 1 Ch 19, ... *Times*, June 30, *Phip Ev 7th Ed* 108 Though section 110 of the Evidence Act recognizes a presumption that the person in possession also has a good title there is no corresponding section saying that the person with the title should be presumed to be in possession *Kashi Nath* v *Ganesh*, 1923 Bom 361 = 77 Ind Cas 506 ... presumption of ownership ... tered lease is ... 110 Evidence ... 199 Where ... he owner, the ... *Nizam Din* v ... esumption is that ... possession at the ... N 1179 Where a person is in possession of property and he uses it for four months of every year for tethering his cattle, such possession is *prima facie* evidence of title, but Court should not say that the person's ownership is established *Kashichand* v.

S.

Atmaram, 119 Ind Cas 701 = A I R 1929 Nag 318 Prior peaceful possession is *prima facie* evidence of ownership under this section and is a good title against all persons except the true owner and can be relied on in successfully
st another who has no title to the land in
Cas 680 Possession acquired tortuously
can show no better right *2 Greenl Ev*

Possession, meaning of The word "possession" contemplated by this section is to be understood as opposed to juridical possession and to denote actual present possession *Mi Ein Kin* v *Nga La*, U B R 1905, Evidence, 7 Where the possession of a person is peaceable and obtained without ousting any

property law *Hanmantrao* v *Secretary of State*, 2 Bom L R 1111 = 25 B 287 The mere length of possession by a mortgagee is not in all cases of itself sufficient to justify the
Kuar v *Pir Baksh*, A W
present possession, and
be *prima facie* evidence of
This section means that
Sambhasheo v *Mahadeo*, 10 N L R 188

the burden of proof will be shifted to the defendant to prove title to himself and his right to oust the plaintiff *Mi Ein Kin* v *Nga La*, U B R 1905, Evidence 7 There is no presumption that the property left by a person long deceased is part of undivided estate When land has been in the exclusive possession of others for a long period, the person asserting that it forms part of an undivided estate should be required to prove the fact *Maung Lee Pe* v *Maung Lee Gale*, U B R (1897 1901) Vol II, 418 Where in a suit to eject the defendant from a house which had been in his possession for 5 years without interruption, on the ground that he first entered the premises temporararily with the permission of the plaintiff's father and the defendant in reply alleged a sale, the burden of proving permissive occupation clearly lay on the plaintiff

e out a title of his own.
6) Vol II, 371 Where the
wrongful dispossession of
ion by defendant, and the
held that the burden of

proof lies on the plaintiff *Maung Tun* v *Maung Pu U*, U B R (1902 1903) Vol II, Evidence, 7 Where the question is whether any person is owner of any thing of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner *Ma Hla* v *Ma Thait* U B R (1892 1896) Vol II, 377 There is a clear distinction as to the *onus* of proof between a case in which a plaintiff sues to obtain possession of land by redemption of a mortgage, and that in which the defence to a suit for possession of land is twelve years' adverse possession by the defendant In each case it is for the plaintiff to plead his title, and if that title is put in issue, he must make it out by at least *prima facie* evidence before the defendant can be put to proof of his defence In the second case, where the defence is twelve years' adverse possession the defendant must plead and make out the title he alleges, and thus show that the title of the plaintiff which otherwise had been proved or admitted was lost. *Parmanand* v *Sahib Ali*, 11 A 438.

Where plaintiff who averred that defendant had been in possession for over 20 years of certain land, and had regularly paid the government revenue thereon during that period as the registered holder of the land in the *thugyi's* books, however, stated that during this period defendant had only been in permissive occupation, having rented the land from plaintiff without paying rent for it, the defendant on the other hand, while admitting that the land was originally owned by plaintiff asserted that plaintiff had sold the land out and out to him, and that he had been in adverse possession ever since for over 20 years, held that the burden of proof lay on plaintiff to establish her title and to show that defer ... not adverse *Ma Ba* v *Maung K* ... it is in the possession of the ... rtgaged to ... hich ... sant ... ion ... ther ... ent

person seeking to oust another out of the possession of the landed property to which the latter has already succeeded and in whose favour mutation of names has also been effected, after regular enquiry by a Revenue Officer, is bound in the first instance, to prove that his right is superior to that of his adversary *Nasibulnissa* v *Mansor Ali* 120 P W R 1909=4 Ind Cas 965 Possession in *prima facie* evidence of title agi ... the person in possession *Krishna Iyer* v *Secr* ... Ind Cas 121=33 M 173 This section ... proof lies on the party who is out of possess ... R (1872 1892), 102 In a suit for pos ... and previous possession are both denied, the plaintiff should start ... *Walker* v *Atma Ram*, 14 W R 478 Possession is *prima facie* evidence of title and is primarily exclusive, and it is for him, who impugns this exclusive title, to show ... his own right *Krishna Cheryc* ... *ler* v *Goluck Chunder*, 1 W ... 5 W R 218, *Adjodhya* v *S* ... *Ye*, U B R (1892 1896) Vo ... 458, *Laldas* v *Kashiram*, 4 B H C A C 60, *Pir Baksh* v *Jhanda*, 157 P R 1882; *Hassan* v *Fazal*, 121 P. R 1882; *Lachho* v *Har Sahai*, 12 A. 46=A W. N 1889, 43 *Maung Ya Baing* v *Ma Khyin* U B R (1892-1896) Vol II 234; *Nga Shwe Yon* v *Nga Kaing*, L B R (1872 1892), 133, *Ma Kyin* v *Ram Persad*, 6 Bur L T 185=21 Ind Cas 333, *Aslum* v *The Crown*, 8 S L R, 141=16 Cr L J 138=27 Ind Cas 202.

... Possession or owner ship ... continue ... was seized ... the burden

S.

is on him who alleged a disseisin *Brown* v *King* 5 Metc 173 Where a person is proved to be the owner of personal property with the present right of possession, the presumption is that he continues to be owner with the right of possession, until there is evidence that he has parted with that ownership or right of possession and the mere fact that the property is in the possession of another, with his consent
shift the burden of
right of property
of one person is she
will not be adju
proof of its having distinctly become so, for every presumption is in favour of the possession continuing in the same subordination of title *Lawson Pre Ev* 210

What constitutes possession The acts of enjoyment from which the ownership of real property may be inferred are various, as for instance, the cutting of timber, the repairing of fences and banks, the perambulation of boundaries of a manor or parish, the taking of wreck on the foreshore and the granting to other of licenses or leases under which possession is taken and held, also the receipts of rents from tenants of the property, for all these acts are fractions of that sum total of enjoyment which characterises *dominium Wills Ev* 60, see also *Kirbey* v *Cowderoy* (1912) A C 599 *Doe* v *Arkwright*, 5 C & P 575 *St Leonards* v *Ashburner*, 21 L T 595, *Woolway* v *Rowe*, 1 A & E 114 In cases of possession every act of enjoyment or possession is a relevant fact, since the right claimed is instituted by an indefinite number of acts of user exercised *animo domini* But inasmuch as such acts are more or less discontinuous in their character—and in the case of ancient rights the evidence of them is by lapse of time rendered even more so—the question for the tribunal is whether the acts proved are so numerous and so connected that the right of possession may be inferred from them If they are so frequent and of such a charac
nuous open claim
it to exercise it, the
the mere discontin
Ibid Acts of possession and enjoyment of land as cutting timber, repairing hedges, granting leases etc may be evidence of ownership, not only of the particular piece or quantity of land with reference to which such acts are done
...cality or similarity
of the other piece
of rent constitutes
...s of jungle lands
possession is presumed with the rightful owner *Leelanund* v *Basheeroonissa* 16 W R 102, *Moochee Ram* v *Bissambher Roy*, 24 W R 410, see also *Munshi Mazahar* v *Bepari Singh* A W N 234=3 A L J 567, *Basanta Kumar Ray* v *Secretary of State* 44 C 858

111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Proof of good faith in transactions where one party is in relation of active confidence

Illustrations

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client The burden of proving the good faith of the transaction is on the attorney

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son The burden of proving the good faith of the transaction is on the father

Principle In the ordinary transactions of life, fairness and honesty are presumed and conveyances, sales and contracts generally are presumed to have

been made in good faith until the contrary appears *Burr Jones Ev* § 13 The allegation of bad faith is one which the plaintiff according to section 101 is bound to prove in contradi on to that section ndant is this if it were not The plaintiff having been entirely in the hands of the defendant, would b destitute of the means of proving affirmatively the *mala fides* of the transaction whilst the defendant, in such a transaction, may fairly be subjected to the duty not only of dealing honestly but of preserving clear evidence that he has done so *Ib* Ev 86 ' The broad principle on which the Court acts in cases of this de cripti n is that, wherever there exists such a confidence, of whatever character that confidence may be a repo d to exert influence in any transaction between t and fairest explanation and communication of every particular re ting m been of the one who seeks to establish a contract with the person so *trusting him*" Per *Pagewood* L C in *Tate* v *Williamson*, 1 Eq at p 536

Scope of the section The rule is that the burden of proof is always upon the party alleging a fraud but there is one large class of cases which forms an important exception When a question arises between a trustee and a beneficiary or between other parties who are in a fiduciary relation as to the good faith of transaction between them, a peculiar burden is imposed upon the one in whom the trust is reposed When the complaining party proves such relation, the burden of proof is cast upon the trustee or other persons holding the relation of trust to show that the transaction is fair and reasonable and that o other party To state the rule ist between two persons resulting a business transaction takes pla the person holding the influential position, the law presumes everything against the transaction and casts the burden of proof upon the person benefited to show that the confidential relation has been, as to that transaction at least suspended and that it was as fairly conducted as if between strangers In equity, persons standing in certain relations to one another—such as parent and child, man and wife attorney and client confessor and penitent, guardian and ward—are subject to certain presumption when transactions between them are brought in question and if a gift or contract, made in favour of him who holds the position of influence, is impeached by him who is subject to that influence the Courts of equity cast upon the former the burden of proving that the transaction was fairly conducted as if between strangers, that the weaker was not unduly impressed by the natural influences of the stronger or the inexperienced over reached by him of mature intelligence *Per Lord Penzance* in *Parfitt* v *Lawless* L R 2 P & D 462 One of the most important requisites of the validity of these transactions between persons acting under the influence of these confidential relation is that the party presumably under the influence of the other should have had independent advice for a lawyer who is devoted entirely to the interest of the party he is called upon to advise, and in whom that party has entire confidence *Burr Jones* § 180 *In Rhodes* v *Bate* L R 1 Ch App 257 *Lord Justice Turner* said ' I take it to be a well established principle of this Court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which others may have conferred upon them unless they can show, to the satisfaction of the Court, that the person by whom the benefits have been conferred had competent and independent advice in conferring them" In other words every contract entered into by persons standing in such a relation is treated as being *uberrimae fidei* and may be vitiated by silence as to matters which one of two independent parties making a similar contract would be in no way bound to communicate to the other nor does it matter whether the omission is deliberate, or proceeds from mere error of judgment or inadvertence *Malony* v *Kernan*, 2 Dr & Wat p 29 The mere fact that the mortgagee was a money lender and that the mortgage was executed for funds advanced during a litigation on behalf of the mortgagor, is not sufficient to create such a relation of active confidence between the mortgagor and mortagagee as to throw the burden of proof good faith

under section 111 of the Evidence Act, on the mortgagee *Thakurdas* v *Jairaj Singh*, 26 A 130 (P C)=31 I A 46=8 C W N 569 Persons taking a benefit from another over whom they stand in a position of commanding influence, must take upon themse
Portab Bahadur v *Sheoraj*, 1 O C
W N 1903 70 To prove
stands, in a fiduciary relationship to the other, it is certainly not necessary to prove that all the accounts on which the contract is based are correct *Shamulthone Dutt* v *Susila Bala* 12 C W N 1102=36 C 493

Position of active confidence The words "active confidence" indicate that the relationship between the parties must be such that one is bound to protect the interests of the other This is the case between father and son, where the son is just come of age, and between legal practitioner and his client *Markby Ev* p 86 Sub-sections (2) & (3) of section 16 of the Indian Contract Act, run as follows '(2) In particular and without prejudice to the generality of the foregoing principle a person is deemed to be in a position to dominate the will of another—(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to other, or where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. (3) Where a person who is in a position to dominate the will of another

its exercise in the particular case is presumed But again, this habitual influence may itself be presumed

any of these suspected relations, as they may be called, to be in a position of commanding influence over those from whom they take a benefit In either case they are called upon to rebut the presumption that the particular benefit was procured by the exertion of that influence and was not given with due freedom and deliberation They must take upon themselves the whole proof that the thing is righteous (*Gibson* v *Jesyes* (1801) 6 Ves 266 276) A stringent rule
law"
(1866)
in suc
by one and the influence which naturally grows out of that confidence is possessed by the other and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party the person so availing himself of his position will not be permitted to retain the advantage, although the trans
relation had existed
long asserted and
who are placed in
have influence over them by which acts the person having such influence obtains any benefit ... ed the transaction L R
7 Ch 399 ((*Hatch*
v *Hatch* 9

'Position implies lawful relation See *Horgreave* v *Everard* 6 Ir Eq

111. Ves 285 and adopted by *Lord Cottenham* in *Dent* v *Bennett*, 4 My & Cr 269 (277); *Billage* v *Southee*, 2 Ha 534, 540; *Pollock's Contract* p 583 In *Parfitt* v *Lawless*, L R 2 P. & D 462 *Lord Penzance*, laid down that such position includes the positions of a parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, and guardian and ward But the list is by no means exhaustive. His lordship added to the list of suspected relations that of promoters of a company to the company which is their creature *Erlanger* v. *New Sombrero Phosphate Co* 3 App Cas at p 1230 But the soundness of this decision is doubted by *Sir Fredrick Pollock*. He says. " ... present doctrine applicable? ... in a promoter the burden of ... between them and the company was a fair one ... *Railway Lamp and Lighting Co*, (1889) 23 Q B D. 568=58 L J Q B 519, where the duty is put on the ground of agency" So this section refers to transactions between attorney and client, doctor and patient, guardian and ward, *trustee and ces que trust*, *spiritual advisers and* those whom they advise, wherever in fact a real or apparent authority is calculated to give one party to the transaction the means of dictating terms to and robbing the other party of perfect freedom of will *Huguenin* v *Basely*, 2 W & T L C 597, *Cun Contract*, 6 ... indeed the Court is not bound by author ... which the Court judges to be ... uence founded on the confidence exists, or to require such proof thereof ... t may think fit In the absence of any special relation from which such influence is presumed, the burden of proof is on the person impeaching the transaction and he must show affirmatively that pressure or undue influence was employed *Blackie* v *Clerk*, 15 Beav 595, *Toker* v *Toker*, 31 Beav 629; *Pollock on Contract*, 581 To treat undue influence as having been established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the oth ... the will of the first in giving it, is erroneous ... t must be further established that a person in a ... sed the position to obtain unfair advantage for himself and so as to cause injury *to the person* relying upon his authority or aid *Fayyaz uddin* v *Kutabuddin*, 10 Lah 761=30 P L R 288=116 Ind Cas 899=A I R 1927 Lah 369 Where the donee is in active confidence burden of proof of good faith of the gift is on the donee even if the doner is not a purdanashin lady *Vithal* v. *Narayan*, 34 L W 471=61 M L J 878

Relation of confidence is presumed to continue "Where a relation of confidence is once established, either some positive act or some complete case of *abandonment must be shown in order to determine it" it will not be considered* as determined whilst the influence derived from it can reasonably be supposed to remain *Per Turner L J* in *Rhodes* v *Bate*, (1866) 1 Ch 252, 257, 260=35 L J. 267; *Holman* v *Loynes*, 4 D M G 270 Where the influence has its inception in the legal authority of a parent or guardian, it is presumed to continue for sometime after the termination of the legal authority, until there is what may be called a complete emancipation, so that a free and unfettered judgment may be formed independant of any sort of control *Archer* v *Hudson* ... vious that without ... s said that as a ... e authority before ... of course does not ... at time *Pollock's Contract* p 587.

Agent It is possible for an agent dealing directly with his principal to make a contract which the Courts will uphold, but such transactions, to be maintained, must be characterised by the utmost good faith There must be *no misrepresentation, and an entire absence of concealment or suppression of any* fact within the knowledge of the agent, which might influence the principal, and the burden of establishing the perfect fairness of the contract, in such cases rests upon the agent Such transactions are never upheld, unless it is clearly shown that there has been, on the part of the person trusted, that most marked

integrity, that *ubberrime fides*, which removes all doubts respecting the fairness of the contract. *Condit* v. *Blackwell*, 92 N. J Eq 481 (Am); *Exparte Lacey*, 6 Ves 625; *Brookman* v. *Rothschild*, 3 Sim 153; *Rothschild* v *Brookman*, 2 D & C ... *Phul Chand* v. *Lalla*, 25 A 358 = 23 A ... 3 B L R 127 = 21 W R 340 = 1 I A 1 ... L R O C 31, *Wajed Khan* v E ... *Pushong* v *Mooma*, 10 W R 128

Paren ... with his c ... naturally ... when the circumstances are such that the former assumes a fiduciary relation In the case of a child's gift of its property to a parent, the circumstances attending the transaction should be vigilantly and carefully scrutinized by the Court, in order to assertain whether there has been undue influence in procuring it; but it cannot be deemed *prima facie* void; the presumption is in favour of its validity; and, in order to set it aside the Court must be satisfied that it was not the voluntary act of the donor *Burr Jones* § 190 In the case of a conveyance by a child to its parent, just after attaining majority the burden is upon the parent to show, in the clearest, and most satisfactory manner that it is in every particular worthy of receiving the sanction of a Court of Equity *Burr. Jones* § 190, *Branbridge* v *Brown*, L R 18 Ch D 188; *Wright* v *Vanderplank*, 25 L J. Ch 753; *Hartopp* v *Hartopp*, 25 L J Ch 471, *Densdale* v *Densdale*, 25 L J Ch 806, *Bury* v *Oppenheim*, 26 Beav 591; *Potts* v S ...

applicable in cases of persons in *loco parentis* such as uncle in *loco parentis* and niece (*Vide Archer* v *Hodson*, 7 Beav 551; *Maitland* v *Irving*, 15 Sim 437) step-father in *loco parentis* and step-daughter (*Kempson* v *Ashbee*, 10 Ch ... between ... , 15 Sim ... hich the ... of the donee (*e g*) father, to advice the donor (son), or even to manage his property ... n of proving ... ma le to him ... *Lakshmi* v ...

Husband and wife From the confidential relations which exist between husband and wife, a presumption of undue influence arises in relation to any transfer of property between them, and in order to sustain a conveyance or gift by the wife to the husband, the burden of proof is upon him to show that the ... fair and proper ... *omissa*, 11 M I A. ... *Najiban*, 20 A 447, ... *k*, 20 Beav 521, ... relation between ... see also *Coulson* ... ood in a position of ... saction under his guidance, the burden of proving good faith is on him To uphold the transaction, it must be shown she was given that care and advice which was due to her in her situation *Dwarka Prosad* v *Nasir Ahmed*, 11 O L J 219 = 78 Ind Cas 850 = 1925 Oudh 16 Where the vendor had been living separately and was not under the vendee's influence the rule as to burden of proof in section 111, does not apply *Jai Lal* v *Sheo Chand*, 6 Lah L J 408 = 85 Ind Cas 293 = A. I R 1925 Lah 123

Spiritual adviser According to the English law spiritual influence would be presumed between a clergyman and any person placing confidence in him *Dent* v. *Bennett*, 7 Sim at p. 561, see also *Nottidge* v. *Prince*, 29 L J Ch 857;

1. Ves 287 and adopted by *Lord Cottenham* in *Dent* v *Bennett*, 4 My & Cr (277), *Billage* v *Southee*, 2 Ha 531, 540; *Pollock's Contract* p 583 In *Parfitt* v *Lawless*, L R 2 P & D 462 I
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their creature. *Erlanger* v *New Sombrero Phosphate Co* 3 App Cas at p 1230 But the soundness of this decision is doubted by *Sir Fredrick P.*
He says "But is not *personal confidence* essential to make the present doctrine applicable? And has any case gone the length of casting in a promoter the burden of proving in the first instance that a contract between them and the company was a fair one? *Cf. Eden* v. *Ridsdale's Railway La and Lighting Co*, (1889) 23 Q B D. 368=58 L J. Q B the duty is put on the ground of agency". So this section refers to transactions between attorney and client, doctor and patient, guardian and ward, trustee and *ces que trust*, spiritual advisers and those whom they advise, wherever in fact a real or apparent authority is calculated to give one party to the transaction the means of dictating terms to and rob the other party of perfect freedom of will *Huguenin* v *Basely*, 2 W & T L C 597, *Cun Contract*, 68 As to certain well known relations, indeed, the Court
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question and section 111 of the Evidence Act applies *Suraj Singh* v *Baldeo,* 8 N. L R 150.

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Medical attendant and patients The rule applicable to a transaction

603, *Pratt* v *Barker*, 1 Sim 1.

gift sued the son
the deceased donor
could be seen that
was very intimate
with him and had lent money, that he not only disinherited his son and his wife but he stripped himself of all the property he was possessed *Held* that the donor's son had merely to prove that the donee was in a position to dominate the will of the aged donor and that the gift was unconscionable and by so doing he was able to shift the *onus* of proving good faith on to the shoulders of the donee *Safdar Ali* v *Nur Mahomed,* A. I R 1930 Sind 25

underlying this section
hich undue influence
indson v *Weatherill,*
, *Parfit* v *Lawless,*
C 349 In *Venkata-*
99=99 Ind
Wills and
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other matters or transactions But the principle must not be carried too far When a jury sees that, at and near the time when the Will sought to be impeached was executed, the alleged testator was, in other important transactions so under the influence of the persons benefited by the Will, as to them, he was not a f
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influence is presumed to have been exerted unless the contrary is shown It is therefore, in all dealings with those persons who are so situated, always incumbent on the person who is interested in upholding the transactions to show that its terms are fair and equitable The most usual mode of discharging this *onus* is to show that the lady had good independent advice in the matter, and

acted therein altogether at arm's length from the other contracting party and in the absence of such proof, the transaction would be set aside *Bibee* [illegible] v *Shaikh Ahmed* 22 W R 443, *Kanailal* v *Kamini* 1 B L R O C 31 [illegible], *Joy narain* v *Gangadhar* 9 W R 297 *Thakoor Din* v *Nawab Syed*, 21 W R 340 P C 13 B L R P C 427 Where a person seeks to bind a purdah lady by a document alleged to have been executed by her on her behalf by a third person clear and strict proof of the agents authority must be given It is incumbent on the Court, when dealing with the disposition of her property by a purdanashin woman to be satisfied that the transaction was explained to her and that she knew what she was doing and especially in a case where for no consideration and without any [illegible] which deprived her of all her property [illegible] 1857 81 see also *Tirthanuns* [illegible] v [illegible] *Buttoor* v *Shamsoona sa* 11 M I A 551 *Panna Lal* v *Bamasundari* [illegible] B L R 73[illegible], *Ram Jerbel* v *Ranee Hoolpattee* 7 W R 99; *Hasanalli* v *Popatla* 27 Bom L R 181=86 Ind Cas 880 *Deo Kuer* v *Man Kuor*, 17 A 1, *Akhtar Kuar* v *Thakur Das* 17 A 125=A W N 1895 21

To charge a purdanashin woman upon an instrument alleged to have been executed by her it is necessary that satisfactory evidence should be given that the document was explained to and understood by her *Sudhalal* v *Sheolora* 8 C 215=8 I A 39 (P C) *Annada* v *Bhuban* 28 C 546 (P C)=28 I A 71=5 C W N 489=11 M L J 161=9 Bom L R 386; *Shanbati* v *Jogo Bibi* 29 C 749 (P C)=29 I A 127=6 C W N 682=4 Bom L R 444, *Kubra* v *Ajodhia* 7 A L J 115=6 Ind Cas 689, *Muhammad Ali* v *Ramzan* 24 C W N 977 (P C) *Hasanalli* v *Rupulla* 27 Bom L R 181=86 Ind. Cas 880 *Bhagwati* v *Chobi* 2 Lah L J 689 *Annada* v *Bhuban* 3 Bom L R 3[illegible]6 *Amirbai* v *Abdul* 3 Bom L R 658, *Man Singh* v *Nawal Ibati*, 2 Pat 604=73 Ind Cas 892, *Muhammad Shafi* v *Kalsum Bi*, 4 Lah 467, *Bholanath* v *Bhutnath* 40 C L J 393

The Court when dealing with a deed alleged to have been executed by a purdanashin lady must before it gives effect to it satisfy itself first that the deed was actually executed by her or by some person duly authorized by her [illegible] that she had [illegible] that he [illegible] [illegible] that those who rely upon documents executed by purdanashin ladies should satisfy the Court that they had been explained to and understood by those who executed them *Bindibasini* v *Girdhari*, 3 Ind Cas 330=12 C L J 115, *Samsuddin* v *Abdul* 8 Bom L R 781-31 B 165 *Debroos Banoo* v *Nurib Syed*, 15 B L R 167=23 W R 453 *Sinthri* v *Vasudevan*, 3 M 215, *Phundo* v *Bhisuca* A W N 1883 246, *Manan Bibi* v *Sakina*, 14 A 8=A W N 1891, 213 Where it is proved that the lady was of business habits was literate and of considerable intellectual capacity the Court will be less inclined to interfere with the deeds which have been *prima facie* properly executed or to interfere with transactions to which her consent had been deliberately given *Bindubasini* v *Girdhari*, 12 C L J 115=3 Ind Cas 330 see also *Thirathman* v *Gunjiswari* 96 Ind Cas 571=1926 P 529 Transactions with a purdanashin widow should not be enforced unless they are strictly fair and equitable *Attakour* v *Bhoiraj* 3 C P L R 118 In a transaction with a Mahomedan purda lady it is the duty of the plaintiffs to show that they were free agents in the matter, and having a clear knowledge of what they were doing accorded their consent to it *Behari Lal* v *Habiba Bibi* 8 A 267=A W N 1886 91 see also *Ram Chunder Dutt* v *Dwarkanath* 16 C 330, *Sunder Koomaree* v *Keshoree Lal* 5 W R 246 Where a person claims under a deed of sale alleged to have been executed by a purdanashin lady living apart from her relations without those natural advisers who would under ordinary circumstances help her with their counsel and especially where the person profiting by the transaction occupied a position of confidence he ought to give [illegible] evidence to show that the lady [illegible] B L R [illegible]=29 I [illegible] v *Tte* [illegible] *puttee* 7 [illegible] *mukhtear*,

at an exhorbitant rate of interest, the security being ample, appears to be a hard and unconscionable bargain on which the contract for such rate of interest would not be enforced *Kamini Sundari* v *Kali Prosanna*, 12 C 225=12 I A. 215 (P C) Party relying on a deed executed by a *purdanashin* lady must prove that it was th[illegible] or that she adopted it with full knowled[illegible] *Ali* v *Rabia Begum*, 95 Ind Cas 506=A I R. [illegible] always be careful to see that deeds taken [illegible] fairly taken that the party [illegible] that she was about [illegible] the *purdanashin* [illegible] V N 1133 The protection which the law throws around a *purdanashin* lady in respect of deeds executed by her demands that the burden of proof shall rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively and that the deed was not only executed by, but was explained to and was really understood by the grantor It must also be established that the deed was not signed under duress but also from the free and independent will of the grantor *Kali Baksh* v *Ramgopal*, 18 C W N 282=(1914) M W N 112=16 O C 371=19 C L J 172 (P C), see also *Keshub* v. *Radha*, 17 C W N 991=20 Ind Cas 717, *Kaminee* v *Krishna*, 16 C W N 649=39 C 933=16 Ind Cas 110, *Sharukh* v *Sheo Prasad* 41 Ind. Cas 435, *Mariam Bibi* v *Shaikh Mahommed Ibrahim*, 28 C L J 306=48 Ind Cas 561, *Kailash Chandra* v *Latifannessa*, 51 Ind Cas 556 In order to enforce a document executed by a *purdanashin* lady all that is necessary is to convince the Court that the transaction was a fair one and that the lady understood the act to which she was subscribing *Bhagwati* v *Choli*, 2 Lah L J 659=55 *Ind. Cas* 698; see also *Motilal Das* v *The Eastern Mortgage and Agency Co Ltd*, 25 C W N 265=47 I A 265 (P C), *Kamawati* v *Digbijai Singh*, 43 A 525=15 L W 1=48 I A 381 (P C) The Court when called upon to deal with a deed executed by a *pardanashin* lady, must satisfy itself upon the evidence, first that the deed was actually executed by her or by some person duly aut[illegible] was about to do; secondly [illegible] f the transaction into whic[illegible] had independent and disin[illegible] be found to fall broadly into two groups, namely, first, cases when the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence and secondly cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length In the former class of cases the Court will act with great caution and will presume confidence put and influence exerted, in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically Independent and competent advice does not mean independent and competent approval, it simply means that the advice shall be removed *entirely from the suspected atmosphere and conveyed from the clear language* of an independent mind, free from that taint of interest, and the party acting should know precisely the nature and consequences of the transaction It is not an inflexible rule that a *purdanashin* lady must have independent legal [illegible]

[illegible]

declaration by the transferor, a *purdanashin* lady subsequently made, that she had not understood what she was doing obviously is not in itself conclusive It must be a question whether, having regard to the proved personality of the [illegible] ch it has been [illegible] blished that the [illegible] If the answer [illegible] e onus which

rests on them Of course [illegible] matters *Barkat Unnessa L* [illegible] 693=25 A L J 311=8 Pat [illegible] who takes a document from a *purdanashin* lady is bound to prove the validity of the document from every possible angle of attack, when the *bonafides* of the document is challenged *Kalaman Bibi* v *Sahajan Bibi*, [illegible] v *Hossain Ali*, 32 C W. N 929=A I R 192[illegible] M L J 84 (P C), see also *Beni Das* v [illegible] 799=A [illegible] 117 Ind [illegible] Ind Cas [illegible] 571=A I R 1926 Pat 529; *Ram Sumran* v. *Gobinda Das*, 5 P 616=A I R 1926 P 582

Birth during marriage conclusive proof of legitimacy

112 The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Principle "The legal presumption that he is the father whom the nuptials show to be so, is the foundation of every man's birth and status It is a plain and sensible maxim which is the corner stone, the very foundation on which rests the whole fabric of human society; and if you allow it once to be shaken there is no saying what consequence may follow" *Rutledge* v *Carruthers* Nicholas Adlt Bart. 161, *Lawson Pre Ev* 141, "Maternity admits of positive proof, but paternity is a matter of inference because the connection of a child with its father is secret, but it may be established [illegible] by a subsisting *firash* (bed) that is, a legally constituted relation between him and the mother of the [illegible] underlying [illegible] down in [illegible] ited

Origin and growth of the rule In accordance with the maxim *pater est quem nuptiæ demonstrat* (he is the father whom the marriage indicate) the rule is the same where the child is born in wedlock, whether begotten before or after the [illegible] the marriage the [illegible] o marries a w[illegible] acknow ledg[illegible], 109, see also [illegible] ardner v *Gardner*, 2 App Cas 723, 728 By the ancient common law, if the husband was within the *four seas* at any time during the pregnancy of the wife, the presumption was conclusive that her children were legitimate *R* v *Murray* 1 Salk 122; *R* v *Allerton*, 1 Ld Ray 122, *Lawson Pre Ev* 141 In the case of *Alien de Wartone* v *Simon*, the son of *Gillan* (1301) Y. B 32 & 33 Edw 1 p [illegible] the husband [illegible] hild born [illegible] ertheless [illegible] he may [illegible] a woman upon his [illegible] conclusive [illegible] n motives of [illegible] n the peril [illegible] rried that in [illegible] e, although [illegible] l during the [illegible] ; while in

bastard,
because
ertheless,
strictness
and refused—except in the case of natural impossibility—to make any enquiry into the paternity of a child whose mother's husband was within the realm In *Fletherham* v *Julian*, Year. Book, 7 Hn IV 9, decided in the seventh year of the rei
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upon a
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v. *Pei*
decided that the presumption could be rebutted by other proof. In 1807, *Lord Ellenborough* laid it down that the illegitimacy of the child might be shown where the legitimacy was impossible, in the five cases, (1) where the impossibility arose from the husband being under the age of puberty In a case in the Year Books it was held that the issue was a bastard where the husband was under fourteer
the impossibility aro e from the husband
by natural infirmity In *Foxcraft's Ca*
man was married in that state twelve weel
child was adjudged illegitimate (3) W
length of time elapsed since the death of
sibility arose from the absence of the husband—as where he was outside the realm at the time the child was begotten (*R* v *Allerton*, 1 Ld Roy, 395; *R.* v *Maidstone*, 12 East 550) (5) Where the impossibility was based on the laws of nature In *Pe*
necessary to show
and wife, after l
and he going to St
born The evidence being strong that the husband had not visited the wife during that time, the presumption of the legitimacy of the child was held to be overthrown, and he was declared to be illegitimate *Goodright* v *Saul*, 4 Term Rep 358

In *Horgrave* v *Horgrave*, 9 Beav 255, *Lord Longdale* laid it down that the presumption that a child born of a married woman is legitimate may be rebutted by showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother, (3) entirely absent at the period during which the child must in the course of nature have been begotten, (4) only present under circumstances affording clear and satisfactory
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modern English law in concise language The ancient policy of the law of

doubt may be excluded from other circumstances, although the husband be within the four seas, the modern practice permits the introduction of every

2. States at the present times *Bosville* v *Att Gen*, L R 12 P. D. 177; *Morris* v *Davis*, 5 Cl & F 163, *Plowes* v *Birry*, 8 Jur (N. S) 352=31 L J (N S) Ch 681, *Anon* v *Anon*, 22 Beav. 481; *Blackburn* v *Crawford*, 70 U S 175 "If sexual intercourse is proved" said the Chancellor in *Morris* v *Davis* 5 Cl. & F 163 (213), "that is, if the Judge or the jury trying the question of fact be satisfied that sexual intercourse took place between the husband and wife at the time of the child being conceived, the law will not permit an enquiry whether the husband or some other man was more likely to be the father of the child" If once you are satisfied that the husband had sexual intercourse with his wife, the presumption of legitimacy is not to be rebutted by its being shown that other men also had sexual intercourse with the woman The law will not, under such circumstances, allow a balance of the evidence as to who is most likely to have been the father *Per Alderson B* in *Cope* v *Cope*, 1 M & R 275 So, where the husband has had inter ... of the wife either before or after the ... *Phillips* v *Allen*, 2 Allen, 153 ... dultery *Cross* v. *Cross*, 3 Paige ...

Scope of the section Evidence that a child is born during wedlock is ... the burden of proceeding to the ... This rule was formerly stated as ... a rule of law which absolutely and ... ther question, but it ... is competent, and ... § 44 So ... or a child born of a married woman ... by ... may only be rebut... ... when the child might have ... sexual intercourse with ... existed, nevertheless ... ol 13 § 694; *Morris* ... & St 153, *H L* ... tants) 1 Q B 441 ... Sm 149; *Atchley* ... T. 701, *Gardner* v ... 83) 23 Ch D 173, ... n, (1903) P 141, ... n, (1903) P 495, *Yool* v *Ewing*, (1904) 1 Ir R 431, *Gaskill* v *Gaskill*, (1921) P 61, *Burnaby* v. *Baillie*, 42 Ch D. 282, *Evans* v. *Evans*, 23 T L R 615 In *Banbury Peerage Case*, Sim & St 153, *Lord Mansfield* thus stated the unanimous opinion of the Court: 'That the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances including a contrary presumption ... That ... according to ... eceived

... it being ... esumed ... otion is ... those who were ... at any ... law of ... n such ... f such ... father ... be of ... on of a ... wife at ... nature, ... 5, *Lord* ... se every

other question of fact, when you answering a presumption it may be answered by any evidence that is appropriate to the issue"

Under this section, there is conclusive presumption that a child born during the continuance of a valid marriage is a legitimate issue of parents no matter how soon the birth be after the marriage *Umra* v *Muhummad Hayat*, 79 P R 1907 Under this section, the *onus* is on the claimants to prove that he was born within 280 days after the death of his father and the burden of proving non-access between his mother and father is upon those who deny his legitimacy *Narendra Nath* v *Ram Gobind* 29 C 111 P C = 29 I A 17 = 6 C W N 146 = 4 Bom L R 213 It is a peculiarity of the English law that it does not concern itself with the conception, but considers a child legitimate, who is born of parents married before the time of his birth, though they were unmarried, when he was begotton That peculiarity of the English law has been imported into India by this section *Muhammad* v *Muhammad*, 10 A 289 The legal presumption as to paternity raised by the section of the Evidence Act is applicable only to the off-pring of a married couple *Gopalasuami* v *Arunachelam*, 27 M 32 Where the husband charged his wife with having committed adultery and prayed for dissolution of marriage and where the charge of adultery rested on the bare fact that she gave birth to a child 330 days or 333 days after the date when petitioner had last access to her *Held* that, though, under the circumstances, very considerable doubt is thrown upon the honesty and truth of the wife's assertion that the petitioner was the father of the child, Courts are not justified in the absence of any other evidence,

v *Gatham*, 27 M L J 580 = 16 M L T 50 According to English law a child
and
Hethe
nine months *Bhavon* v
Gopi, A I R (P C) = 123

consider and act upon the opinion of experts contained in treatises to which it is referred *John Howe* v *Charlotte Howe*, 25 M L J 544 = 14 M L T 417 = 1913 M W N 983 (F B) Where a boy was born about seven months after his father and mother were lawfully married and it was not disputed that they

, *Lal Singh* v *Jadir* Lah
v *Palani* 49 M 533 = A I
1923 and the wife was living
1924 *held* that this section
uced, to disprove legitimacy,

2 Had no access to each other now proved. In this section it should be remembered that the words "access" and "non access" mean the existence or non existence of opportunities for sexual intercourse *Banbury Peerage*, 1 Sim & Stu 179, 5 Cl. & F 250 In the above case *Lord Eldon* said: "Lord Hale in *Hosgell* v *Collins*, decided that the issue for the jury was as to the fact of access, or as I ur [illegible] For the access in question is of a [illegible] acceptation of the word but [illegible] erence to the result, namely, the procreation of children " By access I mean opportunity of having sexual intercourse" *Per Alderson B* in *Cope* v *Cope*, 1 M & R 275 "Access is such access as affords an opportunity of sexual intercourse" *Bury* v *Philpot*, 2 Myl & K 349 *Lord Langdale* in one case calls it "generating access" saying 'The absence of sexual intercourse, where there has been some society intercourse, or access has been called 'non generating access.' *Hargrave* v *Hargrave*, 9 Beav 225 In *R* v. *Inhabitants of Mansfield*, 1 Q B 444 it appeared that a wife was deserted by her husband, who went to live with another woman, that the wife at the end of three or four years married another man and had two children, that eleven years after the second marriage she again co-habited with her husband It not appearing where the husband was between the time of his deserting and returning to his wife, it was held that the evidence was insufficient to show non access when the children were begotten "The question is" said *Lord Denman*, "whether in this case there be any evidence of illegitimacy, and to establish that it is necessary to show non access of the husband That may be proved by circumstances, one of which certainly is an adulterous intercourse between the husband or wife and another party But here the whole proof consists only of that fact. We are not told what the husband was doing or where residing at the time the children were begotten" In *Bury* v *Philpot*, 2 Myl K 349, the wife of P left him and went to live with her father Shortly after, her father dying, she formed a connection with one H, with whom she went to live P took a house opposite where they resided and had frequent interviews with her She had two children during this time It was held that they must be declared legitimate "Access" said the Master, "if it is such access as affords an opportunity of sexual intercourse, and where the fact of such access between a husband and wife within a period capable of raising the legal inference as to the legitimacy of an after born child is not disputed, [illegible] t to a jury [illegible] he adulterous [illegible] ence; for if it were proved that she slept every night with her paramour from the period of her separation from her husband, I must still declare the children to be legitimate The interest of the public depends upon a strict adherence to the rule of law" In *Van Aernam* v *Van Aernam*, 1 Barb Ch 375, the wife of the plaintiff was [illegible] ance of another [illegible] The [illegible] ull be [illegible] at time [illegible] on—the presumption of sexual intercourse is very strong *Plowes* v *Berry*, 31 L J Ch 680 In that case B was married in 1829, became a lunatic in 1833, and was confined in a lunatic asylum until his death His wife, who lived twenty five miles away, occasionally visited her husband, but the keepers of the asylum had strict orders not to allow them at any time to remain alone together He was [illegible] ent it was [illegible] she visited [illegible] was born [illegible] living in [illegible] *See the* [illegible] ast 207, it [illegible] the whole [illegible] ossible (as [illegible] the father [illegible] rresistible [illegible] 5 *see also*

Russel v Russel, (1924) P 1 ... S
the fact of sexual intercourse
...
... ties of meeting, and, therefore, of sexual
...

But proof of access is not conclusive *R v Inhabitants of Mansfield*, 1 Q B 444, *Cope v Cope* 1 M & Rob 275, *R v Shepherd*, 6 Bing 283, *Pandaya v Pali*, 1 M H C 478 ...
for sexual intercourse had existed— ...
house—and the fact itself not bein...
the presumption that it did take place ...
four walls, and the fact of sexual ...
testimony, but by circumstantial evidence raising a strong presumption against the fact. To state this principle briefly—the proof of sexual intercourse being conclusive, the presumption cannot be attacked, but the evidence by which such fact is to be established may be contradicted The law is not so unreasonable ... minute ... If such ... founded ... Pre Ev ...

that the suit was governed by s 112 Evidence Act, and the burden of proof was on the plaintiff *Tirlok Nath v Lachmin*, 25 A 403 (P C) = 7 C W N 617 = 5 Bom L R 474 = 30 I A 142

A sues B, his father, and C the adopted son of B, for partition B disowned ...
a long ...
been co...
no son ...
tenance, and B met it by bringing one for restitution of conjugal rights, and became reconciled to each other Though she lived in her mother's house ... the first wife ... settlement in ... held, that (1) in ... the meaning
of s 112 of the E...
fidelity and produc...
legitimacy must in...
(1911) 1 M W N ...
of a person born ...
and any man, it ...
marriage had no access to each other at any time when he could have been begotten *Delipa v Rela*, 49 P L R 1914 = 22 Ind Cas 409 The pre-

2. **Conduct of supposed father and mother** On the question of acce s the conduct of the supposed father or mother towards the child is relevant. *Cope* v *Cope* 1 M & Rob 275 .. In the case of *Morris* v *Davis* 5 Cl & F 163 the wife concealed the birth of a child from her husband, and declared to him that she never had such a child; the husband disclaimed all knowledge of it, and acted up to his death a ... ; the wife's paramour aided in concealing the c ... and left it all his property by Will ... child was legit mate Any evidence of the conduc ... to each other is relevant *Goss* v *Froman*, 89 K ... , 1 Sim & S 153 *Lord Redesdale* said "I ... of the wife of A, born when A might have had sexual intercourse with her, or in due time after, to be the legitimate child of A; but this was merely considered a ground of presumption, and might be met by opposing circumstances The fact indeed that any child is the child of any man is not capable of direct proof and can only be the result of presumption, drawn from facts, either certain or proved by credible testimony, by which may be determined the proof of a fact alleged but of which there was no direct proof .. It is, therefore, of high importance to consider in a question of legitimacy whether the fact of such knowledge as would demonstrate the legitimacy did take place; or whether by circumstances such acknowledgment was rendered impossible, as by the child being a posthumous child If, on the contrary, it appears that the supposed father was ignorant of the birth of a child, and that the fact of his birth was concealed from him, such concealment is strong presumptive proof that there had existed no sexual intercourse which could have made him the father of such a child" When a father brings ... amounts as has well been said to a daily assertion ... erage Ca 4 Camp 40) So, the fact of the ... with other facts, *e g* that the husband had only on one single occasion an opportunity for access and that the wife concealed the birth of the child from her husband is sufficient to rebut the presumption of intercourse *Cope* v *Cope*, 1 M & ... establi hed ... ie time it ... try which ... *Gurt'y* v ... parties are living apart from each other by mutual consent (*St George* v *St Margranes* 1 Salk 123, *Sidney* v *Sidney* 3 P Wms 275, *Morris* v *Davies*, 5 Cl & F 163), but it is otherwise where they are separated by a decree of the Court, for in such a case the presumption is that they obey the decree But the presumption, in the first case, is, of course, rebuttable by proof of non access *Law Fle Ev* p 150

There is, of course, a presumption that children born of a married woman during the life time of her husband are the legitimate offsprings of that woman ... rebuttable ... nother ... born ... letely ... he was ... into p ... ession ... intenance to the ... *Singh* v ... the plaintiff is challenged, though the burden is initially on him to show that he was the son of his parents, it is shifted on to the defendants as soon as he showed that he has been acknowledged by his parents to be their son ... by repute and habit for the last, say, 40 ... r and stronger and more reliable evide ... finding against the plaintiffs' paternity ... d Cas. 713= A I R 1927 Mad, 733

Declarations of husband and wife Neither the declarations of the wife, nor her testimony that the child was the child of a man other than her husband are admissible (*Stegall* v *Stegall*, 2 Brock 237; *Pendrell* v *Pendrell*, 2 Strange, 925.

Cope v *Cope*, 1 M. & Rob 275; *Atchley* v *Sprigg*, 33 L. J. Ch 345; *Stevens* v *Moss*, 2 Cowp 591); nor of tl
tunities for access (*R.* v *A*
Cross v *Cross*, 3 Paige, 139),
or had not access or opportun
King v *Inhabitants of Sonton*, 5 Ad & E ll 180, *Russell* v *Russell*, (1924) A C 687. *Sir James Fitzjames Stephen* says 'Neither the mother nor the husband is a competent
course with
to be relev
whether the mother or her husband
in applications for affiliation orders wh
of the husband at any time when l
the wife may give evidence as to the person by whom it was begotten *Steph Dig Ev* Art 98 see also *R* v *Luffe*, 8 East 207; *Cope* v *Cope*, 1 M & R 272 4, *Legge* v *Edmonds*, 25 L J Eq 125 (135), *R* v *Mansfield*, 1 Q B 444; *Morris* v *Davies*, 3 C & F 215, *Hawes* v *Draeger*, L R 23 Ch D 173 But a deposition of the husband is admissible to prove that he had never sexual intercourse with his wife before the marriage *The Poulett Peerage*,
C said "I shall submit to
properly admissible There was
and and wife were within the
four seas you must presume that there was intercourse, and that you could not possibly contradict it I think that idea is completely exploded The question is to be treated as a question of fact, and, like every other question of fact when you are answering a presumption it may be answered by any evidence that is appropriate to the issue My lords that is not exactly the question which arises upon the objection taken here The question is whether it is possible for a husband to be asked whether he had intercourse before marriage with the woman who afterwards became his wife I confess I shall be startled if I thought that that which appears to have been in the mind of *Sir John Romilly* (*Vide Anon* v *Anon*, 22 Beav 481; 23 Beav 273) at the time he gave the decision referred to could be held to be the law of England Is it conceivable that a man taking to wife a person whom he imagined to be a pure virgin, and finding out that he had been deceived and that the woman was pregnant when he married her should not be at liberty to say afterwards that, so far as he was concerned, he had every reason to believe that she was not a virgin, having spurious issues put upon him he should not be at liberty to say, "I never had intercourse with my wife before marriage'? The testimony of the parents that they have or have not had connection has on the same grounds of decency, morality, and policy—been, until recent times, uniformly rejected by the Judges *Taylor* § 950 But the rule is otherwise under this section So in India a married woman can be examined as to non access of her husband during her married life, without independent evidence being first offered to prove the legitimacy of her children *Rozario* v *Ingles* 18 B 468, see also *John Hawe* v *Charlotte Hawe*, 38 M 466; *Bai Kamala* v *Babu Bhai* 95 Ind Cas 834=28 Bom L R 607; *Parbati* v *Maharaj*, 10 Ind Cas 188 In *Premchand*
"Having re
laid down by
effect that
intercourse
divorce suit
Chari v *Ma*
10 Ind Ca
(F B) The law of England is that the declarations of a father or mother cannot be admitted to bastardise the issue born after the marriage The Evidence Act does not contain any such rule *Bai Kamala* v *Babu Bhai* 28 Bom L R 607=A I R 1926 Bom 348

Proof of marriage It is upon the person who claims to be the legitimate issue of his parents to bring forward satisfactory evidence in support of their marriage In such case no certain inference can be drawn from the evidence as to the conduct of relations and friends *Thakur Amjal* v *Nawab Ali Khan*,

2. 9 Bom L R 264=5 C L J 1=17 M L J 56 It is a well recognised rule of law that when a particular relationship is shown to exist, such as marriage . . . For the purpose of s 112 . . . divorce of the plaintiffs from relying on the section . . . o show when the divorce took place If the defendants are unable to show that the divorce took place at a time which excludes the plaintiff from the operation of s 112 *then the* conclusive proof in favour of the plaintiff arises and can only be displaced by its being shown that the parties to the marriage had no access to each other at any time when the plaintiff could have been begotten by the husband of his mother *Bhima* v *Dhulapp* . . . cable in any way to a mar . . . lutely valid but is *fasid*, . . . division of marriages merely . . . be applicable to Mahomed- . . . void *ab initio fasid* and valid In any case, it . . . word 'valid' in that section should be construed as 'flawless' so that the presumption would not apply to *fasid* marriages *Kaniza* v *Hasan Ahmad*, A I R 1926 Oudh 231=92 Ind Cas 82

. . . ecessary in order to render a . . . take place after . . . L R 115 (1873) P C

Question of legitimacy is question of evidence The question of a child's paternity is not one of succession, . . . of any religious institution or usage within the mea . . . *Ma Tun* v *Michon*, U B R (1914) . . . J 84 Where the point of decision is . . . be . . . would be governed by s 112 and not by the personal law of the parties *Ibid*

Mahomedan Law The section proceeds upon adopting the period of birth . . . point of legitimacy, but und . . . are referred to the date of the . . . *Allahdad* . . .

. . . happening . . . delivery of a fully . . . expiry of three months A remarriage befo . . . lar and not void if it takes place afte . . . In the last mentioned case a child . . . her first husband or his death, bu . . . with the second husband, is to be considered legitimate under s 112 of the *Indian* . . .

the death of the husband, is . . . question to be determined . . . by this Act *Mazhar Ali* v *Budh Singh*, 7 . . . legitimacy can . . . le legitimate . . . n 112 of the . . . *Sobrabi* 15 . . . But it has been held by the Allahabad High Court . . . this section is a rule of procedure . . . *Hazira* v . . . *idha Singh* . . . L J 713, . . . 72 The . . .

7 A 297 (F B), . . . within the *Sibt Mahamed* v . . . the rule of rule of Mahomed . . . meaning of s 2, . . . les *Rahim* Mahomedan Law

Bibi v. *Chiragh Din*, A I R 1930 Lah 97, see also *Muhammad* v. *Ali Bakhsh*, 76 P. R 1891, *Hajira* v *Amina*, A I R 1923 All 570

Presumption of legitimacy Where a party admits the paternity of the other party but pleads that he ... being in favour of legitimacy the ... to prove it *Dulary Singh* v ...

... l practical purposes
f, while the order is
of proving access

Ma Mya v *Ma Shwe Ban*, 46 Ind Cas 620 Before a presumption of legitimacy can arise under this section all the facts specified in the section must be proved *Maroti* v *Bhagi*, 69 Ind Cas 465 Where plaintiff claims to recover property as the son of B by his lawfully married wife D and defendant denies that D ever gave birth to a child, and sets up that plaintiff is the son of one S the onus of proof is on the plaintiff to show that D gave birth to him or to any child before invoking the presumption under s 112 *Rao Kar Singh* v *Batimaha*, 44 A. 470=20 A L J 271=66 Ind Cas 902 There is no presumption in favour ...

696 The presumption that a particular woman has passed the age of child-bearing is or ... by the light of general knowledge and partly l... son in question It has several times been ... of fifty-three years has been passed, but each case must depend on its particular circumstances *Haynas* v *Haynas*, 35 L J Ch 303, *Re White* (1901) 1 Ch 570; *Wills Ev 2nd Ed* 57; *Widow's Trust*, L R 11 Eq 403, *In re Millner's Estate* L R 14 Eq 245, *Davidson* v *Kimpton*, 18 Ch D 213, *Lyddon* v *Elleson*, 19 Beav 565, *Croxton* v *May*, 9 ch D 388 *In re Hooling* (1898) 2 Ch 567 Where divorce in the sense ... n must be taken ... woman and her

Proof of cession of territory

113. A notification in the Gazette of India that any portion of British territory has been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification

Scope of the section St 24 & 25 Vict c 67, s 25 does not protect s 113 of the Evidence Act, though it does not disallow it This section has provided ... s been ceded to a native ... n at the date mentioned in ...

of prerogative ... of the law is vali... other hand, th... it follows, as a n... and that section ... v *Ganesh Deve*...

... by the Act 24 & 25 Vict chap. ... the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, could not by any legislative Act, purporting to make a

notification in a Government Gazette conclusive evidence of a cession of territory exclude inquiry as to the nature and lawfulness of that cession" The British Crown has the power without the intervention of the Indian Parliament to make a cession of territory within British India to a foreign prince or feudatory *Lachminarain v Partap Singh*, 2 A 1 *Damodar v Deoram* 1 B 367 (P C)=3 I A 102 This section was an attempt for political reasons to exclude enquiry by Courts of justice, into the validity of the acts of the Government But it has been decided by the Privy Council in *Damodar v Deoram* 1 B 367 (P C) that the Indian Legislature had no power to do this, and the section is therefore, a dead letter *Mar b/ Ev* 87

114 The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case

Court may presume existence of certain facts

Illustrations

The Court may presume—

(*a*) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession,

(*b*) that an accomplice is unworthy of credit unless he is corroborated in

en lorsed was accepted or endorsed

h has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist is still in existence,

(*e*) that judicial and official acts have been regularly performed

(*f*) that the common course of business has been followed in particular cases,

(*g*) that evidence which could be and is not produced would, if produced be unfavourable to the person who withholds it,

(*h*) that if a man refuses ... not compelled to answer by law the answer if gi ... nds of the

to such facts as the following in do not apply to the particular case before it —

as to *illustration* (*a*)—a shop keeper has in his till a marked rupee soon after it was stolen and cannot account for its possession specifically but is

cter is *tried* for ertain machinery the arrangement the common care-

sons A B and ot apart from each and the accounts render previous concert highly

of exchange, was a man of iorant person, completely under

A s influence —

as to *illustration* (*d*)—it is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that *time* which might change its course —

as to *illustration* (*e*)—a judicial act, the regularity of which is in question was performed under exceptional circumstances

as to *illustration (f)*—the question is, whether a letter was received It is shown to have been posted, but the usual course of the post was interrupted by disturbances

nent which would
d but which might

which he is not compelled by law to answer, but the answer to it might cause loss to him in
h it is asked
obligor, but the circum-

Scope of the section "The effect of this section, coupled with the general repealing clause at the beginning of the Act, is to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging of the effect of particular facts, and that they are to be subjected to technical rules whatever on the subject" *Vide the Speech of Hon'ble Mr Stephen in the*
esumption to law of evidence *Vide*
or the most part, cases of what in
rtificial rules as to the effect of
guide its decision, subject however,
to understand or to apply, but
question *Ibid* A 'presumption'
may draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved *Lawson Pre Ev* 639 "Presumptions are of two kinds, natural and legal or artificial The natural presumption is when a fact is proved wherefrom, by reason of the connection founded on inference, the existence of another fact is directly inferred The legal or artificial presumption is where the existence of the one fact is not direct evidence of the existence of the other, but the one fact existing and being proved, the law raises an artificial presumption of the existence of the other" *Gulick* v *Loder*, 13 N J (L) 72 "The terms of this section are such as to reduce to their proper position of mere maxims, which are to be applied to fact by the Courts in their discretion, a large number of presumptions to which English law gives, to a greater or less extent, an artificial value Nine of the most important of them are given by way of illustration' *Steph Intro p* 175 Presumptions of law are in reality, rules of law and part of the law itself, and the Court may draw the inference whenever the requisite facts are developed, whether in pleading or otherwise, while all other presumptions, however obvious, being only inferences of facts cannot be made without the intervention of a jury *Best on Presumptions*, 18; *Lawson Pre Ev* 641, *Justice* v *Long*, 52 N Y 523 When certain facts are admitted or proven, the Court takes notice, without further proof, of all such presumptions and inferences arising from them as are warranted by uniform experience, and also all such consequences as are known to flow from the laws which govern the matter, and which are applicable to the proven or admitted facts *Heiks* v *Silliman*, 93 Ill 261 (Am) A presumption must be based upon a fact, and not upon inference or upon another presumption *Lawson Pre Ev Rule* 118 A presumption cannot contradict

to such a
explana-

of the explanation
of determining where
evidence in a point

presumption of law is *func us officio* as a presumption of law." Such a pre ump tion, therefore, cannot shift "the burden of proof" in the strict sense of that t rm and the most that it can effect is a shifting of 'the burden of evidence'—the burden of going forward with new e . . of the Act indicates that it is for the Court,
such a presumption
v *Dayalı* 1 N L
'common' can only . in the experience of t e
Ju . . *dalal* 24 N L R
87— n a mere
inf . inference
dra e umpt on
of L J 833
. presume that a certain
of from the party who is
gpur Ry Co v *Moolj*
Sicka & Co 62 1930 Cal 815

The illustrations appended to this section are not statements of the law qualified only by particular exceptions They are merely what they call them selves illustrations or instances of the application of certain maxims out of many possible instances *Govinda* v *Emperor*, 69 Ind Cas 957=23 Cr L J 673

ILLUSTRATION (A)

Recent possession of stolen property In a criminal case, the budren of proof always lies in the first instance on the prosecution, for the accused is presumed . . . . the bur len of proof
may shift t t has
been estab ortly
after they , the
possession tolen
property recently after the commission of a theft is *prima facie* evidence that the possessor was either the thief, or the receiver according to the other circum stances of the case *R* v *Langmead*, 1 L & C 427, *Taylor* § 140, *Russell Law of Crimes* p 1482 In *R* v *Langmead*, 1 L & C 427, *Pollock C B* said If no other person is involved in the transaction, and the whole of the case against the prisoner is that he was found in possession of the stolen property, the evidence no doubt points to a case of stealing rather than a case of receiving, but in every case, except indeed where the possession is so recent that it is impossible for any one else to have committed the theft, it becomes a mere question for the jury whether the person found in possession of the stolen property stole it
. other evidence, the
le the property,
having stolen
se, it will be for
In the same
perty has been
stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and on his failing to do so the jury may well infer that his possession was dishonest, and that he was
. If he had been
they may
it is more
e was the
ss they are
satisfied that he is not the actual thief' See also *R* v *Smith*, Ry & M 295, *Bayu* v *King Emperor*, 11 A L J 94=18 Ind Cas 681=14 Cr L J 124, *In re*
. (*R* v *Exall*, 4
ibit of the
re 2 East
, *Taylor* §
it requires
is offered
and all the

section is merely an example, and it cannot be read as limiting the presumptions which may be drawn from recent possession of stolen property. *Husein* v *Emperor*, 17 Cr L J 32=32 Ind Cas 160 The possession by the accused of the jewels of a person who has been murdered for the sake of her jewels, if unexplained is presumptive evidence that the accused was the murderer as well as that he committed theft *In Nainamalai Konan*, 14 L W 418; but see

property In a criminal case the *onus* is on the prosecution to prove beyond reasonable doubt the guilt of the accused and the burden never changes *Satya Charan* v. *Emperor*, 52 C 223=88 Ind Cas 515, *Reg* v *Isaac*, (1914) Cr App.
the
ror,
Cr
sion
of the accused in respect of property proved to have been stolen must be de-
Presump-
but extends
s presumption
R 1930 Pat
515= I at 606 Where accused persons are found in possession of stolen property soon after the theft and they are unable to explain their possession they can be held guilty of receiving stolen property knowing it to be stolen under s 411 I P Code *Yamin* v *Emperor*, L R 5 A 81.

Possession unexplained The reasons on which this presumption is founded are well stated in a learned note to the report of *Cockin's case*, 2 *Lewin*, 234.

If the change of possession has been
e forgotten, still less if it be an article of bulk or value If, then, it be reasonable under such circumstances to call upon the party in possession to account for such possession it can not be unreasonable to presume against the lawfulness of that possession when he is unwilling to give an account, or is unable to give a probable reason why he cannot Now there is no reason in general why an honest person should be
s not honest and
some one He is

of wood, t
it was tak
This is a
acquitted
v *Crouh*
of this nature, you should take it as a general principle that when a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is to be a real person, it is incumbent on the prosecutor to show that the account is false; but
or improbable on the face o
Suppose, for instance, a
I were to say, I bought it fr
prima facie, a reasonable account, and I ought not to be convicted of felony unless it is shown that that account is a false one" See also *R* v. *Smith*, 2

4 C & K 206, see *R* v *Schama* 85 L J K B 393, *R* v *Norris*, 85 L J K B 810 *R* v *Grunberg* 33 T L R 428 (i) The presumption under this section is discretionary with the Court having due regard to the circumstances, (ii) the presumption means that the law exempts the crown from proving the guilt of the accused unless he gives some explanation as to how he came by the goods If he gives any explanation which in the opinion of the jury may possibly be true although they do not necessarily believe it then the crown cannot rely upon the presumption and must prove the guilt of the accused just as in any other criminal case accused did not prove his innocence affirmatively *Buthnath* v *Emperor*, 35 C W N 291.

Explanation not inconsistent with the identity of the property The explanation to be given by the accused of his possession of the stolen property must not be inconsistent with the identity of the property A beetle head is stolen from the house of W ... and identified by W as his E ... If E says, ' I cannot remember w ... nd he must be acquitted But if E says, " I bought this beetle head at a sale eight years ago this contradicts the identity, which remains a question on which E s guilt or innocence depends " *Queen* v *Evans*, 2 Cox C C 270, *Lawson Pr Ev* 605 In that case *Allerson B* said to the jury " If the prisoner said in the first instance, ' why, really I cannot tell where or how I got this beetle I should have said that th ... have been indicted for ste ... does not deny that the ... prosecutor Where however the prisoner is shown to have claimed the ... found in his possession, and sworn by the prosecutor, to be his own property by right of a purchase made eight years ago and a continued possession up to the present time, I should say that that was not so reasonable an account of his possession as to exempt him from the necessity of accounting for it to the satisfaction of the jury, for if it be true the prosecutor is wrong and the identity of the thing found with that is disputed If the prosecutor should satisfy the jury that the beetle in question was his, then the statement of the prisoner accounting for his possession of it must be false, and he must be presumed to have stolen it, althe ... fifteen months after the loss Th ... eetle ... the thing which ... ool ... eight years ago, or ... ion ... of the prosecutor ... e the case, the prisoner is guilty

... t, in order to put ... ty must be recent ... ined by the nature of the articles stolen *i e* whether they are of a nature likely to pass rapidly from hand to hand; or of which the accused would be likely from his situation in life or vocation, to become possessed innocently *Best* § 211 So what is or is not recent, within this rule depends upon the cost, bulk or transferability of the thing stolen " Suppose the Pitt Diamond or the Crown Jewels were stolen and, after the lapse of one or two years found in the possession of a person in a comparatively humble station of life, who refused to give any account of where he got them would there be anything harsh or violent in presuming that he had not come by them honestly? But suppose the goods lost were merely a pair of shoes or a coat, such as in his station of life it would be natural and proper for the prisoner to wear, and that these were not traced into his possession until after a few months from th ... of making so violent a presumption as to deem ... ce " ' Even if the point were not settled ... ople process of reasoning to the conc ... for drawing, from recent possession ... uilt without reference to the nature ... allic or paper piece of money of the ... was stolen might have less weight as ... ary of Harvard University or Power s Greek Slave, or an elephant, ... ars after the larceny of such property It would ordinarily be more probable

that the possessor could prove by other evidences than his own testimony, how he obtained the possession in the latter case than in the former It is equally clear, upon authority and upon reason that the presumption from recent possession of stolen property depends upon the nature of the property "*Lawson Pre Ev* p 606 ' A couple of sacks are stolen from a farmer A month afterwards they are found in the possession of another person This alone cannot raise an inference that the latter stole them *Cockin s Case*, 2 *Lewin*, 235 The reason for this limitation to the rule is well expressed in a learned note to this case, by the author 'If the property' says the writer 'has not the
here
the
difficulty of giving an account. After an interval of time the means of proof are
die and little circumstances
subsequent or antecedent
tending the truth may not
the recollection of facts
or enmities may have grown up and the occasion may be laid hold of to gratify a vindictive feeling Again the circumstances in life of the party may be a

bulk, and as it may happen to be an article that is more or less frequently brought under the party s view Judges therefore hold and most reasonably hold that a person is not to be called upon to give an account at a distant period after the theft The question however of distance of time or recent possession must be at all times one of fact under the circumstances and a jury under the Judge s direction must ultimately decide' In *Cockins s Case*, 2 Lew 235 *Coleridge J* said to the jury If I was now to lose my watch and in a few minutes it was to be found on the person of one of you it would afford the strongest ground for presuming that you had stolen it but if a month hence it were to be found in your possession the presumption of your having stolen it would be greatly weakened because stolen property usually passes through many hands'

Two bundles of woollen cloth were stolen from M Two months after they are found in the possession of P The presumption is that P stole them *R* v *Patridge* 7 C & P [illegible]
time is to be consi
stolen If they
be a long time bi
March 1st On June 1st they are found in A s possession This raises no presumption against A *R.* v *Adams* 3 C & P 600, *R* v *Hewlett* 2 *Russ on Cr* 728 (note), *R* v *Dewhurst* 2 *Stark Ev* 449 note *R* v ——, 2 C & P 459 A horse disappears from the possession of its owner on December 17 1849 On June 20 1850 it was found in the possession of C This does not raise a presumption that C is the thief *R* v *Cooper* 3 C & K 318 In that case *Maule J* said he thought there was no case to go to the jury—the possession was not sufficiently recent Where a man is found in possession of a horse six [illegible]

4\. thief *Queen* v here property of to have been possession of a possession on come honestly lways had to the character and value stolen property soon after the theft, ossession is either the thief or the f not the mo t the ding great to make it necessary for the prisoner to account for his possession *In re Puthenvittil*, 2 Weir 777 Where a bullock which has been stolen was sold by the accused in another place about two or three months afterwards and though as to theft he convicted Illustration (a) *Held* that in the theft the conviction 71 = A I R 1930 Bom 1

Possession of stolen property does not give rise to any presumption under this Ind Ca 800 = 32 Cr L J 614 = A I R om a pen underneath a house during the d offered to find it, if he were given Rs told the complainant where the bullock tied up in the place indicated by the accused *Held* that it must, from the circumstances spoken to, be presumed that the accused was in possession of the bullock when it was tied up in the jungle, from which possession, it might undoubtedly be presumed that he was the person who stole the animal *Don Be* v *Crown* 1 L B R 332 An accused cannot be convicted for the possession of stolen cooking utensil fourteen months after theft *Empress* v *Keshub Dutt*, A W N 1881, 155 But when stolen property is traced to the possession of an accused person three weeks after the theft took place, the proper presumption *is, not* that he was one of those who committed the theft, but that he received the stolen property knowing or having reason to believe it to be such Whether a presumption of theft or of receipt of stolen property should be drawn would depend on the theft how much estion, the d with the = 13 Ind would not on of the ss v *Burke* 1887, 281 after their art of the property pos es *Emperor*, umption would arise where the accused is in possession of the stolen property three weeks after it was stolen 30 = 7 Cr L J 30: *Empress* *mperor* 1914 M W N 84 e mere fact that the accus cealed does not give ris ion of ption would arise when of such stolen articles 101 = 32 Bom L R possession of articles is recent or otherwise But every case must be judged on its own facts If a few stolen articles are found in possession of a person under circumstances

S.

which may give rise to the probability of his coming by them honestly sometime after the theft the presumption under the law might not arise against him. *Emperor* v *Ekabbor*, 27 Cr L J. 617=94 Ind Cas 361=A. I R 1926 Cal 925; *Necha* v *Emperor*, A I R 1928 Nag 213=103 Ind Cas 801 Where, more than six months after the dacoity, some ornaments consisting of a pair of bangles, a bracelet and ear rings were found in the possession of the accused, *held*, that havir

description, and

covered by s

upon to explain

L J 436=29 A. 138 Where the possession of property, stolen some years before, reasonably and circumstantially explained, such explanation should not be rejected merely because it is unproved *Talu* v *Empress*, 15 P R

y rule of English

sumption concern

goods are found

nnot be regarded

as soon after the theft *Jainullahdin, In re*, 26 M L T 389=11 L W 43=53 Ind Cas 119, *Joeenullah* v *Emperor*, 22 C W N 597=46 Ind Cas 158=19 Cr L J 702, *Ramhit* v. *Emperor*, 20 A. L J 178=65 Ind Cas 849=23

Cas 722=26 Cr L J 578=A.

Cas 650=27 Cr L J 986,

Cas 471=A I R 1926 Lah

Ind Cas 514=A I R 1926

Possession must be exclusive In order to give rise to the presumption in this illustration the possession must be exclusive The possession of a watch by the wife of the accused is not sufficient *Sorenson* v *U S* 8th C C A 168 Feed 785 It is not sufficient that the stolen goods were found in the house of the wife of the accused, where he does not live *People* v *Kubulis*, 298 Ill 523, *Wigmore* § 2513, *Lawson Pre Ev* p 599 The two accused in this case were husband and wife and both were in possession of the stolen property within such a short time of the theft as to raise the usual *prima facie* presumption

Empress, U B R (1897 1901) Vol I 171 Where stolen property was found in the Camp of a party of refugees it was held that it was not proved in whose possession it was, to justify the conviction of any one of them for theft *Nga*

ed that

ind in

Held

rs and

ot arise

ILLUSTRATION (B).

Corroboration of evidence of accomplice Although as a matter of law,

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of

are

the less liable would the evidence of the accomplice be to suspicion and discredit *Emperor* v *Lakshmi*, 6 Bom L R 1091 = 29 B 254 For further discussion on this topic *Vide* notes under s 133 *infra*

ILLUSTRATION (C)

Presumption as regards Bills of Exchange Bills of exchange and promissory notes enjoy the privilege of being presumed *prima facie* to be founded on a valuable consideration *Collins* v *Martin*, 1 B & P 651, *Holliday* v *Atkins*, 5 B & C 501 The law raises this presumption in favour of these ... negotiability in fact, ... may reasonably be ...

mode in w ...
and other ...
Instrumer ...
is that a note is of the value of the sum promised thereby to ... *Pre Ev* 94 'The law was thus framed and has been so administered in order to encourage the free circulation of negotiable paper by giving confidence and security to those who receive it for value, and this principle is so comprehensive in respect to bills of exchange and promissory notes which pass by delivery that title and possession are considered as one and inseparable and in the absence of any explanation, the law presumes that a party in possession holds the instrument for value until the contrary is made to appear, and the burden of proof is on the party attempting to impeach the title These principles are ... are believed certainly in accordance with ... mercantile to correspond with the general ... *iptive Ev* 9... pursuits.' *Goodman* v *Simo* ... But where fraud or ille ... the burden is on the holder to sho ... V 76 *Fitch* v *Jones* 5 El & B 238 ... *ron Parke B* said It certainly ... f the note were proven to have been o ... that afforded a presumption that ... would dispose of it and would place ... upon it, and that such proof casts upon the plaintiff the burden of showing that he was a ... states of America, want of considera... ie holder *Wallace* v *Bank* 1 Ala 567 ... no fraud nor any suspicion of fraud ... ant received no consideration for his ... on to prove that he gave value for ... Ell 638, overruling *Thomas* v *Newton* ... 2 B & Ald 294; see also *Robinson* v ... 3 M & W 72, *Berry* v *Alderman* ... B 244, *Moti* v *Mahomed* 20 B 267, *Sukharam* v *Gulab* 16 Bom L R 743, *Madhoram* v *Nanda*, 58 Ind Cas 98... But this presumption does not arise where the endorsement is forged or the consideration is unlawful *Banka* v *Secy of State*, 36 C 239, *Ramdas* v *Lal Chand* 101 Ind Cas 325 = 1927 Lah 137

ILLUSTRATION (D)

Continuai ... of an object condition qua ... existence of it is in human ... ce or cont... nuance at a l ... continuance ... ured to bring ... es will depend ... ce is in issue ... So far then ... n, the nature ... rol *Wigmore* ... ontinuance or ... hen, therefore,

S.

the existence of a person, or personal relation, or a state of things, is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, till the contrary is shown, or till a different presumption is raised, from the nature of the subject in question *Price* v *Price*, 16 M & W. 232 When things are once proved to have existed in a particular

until the contrary is

st Ev § 405 Although

contrary, the settlement of a pauper, or the appointment of a party to an official situation, will, at least for a reasonable time, be presumed to remain in force

M I A 194

and not against

24 A L J 76

existing state of

745=24 A L

section relates to the existence of certain facts and not their probative value *Nanda Kumar* v *Emdad Ali* 44 C L J 265=A I R 1927 Cal 49 Where in

existence at a particular time of a fact of a continuous nature gives rise to a rebuttable presumption within local limits that it existed at a subsequent time or has previously existed The limits of time within which the inference of continuance possesses sufficient probative force to be relevant must obviously

existence at a

ist as long as

ther backwards

or forwards, whether onwards or downwards, is an inference of fact and may therefore be rebutted *Secretary of State* v *Upendra Narain Roy*, 71 Ind Cas

presumption as to the continuance of the state of things *Hiranmoy* v *Ranjan*, 29 Ind Cas 691=20 C. W N 48; see also *Soudamini* v *Secy of State*, 38 C L,

4 J 47 Under this illustration a person who is once proved to be a profligate is presumed to continue as such during his lifetime But the presumption is rebuttable *Mussammat Shahal* v *Allah Bachayo*, 9 S L R 196=34 Ind Ca 504 It is not right to presume from the fact that a man is member of an association when it is lawful that he continues to be a member after it is declared unlawful This is not a matter of presumption, there must be evidence of continuing membership *Emperor* v *Dharmanand*, 33 Bom L R 933=A I R 1931 Bom 203, *Emperor* v *Sripad*, 55 B 481=A I R 1931, Bom 199

Subsequent existence Similar considerations affect the use of subsequent existence as evidence of existence at the time in issue Here the disturbing contingency is that some circumstance operating in the interval may have been the

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an

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In

ways (to have been) at some previous is never presumed

ILLUSTRATION (E)

Presumption a that a rule of official those upon whom of due performance

of reason are found in the pa ves a mere formality or detail of required procedure, in the routine of a litigation or of a public officer s action, next that it involves to some extent the security of apparently vested rights so that the presumption will serve to prevent an uns wholesome uncertainty and finally, that the circumstances of the particular case add some element of probability *Wigmore* § 2534 There is a well known maxim of law *omnia praesumuntur rite esse acta* this is an inference of reason able probability arising out of the experience of mankind The law assumes done will be performed ll Ev 391 In Berry an peace officers Justices of the peace, constables etc, it was sufficient to prove that they acted in those characters without producing their appointment Where successive decisions are inconsistent with a general order of the Court, a reversal of that order ought to be presumed *Bohun* v *Delessert*, 1 Coop 21 *Man* v *Ricketts* 2 Coop 8 1 Again on an indictment of bigamy, proof of the solemnization of the first marriage in a W of ... of such marriage pt on that =7 Cox ud c al or the presump *Deputy Legal* R 19 8 Pat 33—A I R 19 3 have been done certain things are spect of any right o prove that the on arises of the 1932 Cal 833 53 C 718=1 pplying Part was promul in arise that

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it was so promulgated *Khurshid v Raniganj Municipality*, A I R 1932 Cal. 833 = 36 C W. N. 823 From the mere fact that the warrant for the arrest of a judgment debtor bore the signature of the *sheristadar* it cannot be presumed under s 114 (e) that the *sheristadar* had been duly appointed to sign warrants ... W. N 845; see also *Girdhar* v ... v *Emperor*, 3 Pat L J 636 ... an offence under Penal Cod ... the back of the paper instead of in the body of the sanction merely because there was not sufficient space left on the front side *held* that the initial presumption was that all the official acts were done in a regular manner hence the sanction was valid. *Emperor* v *Diwan Chand*, A I R 1930 Lah 81 Where a committing Magistrate writes at the foot of the deposition that the cross examination is being reserved by him and that the accused has not been given an opportunity for cross-exami- ... n done properly and ... be presumed to have ... cross-examination to ... *Emperor* v *Mahtab*, A I R 1930 Sind 54

Regularity of Judicial acts Where a Court having general jurisdiction acts in a case, its jurisdiction so to act will be presumed *Lawson Pre Ev* ... ings by Magistrates, the maxim *omnia praesumuntur rite esse acta* does not apply to give jurisdiction has never been questioned Here, then, the jurisdiction, should at all events have appeared on the face of the examination, supposing proof of it *aliunde* not to have been necessary" But where the ... nal in a special ... must be shown

Under ... all judicial ... v *Blackwood* ... general pow ... diction being ... *acta* finds, ... proceedings ... Ind Cas 5 ... will assume ... correctness ... d v *Kanto*, ... the Peace ... inutes of a

be drawn that it was given up To hold others
and to presume that the Court failed to do so
1923 Lah 121=68 Ind Cas 710 After a
filed his accounts and they have been accepted
tion as to their accuracy does certainly arise and it is open to parties to rely
on guardian and ward *Gopal v*
Sa presumption arising under this
sect Court's proceedings can only be
ove *Sheo Darshan v Assessor Singh*
5 C applicant before the Court is
attempting to rebut that presumption it is not for the Court itself to give
assistance to the otherside or to deal with the matter otherwise than impartially
Sohaglati v Surendra Mohan, 4 Pat L W 206=44 Ind Cas 661 Before the
depositio
admitted
must be
the prisoner's presence It should not be merely presumed under s 114,
illustration (e) to have been so taken and attested *Queen Empress v Ridug*
9A 720=A W N 1887, 228 Where a point is definitely raised in the grounds
of appeal and the Court makes no mention thereof in its judgment, it must still
be presumed to have performed the judicial act of writing a judgment regularly
and properly *Har Charan v. Lachman*, A I R 1928 Lah 94

Regularity of Official Acts The presumption is that one who is proved to
have acted in an official

this rate, and I
the proof of their
Where is the line
were trustees" T
duty requires th
strong presumption
ence of clear proof
urt is bound to admit
plaintiff that the re-
Farzand, 9 A L J
Act are conducted
1822 which are appli
notice to all
binding upon
ction 61, the
ive been regu
9 Ind Cas
n Court in
nal Judge
Cutch
isfied the
but not
der s 114
require
was a correct copy
he supervision of the
Bom L R 1519=
by the Court
which has been ac
the manner provi
R m v Sohana,
this section illus
71
Gaya, 8 O W N 914
ra v Manmohan, 57 I A
held to
v *Bal*
imed, 3

C. W. N 242, *Emperor* v *Mahrab*, A. I R 1930 Sind 51=31 Cr L J. 121 **S.**
An order issued under s 31 may be oral order by a police constable issued

disregard s 114 illustration (e) and assume irregularity in official acts A Sessions Judge should presume that a confessional statement placed on record by the Magistrate was voluntarily made *Public Prosecutor* v *Nagaraju*, 129 Ind Cas 229=32 Cr L J 262=A I R 1931 Mad 42=59 M L J 114 The presumption as to official acts can be applied to a sanction order under s 196, Mysore Cr Pro Code Reg 1904 *In the case of Setharama Sastry* 8 Mys L J.

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Evidence Ac

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" Regularly

procedure The regular performance of official acts does not imply that the representation made to them must be correct *Jagdeo Narain* v *Balaki Gope*, (1921) Pat 343=63 Ind Cas 226 The action of a Deputy Commissioner under Regulation XVII of 1836, is purely ministerial His acts therefore, are official acts and the presumption contained in s 114 illustration (e) of the Evidence Act applies to them *Juala Bakhsh* v *Newazish*

is short, a Court might require stricter proof that all the formalities for publishing the notification had actually been carried out *Emperor* v *Bal Krishna*, 55 B 356=A I R 1931 Bom 132

ILLUSTRATION (F)

Presumption as regards common course of business In commercial

4. or that his name could not have been adopted by any other person In the absence of all evidence the mere fact that the title page bears his name does not justify the conclusion that he and nobody else could be the author thereof *Ranjit Singh* v *The Crown* 26 P L R 403=83 Ind Cas 306=26 Cr L J
... there may be a presumption that it ...
Habil v *S...* 80 Ind Ca
... Oudh ... When the fa...
of a particular case can form a foundation for a fair presumption that an application was made th... was mad
Mulchand v *Jaman* ... Bom
443 ... illu
strati... presump
tion ...
Ind Cas ... Court
the time when a receipt was given for them the presumption under this section is that the ordinary course of business was followed in the ... question The mere statement by appellant s counsel that these sums are not always paid at the time when the receipts are given are sufficient to throw the onus on the prosecution of proving that the plea was wrong *Emperor* v *Imdesha* 1933 Lah 566 This illustration is not exhaustive and the general language of the section applies to all acts and proceedings which might be presumed to have been done in the usual course of business *Laxmi Pillja* v *Ram Chandra* ... M W N 133=20 M L T 228=31 M L J 311=35 Ind Cas 421

ILLUSTRATION (G)

Withholding evidence—presumption from The illustration refers to evidence which can be and is not produced *Girish* v *Emperor* A I R 193...
... to produce
... presump-
... withh...
... or its ...
... *n Pre E...*
... *Archer*, Comp
... which it was in
... and in the power of the other to have ... testify to facts within his knowledge ... testimony is proper subject of ... ty and in the Courts of law *Lawson* ... ed which is part of a title which he claims The presumption is that if produced the deed would injure his claim *Haldane* v *Harvey* 4 Burr 2486 In cases like this it is laid down that the case of written evidence presents the strongest illustration of the extent of the rule The non production of documentary evidence within the party s power raises it is said in several cases a very strong presumption that if produced it would militate against him who withholds it Therefore in an action of trespass where the plaintiff relied upon bare possession although it appeared that he had taken the premises under an ... which was not produced the Judge charged the jury that ... ssion of the close at the time of the trespass ... to more than nominal
... In affirming this
... na of showing the
... the lease ...
... o good *Try* ...
Gen v *Dean of Windsor*, 24 Beav 679 the ... e is always to be taken most strongly against the persons who keep back a document and the circumstance that the body keeping it back is a corporation does not in the slightest degree affect this ... exonerates the present members from blame in that respect
... f wilful suppress...
... poration and yet the
... they cannot now

S.

receive" It is well observed by Mr. Evans in substance, that if the weaker and less satisfactory evidence is given and relied on in support of a fact when it is

uncertain testimony was intended to conceal 2 Evans Pothier, 149.

In *Bathurnite* v *Coleman*, 1 Harr & Well 239, which was an action by the indorsee against the drawer of a note, the only evidence of notice of dishonour was the statement of the defendant to a witness "I have good

time"
Lord
oduced,
Denman
ceived

the letter, and as he does not produce it, it might be fairly inferred by the jury that it was in time" But the other members of the Court were of a contrary opinion and a new trial was ordered But in the case of *Curlewis* v *Corfield*, 1 Q B 814, which six years later came before the same Court, and nearly before the same Judges, a different conclusion was reached In *Bell* v *Frankis*, 4 Man & Gr 447, also an action by the indorsee against the drawer of a bill of exchange it appeared that the defendant had told a witness that he expected to receive by post a notice of its dishonour, and afterwards gave him a letter he received by post, requesting him to negotiate a renewal of the bill, but the letter, which had found its way into the defendant's hands, was not produced at the trial It was ruled that the jury was

dishonour had been given See also *Lobb*

party does not produce a document in

that its production will damage his case

carrying on business and the non-production was not sought to be explained, *held* that the Court was entitled to draw an inference under s 114(g) of the Evidence Act *Gu*,

Sankar Das, 111 I

account books by

L J 4 7; *Sankara Linga*

Every deed being the best evidence of its own contents, its non-production raises the presumption that it contains some defeasance, in other words, there is some endorsement on the document which the plaintiff does not like. *Mahammad* v *Zahur*, 21 A L J 961=97 Ind Cas 82=A I R 1926 All 741, *Ahmed* v *Ali Ebrahim*, 27 Bom L R 746=1925 P C 177, *Sreenath Roy* v *Secretary of State*, 50 C 276=70 Ind Cas 510=1923 Cal 230=36 C L J 315, *Secretary of State* v *Upendra Nath Roy*, 36 C L. J. 346, *Harendra* v *Durga*, 62 Ind Cas 697. Where a document is a very old one the possibility of its having been lost and being no longer in existence is naturally much brighter than in the case of a document of recent date Consequently the presumption

4 arising quite as strong in the case of an old ... mji Das v Mihir Lal, 71 Ind Cas 65 ... es not produce certain books saying that they have been destroyed and the matter dealt with by the books could be easily proved by secondary evidence which is admittedly in the possession or power of the party and which he does not attempt to place on the record, the opposite party is entitled to the presumption that these books if produced would have gone against the contentions of the party not producing them *Secretary of State* v *G T Sarain*, A I R 1930 Lah 364 But no presumption can be ... of their title deeds in ... which did not ... escart A I R 1

Exception. A does not produce one of his muniments of title He proves that it is in the possession of B from whom he cannot obtain it There is no presumption against A *Gilbert* v *Ross*, 7 M & W 121 *Marstons* v *Downes* 1 Ad & Ll 32 In the first case it has been ruled that where the evidence alleged to be withheld is unattainable, the presumption does not arise There fore if a deed be in the possession of an adverse party, and not produced, or if it be lost and destroyed, no matter whether by adverse party or not secondary evidence is clearly admissible, and if the deed be in the possession of a third person who is not by law compellable to produce it, and he refuses to do so the result is the same *Lawson Pre Ev* 169

Necessary witnesses not called Where a witness is not called by the ... that ... he ... R ... nce ... on ... Cr ... ime ... un ... t it ... a v ... ror, ... ited ... lace in this illustration arising from non production of evidence can ... the contrary inference supported by adequate evidence *Demisetti* v *Demisetti* 13 L W 293 = 63 Ind Cas 740 (P C) Where in a suit for profits of land the recorded collections are suspiciously low, and the defendant neither produces nor gives any evidence to show what was collected the Court would be justified in presuming that the full amount of the rents had been collected and is ... *Hor Dayal* ... ion examined ... colleagues or ... secution case ... in favour of ... the defence ... esses or as ... So also non ... Court ... *Emperor*, A I R 193... prosecution when their evidence was unnecessary when there is nothing else in the record to ... A I R 1930 Lah 163 = 120 Ind Cas 606 = 31 Cr L J 131

Where the plaintiffs are the best persons to give evidence as to the 'interest' possessed by them in a religious institution to prove the *locus standi* for the purposes of s 92 Civil Procedure Code, and they merely put the defendants into the witness box, their failure to go into the witness box goes strongly against them *Kirpa Singh* v *Ajaipal Singh* A I R 1937 Lah 1, see also *Gurbaksh Singh* v *Gurdial Singh*, A I R 1927 P C 230, *Allah Ditta* v *Bhagwan*, A I R 1930 Lah 401, *Kirpa* v *Ajaipal* 11 Lah 142 = A I R 1932 Lah 1.

ILLUSTRATION (H)

S.

Refusal to answer—presumption for This illustration does not contemplate the testimony of a party in a civil or criminal suit, because "every person in the kingdom, except the sovereign, may be called upon and is bound to give evidence, to the best of his knowledge, upon any question of fact material and relevant to an issue tried in any of the Queen's Courts; unless he can show that he is exempted by some exception in his favour" *Per Willes J* in *Baird* v *Fernandez*, 12 C B N S 3, 39. So in such a case he is compellable by law to give answer. So also this illustration does not contemplate the case of witnesses who are not compelled to answer on the grounds of privilege (*Vide* ss 121-129) To make adverse presumption for not answering in those cases would be extremely inequitous. This illustration contemplates cases where a person is not bound to answer but can answer if he so desire, *e g* the case of an accused under s 342 Cr. Pro Code Sub-section (2) of that section runs thus "The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just" So the

which can serve the ascertainment of the truth, this duty includes equally the

ILLUSTRATION (I)

Documents in the hands of obligor—Presumption from When, in the course of dealing, a debtor gives security to his creditor for the payment of the debt in the shape of documentary evidence either alone or accompanying muniments of title, it follows that on the payment of debt, the document should no longer be allowed to remain in the creditor's custody, and hence has arisen the rule that possession by the debtor of the evidence of a debt, as a note, bond,

Burr Jones § 70(a); *Abdul Karim*
Fleming 5 B L R 619; *Ganesh* v
Ind Cas 308 So the obligor's

circumstance in favour of payment, and should turn the scale if the other

evidence of its discharge when it is proved not to have been paid or satisfied? I think it is not" *Pothier* (Obligations, 73) says that *Boisen* holds that possession of the note affords a presumption of its payment but if he allege a release he must prove it, for a release is a donation, and a donation ought not to be

presumed *Pothier* differs, and thinks it should be presumed unless the creditor shows the contrary But *Pothier* agrees with *Boisen*, that if the debtor was the general agent or clerk of the creditor, having access to his papers, possession on

o if he was
emoved on
ase Here
me with his
ept" The
document
has been

discharged is subject to the qualification that, when the bond is in possession of the obligor but the circum

these circumstances are to

maxim would apply or n

v *Hari*, 12 Lah L. J 21=

suit to enforce a mortgage, the defendant's case was that the mortgage deb

The

C L J 2... = 29 Bom L R 1388 The presumption of discharge wou

on him

L. R

n to the

ands of

the obligor the obligation is discharged. But in raising such a presumption the Court has to take into regard any

that it

might have been stolen The bur

d and

initial

when both the parties produce their e.

1 5=

maker

e hands of

drawee alleges that the

us is on him to prove

Cas 650, *Chaudhuri*

(P C), *Binayak* v

Dinkar, 20 Ind Cas 308 Illustration (i) only refers to presumption that may be raised It does not follow that such presumptions would shift the *onus* of proof Where, in a suit on a usufructuary mortgage bond, the defendant pleaded discharge and produced the

endorsement of

discharge written thereon and the perso

have been paid was not examined, *held*

that the mere production of the bon

proving the discharge which lay on the

W 601=18 M L T 94=(1915) M W N 638 In a claim for recovery

produced the agreement

e Court placed the *onus*

not discharged *Held*

that the onus was wrongly placed as the presumption under s 114 illus (i) would be a piece of evidence in defendant's favour but did not shift the *onus* of proof which was on the defendant to show that he had discharged his obligation *Jagannath* v *Amira*, A I R 1931 Lah 299 = 134 Ind Cas 495

OTHER PRESUMPTIONS.

Acceptance At estate is devised to, or a gift is made to A *The law* presumes that it is beneficial to A, and that he accepts it He may disclaim it, but to work thus a disclaimer must be proved *Towson* v *Ticknell* 3 B & Ald 31, *Thompson* v. *Leach*, 2 Salk 618 In the first case it was said "I think that an estate cannot be forced on a man A devise, however, being *prima facie* for the devisee's benefit, he is supposed to assent to it until he does some act to

show his dissent The law presumes that he will assent until the contrary is

Advancement The English doctrine of
country as b
under Engl
also *Kenrick* prevailing
in the Bombay Presidency, a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife or of an advancement for her benefit *Motibahu* v *Purshotam*, 6 Bom L R 975=29 B 306 There is no presumption of an advancement by the name of a son being used as purchaser, other than in the case of a stranger being used *Sayyad* v *Ullap*, 13 M. I A 232, *Gopee Krist* v *Ganga Proshad*, 6 M I A 53

Adultery. A married man enters a house of prostitution and remains there all night The presumption is that he committed adultery while there *Evans* v *Evans*, 41 Cal 103 (Am), *Astley* v *Astley*, 1 Hagg Ecc 720, *Lawson Pre Ev* 323.

Alteration Alterations, erasures and interlineations appearing on the face of writings, whether under seal or not, are presumed to have been made before their execution or completion *Lawson Pre. Ev* 452 In the early

in an ordinary case,
part of his case, ir
the mere infirmity or
factorily explain the state of the document But this wholesome rule admits of exceptions if there be, independently of the instrument, corroborative proof strong enough to revert the presumption which arises against an apparent and

who seek to enforce an altered instrument, to show the circumstances under
3 M H C R 247
he party, although
in avoiding the
has the custody of
its original state.
it on a contract to
indemnify A on certain notes made on March 16th The contract is also dated

. . . f noth ng appear to the contrary, should be presumed to
I think this rule is demanded by
s of this country, and especially
e contracts made are drawn by the
rd to interlineations and altera-
f the defen
plain
very

tolerated—might, perhaps, ... in regard to a negotiable ... country, like that of Great Britain, in regard to a negotiable ... upon stamped paper, the very cost of which would induce special care in the drawing of it, but I ... here could not be otherwise than injurious It ... be accounted for by extraneous evidence, and ... evidence must be given without regard to any suspicious appearance of the alteration, would I think, in many instances, be doing such manifest injustice as to shock the common sense of most men " "In this conflict of opinion," says *Woodruff J* in *Maybre v Sniffen* 2 E D Smith 1 (Am), after an exhaustive review of all the authorities ... most in accordance with the ... of its ... able ... rely ... the ... nder ... y be

seal or otherwise, it was made after the ... getting up the instrument greatly to the disadvantage of the holder or party getting up the instrument his own interest? ... that he made them unlawful against ... other No presumption ... ration is in ... ifferent ink, ... its face, or ... f proof, rests ... it to the satisfaction of the

Assent A statement is proved to have been made in the presence of H It will be presumed that H heard it *Hochrieter* v *People*, 2 Abb App Dec. 363

... attestation of a deed does not necessarily import an ... *Imam Ali* v *Baij Nath*, 10 C W N ... *ngh* v *Bhagwant*, 5 Ind Cas 202; ... 21 C W N 225 (231)= ... *Jagatkishore*, 21 C W N ... ss who has seen the deed executed ... v *Laxmanrao*, 10 Bom L R 913=33 B 44 Where there is nothing to suggest that the attesting witnesses signed after the mortgagor the Court can rely on the presumption under s 114 and hold that he signed after mortgagor *Radha* v *Nagendra*, 134 Ind Cas 767=53 C L J 586=A I R 1931 Cal 806

Benami The mere fact that the deeds are in the possession of the mortgagor does not of itself prove that the mortgagee was a mere *benamdar* for the mortgagor *Hiraji* v *Vishnu*, 1923 Bom 429 Property purchased by the father of a joint Hindu family in the name of his minor son is presumed to be ... becomes the property of the family *Bhaghut* ... *Pal* 20 W. R 269, *Sayyud* v *Ultap*, 13 M 1 ... Dass v ... 6 I A ... W N ... *Kumudbala* 28 C W N 131, ... M 214; 226=26 C 871=4 C W N 1; ... 409 (P. C); *Sreman* v *Gopal*, ... *Narshima* v *Srinivasha*, 33 M 112

Best evidence Best evidence not produced though available raises adverse presumption *Rameshwar* v *Bajit Lal*, 33 C. W N 430=27 A L J, 261=49 C L J 408=31 Bom L R 721.

S.

Bond Independently of a statute of limitation or in the absence of one, after a lapse of
bonds *Lau P*
in the case of
tial justice and
will sit still an
exist, and to ac
property, there
therefore, well
prevails as mu
Ch 545 "Ever
Stamford, 2 V
stale demand
to make the demand affords a presumption either that the claimant was conscious it was satisfied or intended to relinquish it" *Lauson Pre Ev* 371 But in India this presumption is of little value as a bond becomes time barred after a lapse of the time mentioned in the Indian Limitation Act (IX of 1908)

Blank-paper Where a person places his thumb impression on a blank paper, the understanding between him and the person to whom he delivers the paper ordinarily is that it is to be converted into a valuable security *Balsa* v *Emperor,* A I R 1932 Pat 335=13 P L T 558 Where it is shown either by proof or by admission that the thumb impression on the suit hand note is

233=A I R 1931 Pat 219

Character The character, habits and personal appearance of a person are presumed to continue as proved to be at the time of the past *Law Pre Ev. Rule 32* "It migh
presumed to remain u
ledge and just app
a strong presumptio
mental and social con
in human conduct,
bad to a good charact
is to be hoped,
the contrary t
bad four years
Middles Worth, Denio, 431, *Law Pre Ev* 230

Child bearing age The presumption that a particular woman has passed the age of child bearing is one of fact to be determined partly by the light of
question It
s has been
Haynes v
nd Ed 57,
ix years and
three months, who had never had but one child (born when she was between twenty one and twenty two years of age) and lived afterwards with her husband for twenty-four years until his death, is presumed to be past child bearing *In re White,* (1901) 1 Ch 570 In delivering the judgment, *Buckley J* said "A number of cases have been cited, but the material ones to my mind are these, *Haynes* v *Haynes,* 35 L J Ch 303, where it was held that a spinster aged fifty three years and two months must be presumed to be past the age of

decision was pronounced in 1872, so that there had been twenty six years of married life, no issue, and the husband was living. *Dandoon* v. *Kimpton,* 18 Ch D. 213, where the lady was a spinster of the age of fifty-four, and

Hyddon v *Edison*, 19 Beav 565, where she was a spinister and aged fifty six It will be observed that in all the cases to which I have referred the ages were less than [illegible] will also be remarked that I have [illegible] children *In re Widow's Trust*, [illegible] to consider whether the cases relating to spinisters do not equally apply to widows who have had children The only difference that occurs to me is that there is nothing to show in the case of spinisters whether they are or have been capable of child bearing which in the case of a widow who has had a child there is On the other hand, if there has been a long lapse of time since the birth of a child—as in this case twenty four years—the presumption will be that the capacity of child bearing has ceased" See also *Payne* v *Long* 19 Ves 571; *Groves* v *Groves*, 12 W R 45, *Levy* v *Hodges*, Jac 585, *Miles* v *Knight*, 12 Jur 666 *Dodd* v *Wake*, 5 Deg & Sm 226; *Brandon* v *Woodthorpe*, 10 Beav 463 *Brown* v *Pringle*, 4 Hare, 124, *Edward* v *Tuch*, 23 Beav 271; *Davis* v *Bush* 8 Jur 114

Conduct From a person's conduct in not claiming the property while others were actually contesting their right to it, an inference against his title can certainly be drawn *Kumarswami* v *Narayanswami*, A I R 1932 Mad 762=36 M L W 186=1932 M W N 850=139 Ind Cas 766

Conflicting presumption In the case of conflicting presumptions the presumption of payment is stronger than, and will prevail against, the presumption [illegible] innocence is stronger than and will [illegible] of life, of the presumption of [illegible] knowledge of the law [illegible] the presumption of innocence, and the [illegible] will prevail against the presumption of innocence *Law, Pre Ev* [illegible] 122 "Nothing [illegible] (*Jayne* v *Price* [illegible] contrary and stronger [illegible] went on a foreign [illegible] after his departure [illegible] legitimate *King* v [illegible] conflicting [illegible] of the [illegible] of the second [illegible] been indicted [illegible] have been [illegible] at the time of the second marriage [illegible] contended [illegible] answer is that the presumption [illegible] sequence of his being so is that [illegible] But 'when it is recognized [illegible] that when certain facts are presented in an invariable formula the finding thereon shall always be the same way, the logical impossibility of a conflict of presumptions becomes [illegible] conflicting presumptions [illegible] to certain [illegible] inconsistent [illegible] of law to affix inconsistent conclusions to the same state of facts at the same time" 9 *Encyc Ev "Presumptions"* p. 891 The market values, so to speak, of the various presumptions have been sometimes sought to be established, but so [illegible] Keeping, then, to the expression as it is [illegible] one party to a cause relying upon a given [illegible] party upon another Which party is to prevail? In every case it depends on the nature of the respective presumption *Burr Jones* § 101.

Co-sharer's possession Mere possession or occupation of the property by one co-sharer does not constitute adverse possession against the other co-[illegible] of hostile title or other-[illegible] 92 Where property is [illegible] has not received the [illegible] of the other co-owner

S.

was adverse *Bharat* v *Ganga*, 9 Ind Cas 425 The possession of joint property by one co sharer does not

v *Sheikh Akbar Ali* 1 C L R 364; *Udairam* v *Dujan*, 78 P L R 1909,

Death Where among some relations the evidence on the question who died first is quite evenly balanced, the Court is entitled to say that the probabilities are in favour of the younger man surviving the elder *Kulkarni* v *Laxmibai*, (1922) Bom 347

Debts Debts once proved to exist are presumed to continue until the contrary is
an entry
indebted
the debt
a money
without o
demanding payment the presumption is that the debt has been paid *Narain* v *Durga Singh*, 22 O C 335=54 Ind Cas 95

Delay in enforcing rights Where the long delay of the plaintiff in bringing the suit has prejudiced the defendants and has prevented them from bringing the best evidence that would otherwise have been available to them, the tendency of the Court must invariably be to make an inference against the plaintiff unless good cause
tance to such presumption in
given *Brij Raj Saran* v *Bas*
561 Under a possessory m
not transferred to the mortgagee and no steps had been taken by the latter or his heirs to recover the amount *Held* that under the circumstances it was
hat the
tabai v
ence of
is on
rain v
1866.

Documents It is a general though not a conclusive presumption that a document was made on the day of the date it bears *Mina Kumari* v *Rajah Bijoy Singh* 21 C W N 585 P C, *Parshatam* v *Nazir* 84 Ind Cas 846 *Davies* v *Lowndes*, 7 Scott N R at 214, *Owen* v *Waters* M & W 95, *Hunt* v *Massey* 5 B & Ad 902 When a document is not produced after due notice to produce and after being called for, it is presumed to have been duly stamped, unless it be shown to have remained unstamped for some times after its execution *Closmadene* v *Correl* 18 C B 36
5 H L 624, *Steph Dig* 7th Ed Art
regard the regularity
417, *Lawson Pre E*
Nanka, 106 Ind Cas
unregistered and such
it has been shown the
produced but was not produced the presumption is that the document is not

necessary to effect the purpose for which they were executed *Rajeswar* v *Ajab Singh*, 118 Ind Cas 865=A I R 1929 Nag 257

Duty All persons are presumed to have duly discharged any obligation imposed on them either by unwritten or written law, *Best Ev* § 318, *Ram* v *Kalab*, 36 Ind Cas 100

14. Domicile. Domicile once shown to exist, is presumed to continue until ... *Law, Pre Ev Rule* 30 "It is necessary" said *Lord* ... ation of the ... as ... oked for the purpose of regulating the rights ... well that succession and distribution depend upon the law of the domicile *Domicile, therefore* is one idea of law. It is the relation which the law creates between ... ular locality or country To every adult person the ... that domicile remains his fixed attribute until ... usurps its place" And *Lord Cranworth* added "It is necessary to bear in mind that a domicile, though intended to be aban ... til a new domicile is acquired, and that a new domicile is ... xed intention of establishing a permanent ... until also this intention has been carried out by actual residence there

Encroachment by tenant. The true presumption as to encroachment ... upon the adjoining lands of his landlord ... added to the tenure, and form part ... o long as the original holding continues, ... clearly appeared by some ... his own benef ... is supported ... 16 (247), see al

Forgery If the accused who is charged with a forgery refuses to write ... in Court an adverse inference may be drawn ... which he is brought to trial *Emper.* ... Bom L R 598

... imputed to th ... are no ... uelty t ... dence o

Genu ... production ... *Dhanpati* ... ut non ... of the original is presumed

... ted, when it is not denied that ... *Daulat* v *Corporation of* ...

Good faith The moral presumption is in favour of good faith and not of bad faith on the part of the assessee *Jambu Das* v *Income tax Com* A I R 1927 Nag 336=104 Ind Cas 336

Grant The gist of the principle upon which a lost grant is presumed is that the state of affairs is otherwise unexplained When from a certain set of ... ference of fact and not ... 31 C L J 501=57 Ind ... of lands under a claim ... grant may be presumed ... v. *Srinath Chakravarti*, ... sumption of a *lost grant* ... of each case *Ibid*

Guilt Where no motive for the commission of a crime is shown, the ... of the suspected person is strengthened But the ... ts pointing to the prisoner ... levant, and is a circum ... nferred *Lawson Pre Ev* Rule 105.

... no express prohibition, nor are ... ied, the mere fact that a ... der the adoption male

by her invalid The husband's consent is, in the absence of prohibition, always to be implied *Laxmibai* v *Sarasuatibai*, 1 Bom L R 420=23 B 789 Where an adoption has been acquiesced in for a period of 33 years, it is presumed that the necessary consent of some person competent to give away the adopted son had been obtained. *Anandrao* v, *Ganesh*, 7 B, H C App 33 The Court, when it is satisfied that permission to adopt exists, will exact slight proof of the

S.

Law lopted in its entirety one uncertain which form they ɔpted the form which prev. *Chandra Dassia*, 20 C 409 Where a family migrates from Guzerat where the *Mayukha* prevails, it must be assu s it is shown that the family ry where it has settled v *Jagadish*, 20 C. 433; *Ch*

Hindu Law—Endowment A person seeking to set aside an alienation on the ground that the property allenated is *debutter* or endowed property, must adduce proof that the same was endowed in perpetuity Proof that the rents and profits have been utilized for the idol is insufficient *Konwar Doorga Nath* v *Ramchunder*, 2 C 311 (P C)=4 I A 52

Hindu Law Joint Family Hindu families are ordinarily governed by the law of their origin, not by that of their domicile *Lalkea* v *Gunga*, W R 1864, 56 Where parties, who are not Hindus, reside in a Hindu country and, adopt the customs of Hindus, have lived as Hindu families do joint in food and

Hindu family, there is a presumption of continuance of joint right of every member *Moonaye* v *Lomun*, 2 W R 288 If brothers are found to be living together as a joint Hindu family, they must be presumed to be joint in property *Dhurm Chand* v *Raj Mohishee* 5 W R 445, see also *Gane* v *Kanae*, 3 W R 165 5 W R 82, *Lukhun* v *Madho*, 5 W R 278, *Gane* v *Kene*, 4 B H C A C 169, *Nandram* v *Chootoo*, 1 Agra 255 Where the family is joint and there is a nucleus from which the property may be

training at the expense of the joint family property *Gokul Chand* v *Hukum Chand*, 145 P L R 1916=109 P W R 1916

Hindu widow One who claims title under a conveyance from a woman, with the usual limited interest which a woman takes, and who seeks to enforce

4. reasonable to satisfy himself of the existence of such necessity *Bhaguant* v *Debi Dayal*, 12 C W N 393=35 C 420 (P C) It is general presumption of law that the acquirer of property intends to retain dominion over it, and in the case ... n the fund with which ... m her hu band s estate ... I L J 5

Husband and wife In *R* v *Hughes*, 2 Lewin 229, *Thompson J* said "The law out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption *prima facie* that it was done under coercion" See also *R* v *Connolly*, 2 Lewin 230; *R* v *Knight*, 1 C & P 116 The mere fact of marriage raises no presumption with regard to any property standing in the name of a wife that the beneficial interest must be in her husband Before ... some evidence adduced to indicate ... wife, but in fact to the husband ... *Kumari* v *Subudhi Tatuani* ...

Identity Identity of name raises a presumption of identity of person where there is similarity of re ... stances or where the name is an unusual one; but *alite* ... and there are several persons known of ... *Law* ... "In ... being ... may be ... urrence drawn If the name were only John Smith which is of very freque ... there might nc ... But Hurry Thomas Rhydes are ... rally ... cal there is every ... until the

Infancy Infancy once ... ved contrary is proved *Law P* ... un that a son is over age It ... ry emancipated as in the days ... *Re Lilleshall*, 7 Q B 158

In *R* v *Smith*, 1 Con 260, *Earl J* said to the Jury: "Where the child is under the age of seven years, the law presumes him to be incapable of committing a crime, ... responsible for his actions as e ... even and malicious ... ist be proved by the ... The ... of the act ... *ide* s 83, *I P Code*) ... nd presumed to be unacquainted with guilt, yet this presumption will diminish with the advance of the offender's years and will depend upon the particular facts and circumstances of his case" 1 Russ 109; *Mayne Ev Law*, 402

Innocence The law presumes the innocence of a person charged with crime until the contrary is proved beyond a reasonable doubt *Law Pre Ev Rule 90* "It is greatly to be regretted that the so called presumption of innocence in favour of the prisoner at the bar is a pretence, a delusion an empty sound It ought not so to be, but it is *Rufus Choate* said that this presumption is not a mere phrase without meaning;' that 'it is in the nature of evidence for ... overcome,' that ' ... equal trial,' that 'it ... ically to one witness' ... judge it is of no avai ... deal ... it, it is hazardous to say ... y, by prosecution, very one, as he ... self and answer it ... so The reason is plain The whole course of criminal procedure from inception to close, is designed to shut out presumptions of innocence and

invite the presumptions of guilt The secrecy of complaint making at the magistrate's office the mysterious inquisition of the grand jury room, the publicity of the arrest the commitment to the lock up, the demand of bail, the delay of trial, the enforced silence of defence till prosecution has done its worst, are all so many steps and strokes to blacken the accused before he is

when he is put on trial, is he put in the dock? Why does he not have place with the by-standers, who are simply presumed innocent? The 'presumption', in the presence of such things, is a contradiction of terms How can a person be presumed innocent who is presumably guilty? The fact that he is restrained of his liberty presumes guilt There is no other construction to be placed on the restraint Human nature is not capable of any other Yet human nature ought to presume innocence till the contrary is proved" From *Ten years a Police Court Judge New york Funk and Wingalls,* 1884

Professor Thayer says 'To sum it up the substance of all this is, as I have said
the proof—
appears to
the party in

It may be
it may
eight of
ves no
ption is
is ac-
companied by another rule
by him against whom it ope

moment these conceptions give way to the perfectly distinct notion of evidence proper—i e, probative matter, which may be a basis of inference, something capable of being weighed in the scales of reason and compared and estimated with other matter of the probative sort—so that we get to treating the presumption of innocence or any other presumption, as being evidence in this its true sense, then we have wandered into the region of shadows and phantoms" *Prof. Thayer's* article in *Yale Law Journal* of March 1897

The rule underlying the presumption of innocence merely means, that a person who is accused of a crime is not bound to make any statement or to offer any explanation of circumstances which throw suspicion upon him He stands before the Court as an innocent man till he is proved to be guilty It is

that word He is entitled
the other by a ... s, is inconclusive, and that
to rely on th ... help from him Further,
the Crown is b ...
in making out this case, the prosecution is to get rid of every presumption in
favour of innocence The great majority of mankind manage to get through
life without committing a crime, and those who assert that a particular person
... a fact against which there is a presumption
... insuperable to something evanescent
convince a jury that the Commander in
... d a pocket In the case of a member of
... the natural thing in the world *Mayne's Cr*
... duct or crime was alleged whether in a criminal
... offender or in
... s strictly
R 1920

st B, A alleged that B, who had chartered his
... by which a loss happened with
...

Ellenborough said 'That the declaration, in imputing ... a highly dangerous combustible nature, imputes to the defendants a criminal negligence, cannot well
having wrongfully put on board a ship, an article of a highly dangerous com
bustible nature, imputes to the defendants a criminal negligence, cannot well
be questioned In order to make the putting on board wrongful, the defendants
must be cognizant of the dangerous quality of the article put on board, and if
being so they yet gave no notice, considering the probable danger thereby
... to a species of delinquency
on board for which
... hour at least We
are, therefore, of opinion, upon principle and the authorities, that the burden of
proving that the dangerous article in question was put on board without notice
rested upon the plaintiff alleg ... on board with
out notice of its nature and qu ... of law
is, in favour of innocence, ... innocent
intentions, the law presumes th ... has been
wrongfully intended, till the ... *Mansfield*
has, in clear language, pointed out the distinction between these ... where a
criminal intent must be proved, and those where it will be presumed "Where
an act, in itself indifferent, if done with a particular intent becomes criminal
there the intent must be proved and found but where the act is in itself
... se lies on the defendant, and in
t" *R* v *Woodfal*, 5 Burr 2667,
v *Wallace*, 3 Ir R S N 38, *R* v

"It seems well established that where in a criminal case there is a conflict
... on the presumption
... rn & Ald 386)
... ousness of the
... s been said that
... (Re *Hobson*,
... al C J in *Re*
... case of *Nibaran*
... o fact that an
... after a gun was
... fired, may be
... error of law to
... ed under such
C 893
... era of criminal
... doubt' A great
... doubt beyond

the case? If the case is to turn on the matter of reasonble doubt, how can it turn aright, unless the turning point be ascertained and fixed beyond a reas— beyond all question? The learning of the books on this subject is vast It begins with the Bible—that is to say the book writers make it begin there, though it does not appear that the inspired writers were sufficiently inspired to hit upon the favourite expression Its equivalent, lawgivers since the time of Moses, find in the Mosaic provision, which forbade the death penalty till the crime 'be told thee, and thou hast heard of it, and enquired diligently, and, behold, it to be true, and the thing certain' (Deut xvii, 4) This is said to be the amplification of Moses as definer of the doubt Modern authorities do not seem to have done much better But it is not because they have not tried One author says that 'the persuasion of guilt ought to amount to such a moral

approach nearer a solution and resembles a definition once heard in a charge to a jury The Jduge who gave it is admittedly one of the ablest and clearest headed jurists who ever sat upon the Bench He is the man whom *Rufus Choate* called one of the ablest minds of the state' As near as memory serves, his words were as follows: 'Just what a reasonable doubt is, gentlemen, it is

Insanity Insanity once proved to exist is presumed to continue But, *aliter*, as to temporary insanity, produced by drunkenness, violent disease or otherwise *Lawson Pre Ev* Rule 31 In 1837 H was inflicted with insanity, resulting from a violent disease There is no presumption that H was insane in 1838 *Crouse* v *Holman*, 19 Ind 30 In that case it was said "Every man being presumed to be sane till the contrary is proved, the burden of proving certainly rests in the first instance, on the party alleging the insanity How

period, or even several months later The force of presumption arises from our observation and experience of the mutual connection between the facts shown to exist and those sought to be established by inference from those facts Now, neither observation nor experience shows us that persons who are insane from the effect of some violent disease do not usually recover the right use of

in deciding upon its effect upon the burden of proof or law for it may authorize the jury to infer that the same condition or state of mind attaches to the individual at a later period There must be kept in view the distinction between the inferences to be drawn from proof of an habitual or apparently confirmed insanity, and that which may be only temporary The existence of the former,

4. once established, would ... proof from the other party to show a restoration or recovery, and in t ... presumed to continue But if th ... connected with some violent di ... the party alleging the insanity ... that point of time which bears directly upon the subj ... not content himself merely with proof of insanity at an earlier period' *Lawson Pre Ev* pp 22 ... is proved it is presumed to continue *Prinsep* v *Dy* ... rson has been found to be a lunatic under Act XXX ... to be of unsound mind until the contrary ... h a person, the onus is on those who ... mind when he made the adoption *Amanchi* v *Amanchi*, 33 Ind Cas ... 0 M 660, see also *Snool* v *Watts* 11 Beav 105; *Hill* v *Clifford*, (1907) 2 Ch 236, *Harris Gratten* v *Foxwell*, (1897) A C 658=66 L J Q B 715

Intent and knowl ... med in so doing to have intended ... result *Law Pre Ev* ... colluded with an insolv ... action for libel broug ... whether W intended to ... tendency of the libel being injurious to H ... is presumed ... do so *Haire* v *Wilson*, 9 B & C 643 "The Judge", said *Tenterden C J* in that case, "ought not to have left a question to the jury whether the defendant intended to injure the plaintiff, for every man must be presumed to intend the natural and ordinary consequences of his own act" And *Littledale J* added "If the tendency of the publication was injurious to the plaintiff, then the law will presume that the defendant, by publishing it, intended to produce the injury which it was calculated to effect" A baker is charged with delivering adulterated bread for the use of a public asylum It is proved that A delivered the bread The presumption is that he intended it to be eaten *King* v *Dixon* 3 M & S 12 *Lord Ellenborough* said, that it was a universal principle that when a man is charged with doing an act, of which the probable consequence may be highly in ... of law resulting from the doing the act, ... s for the use and supply ... ren to eat for otherwise they ... *Ev* 374 A debtor makes ... erty He makes also a "co ... ors" The law presumes that the intent of the conveyance was to ... efraud his creditors *Exparte Villars*, L R 9 Ch App 443 *Lord Chancellor Cairns* said "It is true that under this as under previous statutes of bankruptcy the acts are specified which if done by the bankrupt are not only acts of ... but are also, if followed by bankruptcy, void One is a con... 's property for the benefit of creditors ... it fraudulent or by way of fraudulent ... of these acts, namely, a conveyance ... special provisions have always ... nce or assignment ... and as to the other ... ld from the earliest ... nveyance must ... to delay or d... at ... gainst, and perhaps ... aws" B forges C's ... as no account there ... The presumption ... *ish* 2 Den C C 498 "The recorder ... t in order to prove an intent to defraud" ... lefrauded, or who might possibly have been defrauded But I do not ... that at all necessary A man may have an intent to defraud and yet there may not be any person who could be defrauded by his act Suppose a person with a good account at his bankers and a friend with his knowledge forges his name to a cheque, either to try his

credit or to imitate his handwriting, there would be no intent to defraud, S
though there might be parties who might be defrauded, but where another

per of the act *Lawson*
Pre *R* v *Munslow*, 1 Q B
758 P 276, *R* v *Cooke*
8 C & P 582, *R* v *Shefford*, R & R 169, *R* v *Beard* 8 C & P 143 'A
sane man' said *Chief Justice Shaw* in *Com* v *York*, 9 Metc 93 (Am) 'a
voluntary agent
intend the neces
therefore, one
destroy another's life the natural and necessary conclusion from the act is

harm to the person assailed the intention to take life or do him some great
bodily har *Empress* v *Tulsha*,
20 A 143, *peror* 37 C 317,
Reg v *G* ctically impossible
for the pro establish affirma
tively the is fair and justifi-
able presu abducted it is un-
doubtedly The intention is
more or less a matter of inference though there may be cases where the matter is
capable of direct proof It is for the accused to explain away incriminating
circumstances *Jowaya and others* v *Emperor*, A I R 1930 Lah 163

Issues me
impossibility v
Boldero 15 ion
Frazer v *Frazer*, Joe 586,
1 Cox 325, *Overhill's Trusts*
onton v *May* L R 9 Ch D
presumption that a person
see also [*Pounaloori* v *Chela-*
lapathi 33 M L J 295

Joint Property Where a piece of land is adjacent to a piece of joint
ners of the joint property
the assertion *Ma Bi*

Knowledge of Law Every one is presumed to know the law when ignorance of it would relieve from the consequences of a wrongful act or from liability upon a contract *Lawson Pre Ev Rule* 1 The presumption that every body knows the law is often spoken of but it is clear that there is no such general presumption When *Mr Dunning* in arguing before *Lord Mansfield*, said The laws of this country are clear evident, and certain, all the Judges know the laws and knowing them administer justice with uprightness and integrity That learned Judge replied As to the certainty of the law mentioned by Mr Dunning it would be very hard upon the profession if the law was so certain that every body knows it,
that it costs much money to know what it
v *Randall* Cowp 38 Is it not a mocl
on the *Louisiana* Penal Code to refe
Whe
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Hd

4. which the law itself ought to have afforded, he would hint that he lived by his profession, and that the knowledge he had acquired by hard study for many ... imparted" We may, therefore, safely say with ... person ... ere so, ... erybody ... existence
knew ... , 2 C B
shows ... ckesbury
715 ... y elector
L R
who saw him presiding at the election must have known as a fact that he was the returning officer, and every elector who was a lawyer and who had read the case of *Reg* v *Owens*, 2 E. & E 86, would know that he was disqualified ... B was mayor and returning officer, was every ... law that he was disqualified? I agree that ... But I think that in *Martindale* v *Falkner* ... xplains the law." And *Lush J* added 'A maxim has been cited which it has been argued imputes to every person a knowledge of the law The maxim is *ignorantia legis neminem excusat*, but there is no maxim which says that for all intents and purposes a person must be taken to know the legal consequence of his acts" The maxim properly understood is true, but it is a rule of presumption, adopted from necessity, and to avoid an evil that would otherwise constantly perplex the Courts in the administration of the criminal law, that is the plea of ignorance Hence the maxim, 'that ignorance of law excuses no one' *Lawson Pre Ev* 11.

Legitimacy It is well established that every reasonable presumption will be indulged in for the purpose of upholding a marriage and establishing the legitimacy of the offspring *Lawson Pre Ev* 139 A child born in India must under ordinary circumstances be presumed to have his father's religion and his corresponding civil and social status *Mahamed* v *Raja Saiyad*, A I R 1931 Oudh 177=8 O W N 349

... applies to ... rticular ... igs and ... having ... resume ... valid' ... arises ... I R ... concu ... nber of ... 846=6 ... 79 Ind ... 3 Ind
Cas 887

But presumption of a valid marriage from two persons living together as man and woman cannot be drawn where the union is between a man who is an *Ahir* and a *Brahmin* widow, who cannot *prima facie* contract a valid marriage *Gulab Chand* v *Bhaiyalal*, 119 Ind Cas 698=A I R 1929 Nag 343 A ... but if it be ... cannot ... esumed ... *Jaimit* ... 7 Lah ... n a case ... l repute

Mahomedan Law The Mahomedan Law is only the law of this country ... law of British India, and so far ... *ya Kishore* v ... ction between ... that converts ... ommunity may

since their conversion have voluntarily imposed upon themselves would be governed by the Mahomedan Law *Mahomed Sidick* v *Haji Ahmed*, 10 B 1 There is no presumption of joint family in Mahomedan Law *Jafer Ali* v *Raj Chanpra* 10 C L R 469=8 C 831 N, *Karim Baksh* v *Rahim*, 21 P L R 1900

injury to *Lawson* 902 (N)

But when the thing is under is such as ordinarily does proper care a presumption accident *Lawson Pre Ev* Rule 19(b) Where a person is under a duty either by law or by contract the failure to discharge the duty raises a presumption of negligence against the person charged with such duty *Ibid* Rule 19 (c), see also *Kush Kanta* v *Chandra Kanta* 28 C W N 104 *Vishu Digambor* v *B B & C I Ry Co* 85 Ind Cas 415 A presumption of negligence arises against a common carrier of passengers where an injury is received by a passenger caused by the breaking down, or failure of the carrier's vehicle, roadway or other appliances for transportation, or by some error of his servants in operating them In other cases the mere fact of injury does not raise a presumption of negligence on the part of the carrier *Lawson Pre Ev* 129

Personal appearance Personal appearance of a person is presumed to continue as proved to be at a time past *Lawson Pre Ev* Rule 32

Possession Where little or no evidence of actual possession or title can be procured it would be almost impossible to administer justice, without having recourse to legal presumptions *Mobaruck* v *Toofany* 4 C 206=2 C L R 446 When evidence of possession is conflicting, the presumption is that possession follows title *Kasturi Singh* v *Rajkumar Babu* 8 C W N 876

Religion The opinions of individuals, once entertained and expressed and the state of mind, once found to exist are presumed to remain unchanged until the contrary appears Thus all the members of a Christian community being presumed to entertain the common faith, no man is supposed to disbelieve from his own

Justice Greaves such and law under which the parties are born *In the goods of Jnanendra Nath Roy* 26 C W N 799 But the sounder view end to the presumption that he still cont Where in consequence of the conversi

Barlow v *Orde* 13 M I A 277 But to acquire a new status the change of religion must be made honestly and without any intent to commit a fraud upon the law *Per Lord Watson* in *Skinner* v *Skinner* 25 I A 34 (41)=25 C 537 (546) *Skinner* v *Orde* 14 M I A 309 (324) Even where the conversion is *bonafide* the convert is not allowed to cast off an obligation which he had previously contracted and which at the time of the contract was indissoluble by any act of his own *Mayne's Cr Law* § 650, *Emperor* v *Lazar* 30 M 551

Sanity Sanity once proved to exist is presumed to continue *Lawson Pre Ev* Rule 31 Every man being presumed to be sane till the contrary is proved the burden of proof certainly rests in the first instance on the party alleging the insanity *Crouse* v *Holman* 19 Ind 30, *Lawson Pre Ev* p 297

Services An agreement to pay for services rendered and accepted is presumed unless the parties are members of the same family or near relations

A and his wife board and lodge in the house of B the brother of A, and as t him in carrying on his business There is no presumption that either the services on the one hand or the board and lodging on the other were paid for *Davies* v *Davies* 9 C & P 87

Solvency Solve contrary is proved / day A is presumed \ *Ball*, 9 Barb 271, ,

Statutory Presumptions There is no impropriety in referring to a th as having been done when that thing is required to be done by a section in a statute *Brindoban* v *G I P Railway Co*, 21 A L J 825=96 Ind Cas 1039=A I R 1929 All 369 (F B)

Tenancy, nature of—Presumption The presumption in favour of permanent tenancy implies that there is ground for inferring that the nature was always intended to be and always was hereditary, or that it acquired that character by subsequent grant. But a presumption in favour of a transaction as umes regularity, it cannot be made in favour of that which offends legal principle *Satya Sri* v *Kartik* 15 C L J 237=16 C W N 227=13 Ind Cas 596

– that her husband is lel presumption ari es against R 1929 Nag 177 Where was compounded it is to be presumed that the criminal Court acted according to law and the presumption is that the criminal case was withdrawn and not compounded *Sadho* v *Jhinra* 116 Ind Cas 749=A I R 1929 All 456 Where in a charge of misappropri and that there was some that there was no conclu re the basis of the confe on nd Cas 605=A I R 1925 M 493=54 M L J 607 The mere signing of a particular entry does not raise an irrebuttable presumption of law against which no evidence can be abduced by the maker of the signature *Emperor* v *Ram Rang* 109 Ind Ca 221=29 Cr L J 493=A I R 1928 Lah 890 The tendency of Engl h Courts to presume a tenancy in common rather than a joint tenancy has no ally the reverse Presumption the absence diction of a 329 There he course of a preliminary enquiry and no inference can be drawn against the accused for non disclosure of his defence at that stage *Kumar Prosad* v *Emperor* 8 Pat L T 656=A I R 1927 Pat 292 Where there is nothing to indicate that the Court had not satisfied itself of the service of notice, it must be presumed that the Court was so satisfied *Amar Singh* v *Rala Singh* 102 Ind Cas 1= A I R 1927 Lah 506 Where the posting of a registered letter is proved but it was returned with a note of the postman that the addressee refused to receive it the presumption arises that he refused to receive it *Sher Afzal* v *Mohan Lal* 94 Ind Cas 103=A I R 1926 Lah 590, see also *Girish Chandra* v *Kishore Mohan* 23 C W N 319 A school leaving certificate issued by a public servant in a native state can be presumed under s 114 Evidence Act to be of the same character as a school leaving certificate issued in British India *Maharaj Bhanudas* v *Krishnabai* 28 Bom L R 1225=50 B 716=A I R 1926 Bom 11 It is a violent presumption drawn from one s knowledge of human nature and of Indian village life which it is the duty of a tribunal in a case of *dhatura* poisoning to apply, namely, that the food pertaken at the evening meal by a husband in an ordinarily constituted house is prepared for him and served to him by his wife *Emperor* v *Har Piari*, A I R 1926 All 73= Ind Cas

The mere fact that in the Revenue Records the sons of a particular person are shown as jointly owning land is not sufficient to raise a certain presumption that the person was the owner of the land *Nath Singh* v *Mohan Singh*, 8 Lah

S. L J 485=27 P L R 721=97 Ind Cas 241=A I R 1926 Lah 659 By taking over the sale and paying the full price a co owner waived his own claim to sue, *held* such action on the part of the co owner is presumptive evidence that the sale by another co-owner was not bad for want of necessity *Basant*

Tadepalli v *Rukmaniamma*, A I R ... When a person ... at liberty to stop something done in his house and is found not to do so the presumption is that he is an accessory to the doing of that thing and he may ... doing of it *Maika* v ... the vacant plot of land ... it was he who built

to prove that it was he tha ... Sind 716 The fact that ... been committed many ... any inference against ... 347 An attempt to fa ... against a convict of ... *Crown*, 86 Ind Cas 344 ... (b) and (c) of s 64 A of the Be ... d, and it being proved that Cl (a) h ... t should under s 144 of ... been published in the manner required ... *ya Prasad*, 9 A L J.

evidence or by both The question of the loss of the original is only material in so far as it may raise a presumption one way or the other under s 114 of the

and consideration therefor from long continued payment of higher rate *Ibid*, see also *Pena Kasupha* v *Raja Rajeswar* 42 M 475=50 Ind Cas 16 Conceal-

taking along in a cart persons one of whom has blood stained clothes and a broken head and these persons are subsequently found to have taken part in a

5. dacoity recently before being taken away in the cart, the burden lies upon the cart man so found in the circumstances to disclose what he knows about the circumstances in which he was found Failure to discharge the burden will lead the Court to the irresistible conclusion that he must have known that those pe- ... in that da ... Where a ... by one of ... bigger um the statement against interest should ordinarily be preferred *Gobind Gorhi* v *Baldeo Ram* A I R 1930 Pat 293=126 Ind Cas 369

CHAPTER VIII.

ESTOPPEL

Estoppel

115. When one person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing

Illustration

A intentionally and falsely leads B to believe that certain land belongs to A and thereby induces B to buy and pay for it

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title He must not be allowed to prove his want of title

Estoppel meaning of "Estoppel is when one is concluded and forbidden in law to speak against his own act or deed yea though it be to say the truth" *Co Litt* 35 (a); cited in *Ashpital* v *Bryon* 3 B & S 474 (489), *Simon* v *Anglo American Telegraph Co* (1879) 5 Q B D 188, C A per *Bramwell, L J* at p 202, *Halsbury* Vol 13 para 488 So there is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it be true or not Estoppel, or conclusion, as it is frequently called by the older authorities, may therefore be defined as a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact ... by the matter giving rise to that ... The rule on the subject is thus laid ... 6 Ad & E 469 at p 474 "But ... ords or conduct wilfully causes another ... things, and induces him to act on ... vious position, the former is concluded from averring against the latter a different state of things as existing at the same time" "The whole doctrine of estoppel of this kind, which is fictitious statement treated as true, might have been founded in reason, but I am not sure that it was There is another kind of estoppel—estoppel by representation —which is founded upon reason and it is founded upon decision also" *Per Jessel M R* in *General Finance & Co* v *Liberator*, L R 10 Ch D 15(20) So also in *Simm* v *Aglo American Telegraph Co*, L R 5 Q B D 202 *Bramwell L J* said 'An estoppel is said to exist where a person is compelled to admit that to be true which is not true and to act upon a theory which is contrary to the truth

"On the whole, an estoppel seems to be when, in consequence of some previous act or statement to which he is either party or privy, a person is precluded from showing the existence of ... state of facts ... Estoppel ... is not to ... de jure ... presumed

is taken to be true, not as against all the world, but against a particular party, and that only by reason of some act done it is in truth a kind of *argumentum ad hominem* Hence it appears that 'estoppels' must not be understood as synonymous with conclusive evidence,—the former being conclusions drawn by law against parties from particular facts, while by the latter is meant some piece or mass of evidence, sufficiently strong to generate conviction in the mind of a tribunal, or rendered conclusive on a party either by common or statute law" *Best Ev* § 533 Estoppel may accordingly be taken to b that which concludes the party against whom it is set up, from disputing his own averment, whether that averment be direct as for example the statement of any given fact or constructive as legally deducible from the circumstances, and the "

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description of *Lord Coke* in which he says—"An estoppel is where a man is concluded by his own act or acceptance to say the truth' (*Co Litt* 352) as though the doctrine were based on the principle of shutting out truth by a technicality It is founded however in fact, on no such absurdity The whole principle of estoppel is, that what has once been affirmed or represented to be truth, or established to be so in a judicial controversy shall not be contradicted by either the affirmant, the party against whom it has been established or those claiming through him, to the disparagement of those who, being in a position to avail themselves of it, have acted on it , *Goodeve Ev* p 532

Principle ' In our old law books , said *Mr Smith* in his notes to the *Duchess of Kingston's case* truth appears to have been frequently shut out by the intervention of an estoppel, where reason and good policy required that it should be admitted . However, it is in no wise unjust or unreasonable but on the contrary, in the highest degree reasonable and just that some solemn mode of declaration should be provided by law, for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act "The general principle is thus stated by *Lord Chancellor (Campbell)*, with the full concurrence of *Lord Kingsdown*, in the case of *Cairncross* v *Lorimer*, 3 H L C 829 The doctrine will apply which is to be found, I believe in the laws of all civilized nations that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it although it could not have been lawfully done without his consent and he thereby induces others to do that from which they otherwise might have abstained he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith

previous license *Sarat Chandra* v *Gopal Chunder* 20 C 296 (311)=19 I A 203 The principle that a party cannot both approbate and reprobate the same transaction, is applicable to Indian cases The maxim is founded not so much on any positive law as on the broad and universally applicable principle of justice *Shah Makhanlal* v *Srikrishna Singh* 2 B L R P C 44=11 W R P C 19=12 M I 157 It is a principle of natural equity which must be universally applicable that where one man allows another to hold himself out as the owner of an estate and a third person purchases it, for value from the apparent owner, in the belief that he is the real owner the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an inquiry that if prosecuted would have led to a discovery of it *Maung Lee Gale* v *Mung Kyau Yau*, L B R (1893-1900) 158

Estoppel is a rule of evidence ' An estoppel is not a cause of action—it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself *Per Lindley L J* in *Low* v

S. Bowena, (1891) 3 Ch 82 at p 101. In the same case, at p 105 Bowen L J added 'Estoppel is only a rule of evidence, you cannot found an action upon estoppel" Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said An
estoppel filling up the gap in the ev
produce this right to relief is found in th
Railway Company, L R 3 Q B 581"
estoppel itself' *Per Bowen L J* in
(1893) 1 Ch 618 at p 628 Similarly in *Hanman* v *Hanman* ... C A, *Farwell L J* at p 144=78 L J P & A 74, said "No consent or admission can justify a decree, it is the duty of the Court to protect the public by seeing that a divorce is obtained only on proper evidence, and so fully is the interest of the public recognised in the matter that by the Act of 1860 (23 & 24 Vict C 144) s 7, any person may intervene between decree *nisi* and decree absolute to show cause why the decree should not be made absolute on the ground of collusion or the suppression of facts, and the King's Proctor may intervene at any time during the progress of the cause or before decree absolute The grounds and the only grounds on which a decree for dissolution can be made are set forth in section 27 of the Act of 1857 It is sufficient to say that a decree for judicial separation is not made available by the Act as one of such grounds If such a decree is available at all, it is by virtue of the ordinary rules of evidence I do not doubt that, as between the parties, the ordinary doctrine of estoppel applies, as was held by the Judge Ordinary in *Finney* v ... estoppel is only a rule of evidence
by expre...
section 31
by personal
any substantive right *in rem*
representative *No estoppel*
of a point of law *Dharam*
Cas 665=A I R 1929 All
both by plaintiffs as well as
9 Ind Cas 472—A I R 1927
Oudh 97 Estoppel is a rule of evidence which in certain circumstances ... from establishing real facts and compels him to abide by a
herally v *Saker Khanubai* 7 Bom L R
=A W N 1886, 101. Rule of estoppel
ffects substantive rights *Wahidan* v

Basis of estoppel ... the Indian statute mainly
... act, and the principle
... be most inequitable and
or by conduct amount-
ing to representation, has induced him to act as he would not otherwise have done the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it *Per Lord Shand* in *Sarat Chander Dey* v *Gopal Chander Laha*, 20 C 296 (311)—19 I A 203

Rule of estoppel whether applicable in criminal cases The principle of estoppel has no place in criminal law *Mohoram* v *Emperor*, 40 A 393=16 A L J 414=19 Cr L J 615=45 Ind Cas 51

Estoppel is neither admission nor presumption 'The branch of the law of Evidence of which that of estoppel forms part is referred to by text writer ... that of admission ... " *Goodeve*
a piece of
evidence It is therefore to be distinguished from those statements ... the party which become in themselves the foundation of independent rights for other persons, by virtue of some doctrine of substantive law—in other words from binding estoppels, etc Thus, if A claims that his boundary line runs to an oak tree, and B admitted this, B's extra judicial admission of the boundary's location is merely evidence for the truth of the other facts on which A rests his claim

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But if B has made his statement to A under such circumstances that A was justified in acting on it and has built up to the line he claimed, B's concession may by estoppel become the foundation of a new right for A, wholly irrespective of the validity of the grounds of his original claim Here the field of substantive

from that of presumptions in the circumstance that an estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving peculiar facts A presumption is a rule that particular inferences shall be drawn from particular facts whoever proves them *Steph Introduction* p 175

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all right to deny, for the purposes of the trial, i e, it removes the proposition in question from the field of disputed issues But statements which are not estoppels or judicial admissions have no quality of conclusiveness and on principle cannot have *Wigmore* § 1059 Estoppel like judicial admissions has the similar effect of concluding all dispute of the fact But here the distinction is that the estoppel is an obligation made by a rule of law, of the same

§ 2589

Different kinds of estoppel according to English law Estoppels according to English law have been divided into three classes (1) By matter of record (2) By deed (3) In *pais*

(1) By matter or record A matter of record, as its name would import ... It is at once the narrative and the more usual form in which the

of the Civil Procedure Code and sections 40 and 41 of the Evidence Act

Estoppel by deed An estoppel by deed is that which binds the parties to the instrument and those claiming through them to its statements and *operation, as an admission of the truth, thus, at least as to the matter intended* to be affected by the instrument, and the facts recited in it The solemnity of
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by the deed, and the deed contained a recital of the plaintiff having invented the improvements in question, invention being of course of the essence of the validity of the patent The defendent pleaded that the invention was not, in fact, a new one; setting up the defence as a ground why he should be relieved from the liability to payment, contracted on the faith of the patents validity The Court, however held him concluded, that is to say estopped, by the recital It was observed by *Mr Justice Famiton* "The law of estoppel, is not so unjust or absurd as it has been too much the custom to represent The principle is,

of either fraud illegality, or immoral purpose, it would not apply, and any of these grounds could be set up to displace the estoppel The meaning of estoppel says *Baron Morton* 'is this—that the parties agree for the purpose of a particular transaction to state certain facts as true, and that so far as regards the transaction, there shall be no question al
is opened where the statement is made for the pu
contract, for persons cannot be allowed to
false statement *Horton* v *Westminst*
Indeed it is not necessary that there
Suppression or omiss on of the real trar
given to a woman securing to her a pecuniary payment in return for future co habitation would naturally be silent as to the consideration, but being in fact for an immoral purpose it would be bad and the obligor would not be estopped from showing the nature of the consideration *Goodeve Ev* 535 So also a party may prove that he never executed the deed, or that it was obtained by fraud or duress or otherwise tainted with illegality *Collins* v *Blantern* 1 Sm L C 369 *Priestman* v *Thomas*, 9 P D 70 210, *R* v *Hutchings* 6 Q B D 300, *Poulton* v *Adjustable etc Co*, (1905) 2 Ch 430

In general however in order to conclude the party by his deed by way of estoppel it should be pleaded for if his adversary does not rely upon the estoppel the Court and jury are not bound by it, but the jury may find the matter at large according to the fact and the Court will give judgment accordingly He asks them their opinion, and they are bound to give it Where, however the title of the party is barred by estoppel and he has no opportunity of pleading it the jur— ... *Ev* p 461 In India the recital (... parate as an estoppel *Ba. Bahac* ... =100 Ind Cas 1037= A I R 1927 All 385 The strict technical doctrine of the English law as to that
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C 1035 Where the plaintiff executed a deed of mortgage, he cannot afterwards sue to cancel it alleging that it was a fictitious one for the purpose of depriving the next reversionary heir of his right to the property *Mutsaddi* v *Bhagwan*, 11 P R 1875 The doctrine of estoppel by deed in its technical sense cannot be said to exist in India *Johnstone* v *Gopal*, 12 Lah 546=A I R 1931 Lah 419

Estoppel in cases of recital in documents When a person with a limited interest in certain property styles himself the owner of it and mortgages it to another he would be estopped if he subsequently acquires the property from setting up his limited interest as against the claim of the mortgagee And the auction purchaser of such proprietary interests of the mortgagor with notice of all the facts, being a person claiming from them would be equally estopped
e that the mortgagor had
Seva Ram v *Ali Bakhsh* 3 L
in *pari delicto potior est*
... ng a man embarrassed by a decree
to which he was himself a party, will not interfere to relieve him from its
ablication Where
ose of defeating the
showing its real
character, the claims of justice, equity and good conscience will be satisfied
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ie by allowing
arties to it or
the case of a
the tenancy

Sabukdulla v *Hari*, 10 C L R 199 In a suit for possession of lands, a plaintiff is not bound down by the recital, as to his vendor's title to the lands, in the document of sale, but is at liberty to prove such title differently *Gour Monee* v *Krishna Chandra*, 4 C 397 The mere fact of a vendor declaring in her deed of sale of a moiety of a landed estate, that the other moiety did not belong to her was held not to be conclusive against her being the proprietor *Nunhoo* v *Boodhoo*, 13 W R 2 The rule of estoppel by deed or by writing as now in force is this that, if a distinct statement of a particular fact is made in a deed and a contract is made with reference to that statement then the party who makes that statement cannot deny the truth of it *Thakur Abdul* v *Mirjan Wahid Ali*, 6 O C 355

S.

Estoppel in pais An estoppel in pais is that which, though not existing as matter of record or under the solemnity of a deed, may nevertheless under the circumstances, conclude equally with the higher species of averment It may exist in writing not being under seal in oral statement, or even in conduct
its were but few, and these existed
its ownership It was said by
W 285 The acts of parties by way of estoppel are but few, and are pointed out by *Lord Coke* Co Litt 352 (a) They are all acts which anciently really were and in contemplation of law have always continued to be acts of notoriety not less formal and solemn than the execution of a deed such as livery, entry acceptance of an estate and

doctrine that the *maxim*—(on applied under circumstances of great variety)—has grown up that a tenant or those claiming under him, cannot dispute the title of the landlord under whom they came into possession This has been applied to the case where the letting was by an agent and the landlord unnamed, and the principle would extend to that of any party coming in under the permission of the owner as in the instance of a lodger a servant or any other licensee Indeed so far has the doctrine been carried in practice, that where the object is t the only course to be pursi ejectment *Goodere Ev* 547 tance of a bailment *Standa* Bing 339 *Biddle* v *Bond* 6 B) 1 Q B

1 Deg 1 & J 33

Extension of the doctrine in modern times In modern times and in more complicated relationships of society which have been growing up the doctrine of estoppel has been considerably extended in application beyond its more ancient limit, and especially in reference to the mercantile and more general transactions of mankind It has been rested too less upon technical grounds than upon the broad basis of good faith and personal honesty —and the principle is to hold men to those representations whether written or unwritten —whether by word of mouth or of conduct—whether intentional or unintentional —upon the faith of which others have been induced to act to the change of any previous position In a case which has always been regarded as a leading one on this subject, that of *Pickard* v *Sears* 6 A & E 469 the law is thus laid down by *Lord Denman C J* "But the rule of law is clear that, where one by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to

alter his own previous position, the former is concluded from averring against the latter a different ' In a some what later case of *Gregg* e cited as an appendix to *Pickard* . *Sears* was in my mind at the time of the trial, and the principle of that case may be stated even more broadly than it is there laid down A party, who negligently or culpably stands by, and allows another to contract on th faith and un lerstad ng of a fact which he can contradict cannot afterwards dispute the fact in an action against the person whom he has himself assisted in deceiving" The former case, it will be observed might possibly seem by the expression 'wilfully cause almost to imply a fraudulent representation only; and to limit the appl cat on of the doctrine to that state of things,—while the latter extends it to a case of mere omissive silence or passive acquiescence, and that not culpable merely in the more obnoxious sense of the term but even negligent, an l a good deal of discussion has arisen as to the precise limit of the rule It is now, however established that the word "wilfully' is to be understood not in the sense of intentionally, but practically deceptive *Gool Ev* 551

The discussion of the proposition as laid down by *Lord Denman* came before the Court in the case of *Freeman* v *Cooke*, 2 Ex R 654, where *Lord Wensleydale* in delivering the judgment, after adverting to the rule as laid down by *Lord Denman*, thus commented on it —' Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been appl e! is not now ... as above laid down in ... By the term ' ... the party represents that to be true which he knows to be untrue at least, that he means his representation to be acted upon, and that it is acted upon accordingly and if, whatever a man's real intention may be, he so conducts himself that a ... be true, and believe that it was it as true the party making from contesting its truth and a duty cast upon a person ruth may often have the same effect As for instance, a retiring partner omitting to inform his customers of the fact in the usual mode, that continuing partners were no longer authori to act as his agents is bound by all contracts made by them with third persons on the faith of their being so authorised" *Lord Wensleydale's* statement of the law was reviewed by *Lord Campbell C J* in *Howard* v *Hudson* 2 El & Bl 1 where he said Now I accede to the rule laid down in *Pickard* v *Sears*, and in *Freeman* v *Cooke* If a party wilfully makes a representation to another meaning it to be acted upon and it is so acted upon, that gives rise to what is called an estoppel It is not quite properly so called but it operates as a bar to receiving evidence contrary to that representation as between those parties Like the ancient estoppel this conclusion shuts out the truth, and is odious, and must be strictly made out The party setting up such a bar to the reception of the truth must ... act on the faith of the rep ... is laying down I ... at he adopts the makes ... exposition of the law given in the later case of *Freeman* v *Cooke* which in effect expounds the word wilful to mean simply intentional —and this probably accordingly, was what *Lord* ... In the same case of *Howard* v *Hurdson* too *Mr* ... himself to this particular expression, observe ... used in the judg ment in *Pickard* v *Sears*, has ... the judgment in *Freeman* v *Cooke* As ... all the important commercial cases, in w ... in any bad sense of the word ... raud or ... a which ... criterion ... art of law ... L C thus ... y a prin ... ...lation

observed ... well known ... c ple equally of Law and ...

to another, and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of falsehood which has so misled the other This is a principle of universal application, and has been particularly applied to cases where representations have been made so as to state the property of persons about to contract marriage, and where, upon the faith of such representations, marriage has been contracted There, the person who has made the false representation has, in a great many cases, been held bound to make his representation good" And in a later part of his judgment, he thus adds —'These principles are plainly and perfectly intelligible, and quite consistent with good sense, and I
opinion or decision to which I am a
slightest degree, question their prop
has been carried, and may be carried
necessary that the party making the representation should know that it was false, no fraud need have been intended at the time But if the party has unwillingly misled another, you must add that he has misled another under

hat the person
It will not do
hen that some
come to him to
make it good The whole doctrine was very much considered at law, for it is a

of the Rolls An appeal was then preferred before the Lords Justices, and finally it came before the House of Lords But up to this point,—(the doctrine as laid down by *Lord Cranworth*)—both in the lower appellate Court, and on the final appeal in the House of Lords, there was no difference of opinion among the Judges *Lord Cranworth*, however, who on the original appeal to the

she made that statement, she

inal appeal before the *Lords*

Justices, only terminated in
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the three Lords by whom the appeal was heard, *Lord St Leonards*, was in the minority, and the ultimate decision was accordingly in conformity with the
anworth and *Brougham* Had *Lords Cran-*
ant to speak of that which a party held out
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5 alter his own ... former ... concluded from averring against the latter a ... time In a some what later case ... may be cited as an appendix to ... ard v Sears was in my mind at the time of the trial and the principle of that case may be stated even more broadly than it is there laid down A party who negligently or culpably ... ntract on the faith and understanding of a fac ... terwards dispute the fact in an action against th ... assisted in deceiving' The former case, it will be observed might possibly seem by the expression wilfully cause almost to imply a fraudulent representation only, and to limit the application of the doctrine to that state of things,—while the latter extends it to a case of mere omissive silence or passive acquiescence, and that not culpable merely in the more obnoxious sense of the term but even negligent, and a good deal ... of the rule It is now, however be understood not in the sense of ... d Ex 551

laid down by Lord Denman ... Cooke, 2 Ex R 654, where Lord ... adverting to the rule as laid down ... hether that rule has been correctly ... in which it has been applied is not now the question but the proposition contained in the rule itself as above laid down in the case of Pickard v Sears must be considered as established By the term wilfully' however, in that rule we must understand if not that the party represents that to be true which he knows to be untrue at least that he ... accordingly ... hat a ... t was ... thing ... and the representation would ... erson conduct, by negligence or omission, where there is a duty cast upon ... by usage of trade or otherwise to disclose the truth may often have the same eff ... As for instance a retiring partner omitting to inform his customers of ... longer author... ed ... ith third person ... ment of the ...

law was reviewed by Lord ... where he said Now I ... Freeman v Cooke If a party wilfully makes a representation ... it to be acted upon and it is so acted upon, that gives rise to what is called an estoppel It is not quite properly so called but it operates as a bar to receiving evidence contrary to that representation as between those parties Like the ancient estoppel ... and must be strictly made out ... f the truth must show, both ... the faith of the representation and that he did so act

Though *Lord Campbell* in enunciating the proposition he was laying down makes use of the expression wilfully, it will be noticed that he adopts the exposition of the law given in the later case of *Freeman* v *Cooke* which in effect expounds the word wilful to mean simply intentional —and this probably accordingly, was ... In the same case of *Howard* v *Hurd* ... himself to its particular expres... used in the judgment in *Pickard* ... the judgment in *Freeman* v *Cooke* As the rule is there explained, it takes in all the important commercial cases in which a representation is made, not wilfully in any bad sense of the word not *maloanimo* or with the intent to defraud or deceive but so far ... on which ...

observed Well kn... ciple equally of Law

as an estoppel it must be a representation of an existing fact and of not mere intention or future promises Also, estoppel, does not confer any title but is merely a rule of evidence which prevents one party from denying the existence of a fact which he represented as existing and upon which representation another person had been induced to act to his detriment *Hindustan Co operative Society* v *Secretary of State,* 56 C 989 A mere representation of an intention cannot amount to an estoppel An estoppel must be a representation of an existing fact If binding at all a representation *de futuro* must amount to a promise *Dhundo* v *Keshab,* 7 Bom L R 179

Estoppel in equity The modern or equitable estoppel is founded upon representations and arises out of
Casperz, Estoppel p 18 The gener
thus laid down "No body ougl
asserting a just demand unless by
the truth or asserting the demand would work some wrong to some other person
whc mething, by
rea *Collie* L R
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tha it seems to
me that it is of the very essence of justice that between those two parties their
rights state of facts which the two
partie *Per Lord Blackburn* in *Burkin*
shaw *Casperz Estoppel* p 19 It is a
principle of natural equity which must be universally applicable that where one
man allows another to hold himself out as the owner of an estate, and a third
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The section whether exhaustive of all kinds of estoppels In *Ganges Manufacturing Co* v *Sourajmull,* 5 C 669 at p 678 *Garth C J* said 'It has been further contended by the appellants that ss 115 to 117 contained in Chapter VIII of the Evidence Act lay
are now intended to be in force in British I
the Act as rules of Evidence; and that t
are repealed, except those which the Act, contains But if this argument were well founded the consequences would indeed be serious The Courts here would then be debarred from entertaining any questions in the nature of estoppel which did not come within the scope of ss 115 to 117, however important these questions r
fallacy of the argument
of evidence The enactm
evidence It is founded u
Sears, 6 Ad & E 469 and other cases, that where a man has made a representation to another of a particular fact or state of circumstances, and has thereby wilfully induced that other to act upon that representation and to alter his own previous position, he is estopped as against that person from proving that the
ase the rule of estoppel
admissible to disprove

are matters of infinite variety, and are
which are dealt with in Chapter VII of th
estopped, not only from giving particula

relying upon any particular arguments or contention which the rules of equity and good conscience prevent his using as against his opponent A large number of cases of this kind will be found collected in the notes to *Doe* v *Oliver* ... p 775; and whatever the true meaning of section 9 of ... prevent a person from giving ... t debar the plaintiffs in this ... ontention as against the ... *rresuai Chandra* 33 C 915 ... at p 921 = 10 C ... *ice Woodroffe* said "The ... is admittedly not a case of estoppel by misrepresentation which is dealt with by section 115 of the Evidence ... at all it is an estoppel by agreement Sections 116 ... well known cases of this kind of estoppel viz ... aler and acceptor of a Bill of Exchange ... of the e though it has been argued in part on the analogy of the tenant's ... It has however been correctly submitted that these sections are not exhaustive of the doctrine of estoppel by agreement" See also *Bhagganta Beuah* v *Himmat Bidyalar* 20 C W N 1335 (1340); *Gotta* v *Sitaram*, 23 M L J 33., *In re Union Indian Sugar Mills Co Ltd* 1930 A L J 305 = A I R 1930 All 330, but see *Asimun-nessa* v *Harendra Lal* 35 C 904 = 12 C W N 721 = 8 C L J 31, where none of the previous cases were considered This equity differs essentially from ... in s 115 of the Indian Evidence Act, 1872, which is not a ... vidence that was formulated and applied in Courts ... kes its origin from the jurisdiction assumed by ... ie in the case of, or to prevent fraud" *Municipal* ... *etary of State for India*, 29 B 580 = 7 Bom L ... of the law of estoppel, by which the Courts in India are to be governed are found in s 115 of the Act there is no need to fall back upon the analogies of the Mahomedan Law in a case of presumption arising between the Hindus *Ajudhia Chaudhuri* v *Chhatarpal* 4 A L J 10 = A W N 1907, 88

Requisites of section 115 To constitute an estoppel under this section t ... are necessary, namely,— ... of material facts, (2) The ... the facts (3) The party ... uth of the matter, (4) It must have been made ... r party should act upon it (5) The other party must have been induced to act upon it (*Bynum* v *Preston* 69 Texas, 287 = 5 Am St Rep 49) (6) Or acts conduct or declarations of a person, by which he designedly induces another to alter his position injuriously to himself but it must be executed and not merely executory *Camp Rul Cas Vol XI*, 104

Declaration, act or omission This section deals with a case of estoppel by misrepresentation *Rup Chand* v *Sarvasuor*, 33 C 915 (921) Under this section such misrepresentation may be made by declaration act or omission *Jetha bhai* v *Natha bhai* 28 B 399 (407) "It is a very old head of equity" said *Lord Eldon* in *Evans* v *Bicknell* 6 Ves 183 "that if a representation is made to ... a matter of interest upon the faith of that ... if he knows it to ... terms and is fr... it may be implied ... sufficient to show ... eceived ... *Cal* ... v *Coke* 8 L J ... *Coke* 8 L J ... *ynes Pentoon Co* ... 296 Where there is no representation by a person ... invoked against him *Sirajuddin* v *Johur*, 134 Ind Cas 898 = 53 C L J 222 In order to establish estoppel upon representation, declaration must have been made and believed and truth must have been inaccessable *Mohammad* v *Mohammad* A I R 1930 All 847, *Johnstone* v *Gopal*, A I R 1931 Lah 418, *ibid* v *Mahboob*, 6 Luck 382 The law on the subject is thus stated by *Brett J* in

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Carr v. *London & North Western Railway Co.*, L. R. 10 C. P. 317 = 44 L. J. C. P. 109 —

"If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false and if the second believes in such a state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist

2 If a man either in express terms or by conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way and it be acted upon in that way in the belief of the existence of such a state of facts, to the damage of him who so believes and acts the first is estopped from denying the existence of such a state of facts

"3 If a man whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation and that the latter was intended to act on it in a particular way and he with such a belief does act in that way to his damage, the first is estopped from denying that the facts are as represented

"4 If in the transaction itself which is in dispute one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist" This case was approved of in the much later case of *Seton Laing & Co* v *Lafone*, L. R. 19 Q. B. D. 68, by a unanimous judgment of *Lord Esher* and *Lords Justices Fry and Lopes* In that case *Lord Esher* said "An estoppel does not in itself give a cause of action; it prevents a person from denying a certain state of facts One ground of estoppel is where a man makes a fraudulent misrepresentation and another man acts upon it to his detriment Another may be where a man makes a false

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represents that to be true which he knows to be untrue, at least that he means

his representation to be acted upon, and that it is acted upon accordingly and if whatever a man's real meaning may be, he so conducts himself that a reasonable man could take the representation to be true, and believe that it was meant that he should act upon it and did act upon it as true, the party making the representation would be equally precluded from contesting its truth, and conduct by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect—as for instance, a retiring partner omitting to inform the customers of the firm in the usual mode ere no longer authorised to act as his agents is bou em with third persons on the faith of their bein . *Hudson*, 2 El & Bl 1, *Crompton* J said 'The word 'wilfully' which is used in the judgment of *Pickard* v *Sears* has been well commented upon in the judgment in *Freeman* v *Cooke* As the rule there explained it takes in all the important commercial cases, in which a representation is made, not wilfully in any bad sense of the word, not *maloanimo* or with intent to defraud or deceive but so far wilfully, that the party making the representation on wh ch the othe l at way That is the true criterion' See ' 391, *Coventry* v *Great Eastern Railway* o v *Lafone*, L R 19 Q B, D 68, *Cornish* v *Abington*, 4 H & N 549 So there is no ground for the suggestion that the person making the representation which induces another to act must be influenced by a fraudulent intention *Sarat Chunder* v *Go* on the cases of *Ganga* 7 M 3 *Lord* majority of the Judges that if the element of fraud be wanting there place

that case also) the Court seems to have taken the view that in order to estoppel, the representation founded on must have been made with an intent on to deceive, and an opinion was indicated that the law of estoppel under the Indian Evidence Act in some respects differed from the law of England It was there said (7 Mad 8) 'The term *intentionally* was, no doubt, adopted advisedly By the substitution of it for the term 'wilfully' in the rule stated in *Pickard* v *Sears* 6 A & E 469 and explained in *Freeman* v *Cooke*, 2 Exch 654 and *Cornish* v *Abington* 4 exclude cases from the rule in India to in which it has been stated by the nable to agree in this view On the contrary, as the rule had been modified in England by there substituting the word 'intentionally' in the rule established for the word 'wilfully' which had been previously used it seems to their Lordships that the term intentionally was used in the Evidence Act for the purpose of declaring the law in Ir person who by his declaratic true and to act upon ithin the meaning of on to be true, and bel ew effect was given r cases 'Estoppels may arise on various grounds,' says *Brett M R* in *Lafone* L R 19 Q B D 68, 'all of which the judgment in *Carr* v *North Western Railway Co*, L R 10 C P 307, endeavours to state, and each of the grounds on which an estoppel may arise, there stated, is intended to be independent and exclusive of the others An estoppel does not in itself give a cause of action it prevents a person from denying a certain state of facts One ground of estoppel is when a man makes a fraudulent representation, and another man acts upon it to his detriment Another may be where a man makes a false statement negligently, though without fraud, and another man acts upon it. And there may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel." While it is not in all cases necessary to show actual knowledge of the facts on the part of the one against whom the estoppel is claimed, it should at least be shown that the declarations were made under such circumstances that he ought to have had such knowledge or that they were made negligently and recklessly *Evans* v

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Phear's, 13 Com B 777 He cannot urge, as an excuse, that he had forgotten them When a person through misapprehension, ignorance or inadvertence, does acts or makes declarations which mislead another to his injury but when at the same time there is no wilful deception or culpable negligence and no intention that the representation should be acted upon as true by the other party and when nothing accompanies it that is equivalent to a promise that the representation is true the person making the declarations or doing the acts is not estopped from proving the truth against the party thus misled It follows that there is no estoppel when the declarations are made in good faith and in ignorance of the real facts in other words when made innocently and by mistake *Jones* 277, ... 26 P L R 1903 It is not essential that the intention of the p ... has induced another to act or abstain ... or that he should not have been under ... *Dass* v *Durga Das* ... 4 C L J 421 Under this section not merely may there be active inducement on the part of the declarant of a belief in the mind of another person but it is enough if declaration is such by which the declarant in the ordinary course permits some body ... declaration and to act on that belief ... N 573 = A I R 1929 Cal 819 It is not n... present received that there should be any ... connection with the misrepresentation which is the subject of estoppel *Balbir* v. *Jugal*, 3 Pat L J 451 = 46 Ind Cas 473

Who can take advantage of the representation Only the person to whom the representation was made or for whom it was designed can avail himself of it A person who receives statements at second hand, not intended for him, clearly has no right to act upon them Indeed it is equally clear that a mere by-stander who has overheard a statement made to and for another has no better right to act upon it than if it had been communicated without authority to him; and so it has been decided If however, the declaration was intended to be ... it seems that one who did not hear it, but to whom it was ... time to be allowed for acting ... of the laws more than that ... act not his own or that of his ... Only such person can take advantage of a representation for whom it was meant *Jogesh Chandra* v *Enlaz Ali*, A I R 1927 Cal 34 = 97 Ind Cas 625 Estoppel applies not only in favour of the person induced to change his position but also in favour of a transferee of such a person *Bhagu Lal* v *Sheo Gobind*, 7 L R 213 (Rev) ... = 15 Ind Cas 770 = 22 C W N 891 ... to the decree holder it is likewise ... *Swaminatha Vallala* v *Durmalinga*, ... representations, induce others to

How a representation may be made ... oral or written *G I P Ry* v *Hammand* ... presentation a party cannot be estopped *D*... 134 = 1922 P C 319 = 16 L W 692 A representation to form the basis of an estoppel may be made by statement or by conduct; and conduct includes negligence *Halsbury* Vol 13 p 377; *Freeman* v *Cooke*, 2 Ex Ch 654

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representation is as to some state of facts alleged to be at the time actually in existence' If the representation ... can be binding ... 299 (407) ... orge White ... 30), where His lordship said If it is anything it is a ... Alderson B ... and ... fect ... 161, ... make

as, for instance, where a person leads another to believe that ... him his heir and then leaves his property away from him Though such ... breach of the ... ands, it ... entation ... him elf ... it See ... v First ... Ed 637; National Bank of New Orleans, ... 159; Sailesh v Bechai, 40 C L J. 67; In ... Ind Fairfield S B Co v Gardnre, 104 ... bour Cas 385, Bajrang v Bhagwan, 11 O ... The Commissioner, 16 W R 34; Chadwick v. Manning, (1896) A C ... doctrine of estoppel by representation is applicable to some state of facts alleged ... binding ... as 164; ... principle ... on where ... denying ... sioner 16 ... 473, ... that ... ations ... not ... acts" ... oppel

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Estoppel, whether should be pleaded An estoppel *in pais* need not be pleaded in order to make it obligatory *Cira Rau* v *Revana Rau*, 2 M H C R ... a person ... contract ... form of ... treat it as ... anderson ... 00) A C ... with suffi... 273=2 P ... precise ... er and must ... Sarup v Maja ... here plea of ... ailed of later, ... Alamelu 119 ... is a mixed ... R 630 No ... son has built ... en of estoppel ... Dwarka v ... Cas 916=1925 ... Purgan v

Nag 916 A question of estoppel can only be raised by pleading ... *Dhanpat*, 52 Ind Cas 739, *Shaikh Abdul Rahim* v *Mt Barira*, 6 Pat L J 273=

2 Pat L T 856=61 Ind Cas 867; *Ram Sarup* v *Moga Shankar*, 46 P. R. S. 1918=25 P L R 1918=13 P W R 1919=43 Ind Cas 656; *Prisanna* v *Bibi*, 47 Ind Cas 985; *Chandi* v *Sarda*, 22 C W N 170 Defence of estoppel can always be taken if it is warranted by the facts proved or admitted even if these facts have not been specifically pleaded *Co-operative Loan* v *Shanmugam*, A I R 19) Rang 25

Onus of proof To entitle a plaintiff to recover from a defendant, on the ground of estoppel, a loss occasioned through culpable neglect on the part of the defendant the plaintiff must prove that the negligence complained of occurred in the particular transaction in which his loss arose, and also that such negligence was the proximate direct or real cause of the loss *Longman* v *Bath Electric Tramways* 74 L J Ch 474=(1905) 1 Ch 646 A person who relies on estoppel by negligence must show that he was led into the belief on which he acted to his detriment A solicitor was ordered by his client to investigate the title to and prepare a conveyance of property adjoining his (the solicitor's) property In the conveyance a small portion of the solicitor's property was confused, but the client did not believe that he was buying the small portion in question The client subsequently brought an action claiming the land *Held*, that the solicitor was not estopped from setting up the truth *Bell* v *Marsh*, 72 L J Ch 360=(1903) 1 Ch 528=88 L T 605=51 W R 325 The estoppel must be strictly interpreted and any point in doubt must be decided against the estoppel *Nihal Singh* v *Narain Singh* 6 Lah L J 45=80 Ind Cas 625=1924 Lah 469 The onus of establishing facts giving rise to estoppel is upon the person who pleads it *Mitra Sen* v *Janki* 16 A 728, *Ahmed* v *Safizan*, 97 Ind Cas 897, *Birendra* v *Baikuntha*, 16 Ind Cas 471; see also *Sheo Tahal* v *Bansi Shukul*, 1931 A L J 653=A I R 1931 All 689

When truth of the matter known to both the parties no estoppel arises Where the party affected has received timely notice that the representation is not true, he cannot enforce the estoppel *Dunston* v *Paterson*, 2 C. B N. S 495, *Sandys* v *Hodgson*, 10 Ad & El. 472 So the party claiming the estoppel must not himself have been negligent "Where the condition of the title is known to both parties, or both have the [illegible]
there can be no estoppel" *Brant* v *Virgi*[illegible]
Knouff v *Thompson* 16 Penn State 361 [illegible]
to learn the truth *Morgan* v *Farrel*, [illegible]
Vol XI p 103 This section does not apply to a case where the statement relied upon is made to a person, who knows the real facts, and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties A false representation, made to person who knows is to be false, is not such a fraud as to take away the privilege of infancy *Mohiree Bibee* v *Dharmodas*, 30 C 539 P. C =30 I A 114=7 C W. N. 411=5 Bom L R 421 Estoppel by conduct does not arise where the party misled had [illegible] facts *Maung Si* v *Ma Kyol*,
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ap[illegible] v *Sorobar Singh*, 27 C, 407
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property to D who was aware of the title of the parties *Sarodi* v *Gosla* 36 C L J 78 Where the position the admission of the parties which did nothing not operate as an estoppel in the present suit *Mehra* v *Dew Ditta* 2 Lah 88 = 3 Lah L J 223 = 62 Ind Cas 665 There cannot be a case of estoppel where the person pleading the estoppel was put on notice and could by reasonable *ad* v *Ananda* where the state is not misled by the untrue statement *Jagarnath* v *Jaikishen Prosad*, 1 Pat L J 16 = 31 Ind Cas 375 Estoppel does not arise where both parties have equal means of knowledge both of the facts and of the law *Tek Chand* v *Gapal Dei*, 13 Ind Cas 482 = 46 P R 1912, see also *Prasanna Kumar* v *Sidanto Raut* 16 C L J 202 — 17 C W N 137 There can be no estoppel where the whole of the record, deed or document in which the statement relied on is contained, shows the truth *Menanji* v *Secretary of State*, 14 Bom L R 651.

Estoppel by representation — change of position brought about by it A by word or conduct induces B to believe that a certain state of things exists and B in that belief acts in a way in which he would not have acted unless he so believed and is thereby prejudiced, then A cannot in any subsequent proceeding between himself and B or any one claiming under B be heard to deny that that state of things existed But A will not be estopped from averring the truth in any other proceeding The estoppel only arises in favour of some person whom A has induced by word or conduct to do or abstain from doing some particular thing *Powell Ev 9th Ed* 468 Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that ... ous position, the former is concluded from aver... ent state of things as existing at the same tim... 469 So it is clear that if a person so conduc... bly draws a certain inference and *acts thereon* the person so conducting ... self cannot gainsay such inference *Cornish* v *Abbington*, 4 H & N 549 *Carr* v *L & N W Railway Co*, L R 10 C P 307, *In re Blakeley Ordinance Co*, (1867) L R 3 Ch 154, *Hollins* v *Fowler*, L R 7 H L 757, *Newton* v *Liddiard* 12 Q B 925, *In re Collie* 8 Ch D 817, *Horsfall* v *Halifax and Huddersfield Union Banking Co*, 52 L J Ch 599, *Couldrey* v *Bartrum* 19 Ch D 394 The other party must have acted upon the act or conduct *Daniels* v *Ev Ins Co* 48 Connecticut, 105, *Earl* v *Stevens*, 57 Vermont 474 Before an estoppel can take place it would be necessary for the party relying on the same to establish that he had been led to do something detrimental to his own interest owing to the action of the other person *Nisar Ali* v *Muhammad Ali* 119 Ind Cas 337 = A I R 1929 Oudh 494 = 6 O W N 519 What this section mainly regards is the position of the person who has been induced to act, and the principle on which the law rests is that it would be most inequitable and unjust to him that if another by a representation made or by conduct ... not otherwise ... l to deny ... of the ... without ... ortunate for him, but it would be unjust even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended that he should do ... whether an estoppel has been occasioned ...

... v *Shafi* ... A I R 1931 ... R 390 = A I R 1931 ... been created, the main ... person, to whom it has ... *Das*, 4 C L J 373 ... act on the faith of a fact ... ds question such fact

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in an action against the person whom he has assisted in deceiving An estoppel of this kind is not created by a wilful, negligent and culpable misrepresentation, unless the person so deceived does act in accordance with the misrepresentation *Inders n v Tr le*, 70 P R 18… The meaning of this section is that no declaration act or omission will amount to an estoppel unless it has caused the person whom it concerns to alter his position and to do this he must both believe the facts stated or suggested by it and act upon such belief *Durga* v *Jhinmm*, 7 A 511 = A W N 1885 1… see also *Sino* v *Lalla Lam Lal* 7 C L R 481, *Jhinmn* v *Durga* 7 A 878 (F B) = A W N 1885 …

the statement not having been made to the person who seeks to render the other liable, and not having come to his knowledge as a matter of notoriety, and it not being shown that he has acted on the faith of such statement. *Plimmer* v *Thompson* 31 L J Ex 207 It is a settled principle of the rule of estoppel that in order that a particular declaration act or omission of a certain person may constitute estoppel against him the … must show that he in accepting the truth o… the truth thereof has acted upon such … detriment *Ahmed* v *Stafi an* 97 Ind …

Person making a representation cannot subsequently deny what he represented when the person to whom it was made acted upon it *Bengal Nagpur Railway* v *Co-Operative Hindustan Bank, Ltd* 53 C 622 = 97 Ind Cas 606 = A I R 1926 Cal 1029 Where the plaintiffs made statements in a suit inconsistent with those made by their father in a previous suit against the same defendants but the plaintiffs did not claim the property in suit through their father and there had been no change in the position of the defendants by reason of the prior inconsistent statement, the plaintiffs were not estopped *Nripendra Nath* v *Basanta Kumar*, 29 C W N 861 = 89 Ind Cas 207 = A I R 1925 Cal 1195 A tenant desiring to erect pucca structures on the leased land asked the permission of the landlord whose agent in reply wrote to say that the lease was a permanent lease and gave the tenant right to erect buildings, but it did not entitle him to hold at fixed rate and that the rent was liable to enhancement after proper legal notice and that pending consideration of a proposal to fix the rent permanently, the tenant might commence the house if he liked. *Held* that the statement of the latter was a statement of fact and not an expression of opinion, and the house having been erected, the landlord was … tion *A H Forbes* v … L J 513 (P C) In … el prevents the plaintiff … e, the plaintiff, induced … y had a fixity of tenure, … them It gives effect to the representation that induced them to act as they did In the case of *Ramsden* v *Dyson*, L R 1 H L 129, the principle which governs this class of cases is stated by *Lords Kingsdown* in the following terms —'The rule of law applicable to the case appears to me to be this If a man, under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord and upon the faith of such promise or expectation, with the …

equitable es… quoted in … case, and … concurrence …

detriment his previous position *Bhagwan Singh* v ... (Rev), *Gusain* v *Ram Rakha*, 50 Ind Cas 128, *Abdulla* v. *Fateh* 62 Ind Cas 809

Before advantage can be taken of the doctrine of estoppel, the presentation ... the action of the party seeking to estop ... as cause and effect There must be ... mission on the part of the person sought ... h a declaration, act or omission the person seeking to estop was led to believe a thing to be true and, thirdly, that by such act or omission the party seeking to estop was not only led to believe a thing to be true which in fact was untrue but to act upon such belief to his prejudice *Ram Boran* v *Ram Nihora*, 57 Ind Cas 263, see also *Girijabai* v *Sadasiv*, 22 Bom L R 974=58 Ind Cas 394; *Kannulal* v *Gaul Saha*, 5 P L J 521=1 P. L T 546=57 Ind Cas 353; *Rajib Hussain* v *Zing Ray*, 54 Ind Cas 962; *Harlal* v *Basanta Singh*, 75 P. W R 1918

Where by his admission of a compromise before the Revenue Court, the plaintiff induced the defendant to withdraw his suit in that Court, he is estopped from bringing another suit in a Civil Court *Gulab* v *Badhaua*, 45 Ind Cas 331 Before applying the rule of estoppel it must be shown that a previous inconsistent statement in some way affected the result of the litigation in which it was made But if the defendants were never proper parties to the previous litigation they cannot in any way be estopped from pleading something inconsistent with their former statement *Raghunath* v *Sheolal*, 13 N L R 69=39 Ind Cas 849 If a man under a verbal agreement with a landlord for a certain interest in law, or what amounts to the same thing, under an expectation created and encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation with the knowledge of the landlord and ... Court of equity will ... pectation The crown ... fers essentially from ... Act, 1872, which is not ... lated and applied in ... jurisdiction assumed ... it, fraud. There is no ... h a person seeks to have in land was not originally moulded in a form recognised by law; the ... a Court of Equity ... v *Secretary of State*, ... person after he has ... h if made earlier, and ... 52 L J Ch 599, ... *Morrison* v *Universal Marine Insurance Co*, L R 8 Exch 197, *Bell* v *Marsh*, (1903) 1 Ch 528 *Halsbury* Vol XIII p 384 The mere payment of money under a mistake of fact induced by the representation in circumstances when there is not the slightest difficulty in getting it back is not such damage or prejudice as will ... *Western Rail Co*, 10 C P ...

... stands by while ... y and he does not ... the owner of the ... afterwards for the ... *Munj* ... ontrary ... asserted a certain ... on the assumption of fresh fact against persons who were parties in the previous suit. *Lloyd*

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v *Sheo Chand*, 105 Ind Cas 481 A party cannot approbate and reprobate with knowledge of the facts, and if the husband or the wife once deliberately affirms the marriage he or she cannot subsequently object to the marriage. Therefore, where a previous petition for declaring the marriage a nullity has been dismissed by consent of parties a second petition is not competent *H* v *H*. 30 Bom L R, 523=110 Ind Cas 2 6=A I R 1928 Bom 27 Where the widow of a deceased co-parcener who died divided in status from the other co parceners allowed the other co parceners to sell to one of the family members including herself in order that the heavy debts due by the family may be discharged, thereby herself participating in the benefit that had accrued from the transaction, she c

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Ind Cas 2-6=A I R 1928 Sind. 175 A Hindu co-parcener who takes property under the Will of another co parcener and acts up to the terms of the Will is estopped from subsequently contending that the Will is invalid *Lakshmamma* v *Sreeramulu* 101 Ind Cas C9=A I R 1927 Mad 1066 Where a testator having either no title or an imperfect title to land devises it by specific description to or upon trust for a person for life with remainder over, one who obtains, or accepts, or retains possession of *property under the Will and who* neither has, nor proposes to have, any title thereto except under the Will, is estopped as against any remainder man or other person claiming under the same Will from asserting that the testator was not entitled to such an estate in

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third person purchases it for value from the apparent owner, in the belief that

Unless a person is found guilty of either an overt act or of an act of omission which is likely to induce the other side to believe that he is entitled to commit the particular act complained of there can be no question of estoppel A plea of estoppel in such case can only be maintained if the conduct of the person against whom the estoppel is alleged, is found to be fraudulent *Ram Dit* v *Chhotak*, 4 O W N 1019 Where the vendor by his conduct induced a belief in the vendee that he had a good title to the property he is estopped from going back on the same, even where he was not fully aware of his legal rights *Vatu Doyal* v *Lalji Sahai*, 25 A L J 878 Where certain lands belonging to a Talukdar were wrongly described as rent free lands in the village accounts but on a

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the lands. *Sur Singh* v *Secretary of State*, 28 Bom L R 1213=A I R 1926 Bom 590 No actual verbal representation is necessary to give rise to estoppel It is quite enough that the conduct of the party leads another to act in the belief that he asserts no claim to the property *Azizullah* v *Ghellam*, 17 S. L R 63=80 Ind. Cas 991

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Multesar, 21 A 316 = A W N 1899, 101 In order to avail himself of the doctrine of estoppel, the plaintiff should prove that the defendant, by representation which he knew to be unfounded intentionally misled the plaintiff into a position prejudicial to the interests which he would otherwise have possessed *Pichurayyan* v *Subbayyan*, 13 M 128 In order to prevent the owner of land who is charged with standing by and allowing another person, who believes he had a good title thereto, to enter on the land and spend money in improving it from recovering possession thereof, fraud and deceit on the part of the owner must be clearly proved, *Langlois* v *Rattray*, 3 C L R 1 In order to raise an equitable estoppel against the lessors, it is incumbent upon the lessee, to show that the conduct of the owners, whether consisting in abstinence from interfering or in active intervention is sufficient to justify the legal inference that they had by plain implication, contracted that the right of tenancy, under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation *Beni Ram* v *Kundan Lal*, 21 A 496 (P C) = 3 C W N 502 A plea of estoppel by general conduct raised by the plaintiff will fail if it is proved that a proper inquiry would have acquainted the plaintiff with facts *Phundo* v *Bhisma*, A W N 1883, 246 The plaintiff who upon misrepresentation by defendant, released a right to him, believing his statement in preference to getting information any where, which information he might have easily obtained, is relieved from fulfilling the terms of the release *Mehi Ram* v *Denu Dayal*, 75 P R 1869

The rule of estoppel ought not to be applied rigorously as against a purdah woman The same inferences should not be drawn from or same construction should not be placed upon, her silence and delay in bringing a suit as might be reasonable and proper in another case. *Kaniz Fatima* v *Abbas Ali*, A W N 1887 84 The Court ought to decline to redress a party asking for it who has countenanced the acts of which he complains *Bhyro* v *Mussammat Lekhranee Koer*, 16 W R 123 Where a representation is such that a reasonable person would act on the faith of it the person who has made the representation cannot get rid of the estoppel by saying that the person, to whom he made the representation would not have been deceived if he made proper enquiries *Nandalal* v *Rukhman* 13 C P L R 30

Parties who, by false representation, induce others to enter into contracts are estopped from afterwards falsifying their statements, and, if necessary may be compelled to make them good *Radha Krishna* v *Shureefunnissa*, W R 1864, 11

A judgment by consent raises an estoppel, just in the same way as a judgment after the Court has exercised a judicial discretion in the matter *Laxmishankar* v. *Vishnuram*, 1 Bom L R 534 = 24 B 77 An attesting witness to a Will cannot sue to have it quashed on any ground, as he is estopped from doing so by being an attestor of the Will *Jumma* v *Imam*, 138 P. R 1889 Though the person, who elects to take a legacy under a Will, may be estopped from setting up a title contrary to its provisions, still, if such person be in possession, he cannot be ousted except by one who can prove a better title to the property *Probodh* v *Harish*, 9 C W N 309 On a decree being passed on compromise, the judgment debtors will be estopped from objecting to the execution of the same *Kashi Das* v *Ishan Chander*, 31 C 914 (P C) = 9 C W N 49 The Civil Procedure Code allows of a decision by an umpire in certain events and hence, parties, who have submitted to the decision of an umpire without taking any objection cannot afterwards call that decision in question in a Court. *Kupu* v *Venkataramyya*, 4 M 311 A person can be precluded by his conduct from objecting to an irregularity in procedure which he himself invites *Timmana* v *Putabhata* 2 Bom L R 90 Where interest has been paid by a banker to a depositor at a certain rate per cent, a renewed deposit will also carry interest at the same rate, in the absence of an agreement to the contrary; and the banker will be estopped from questioning such rate *Mukundi* v *Balakishen*, 3 A 328 The owner may be, in respect of a trade-mark, as in respect of any other right, estopped by his conduct from denying the title of another person *Lavergne* v. *Hooper*, 8 M. 149 A purchased immovable property in the name of B, and allowed B to occupy and retain possession of the property B mortgaged the property to C for a valuable consideration *Held* that A and those claiming through him were estopped from asserting as against C, his or their title to the property and the mortgage was valid *Kally Dass* v

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hnd Chunder, Marsh 269; Puri M Jiee v Prim Koo aree, 3 W R 87; ...h v M Uren, 18 W R 126; Hollins v Linlee March 293 On a decree og passed on compromise, the judgment d'btors will be estopped from objecti to the execution of the same *Kisha Das v John Chunder*, 31 C 914 (P C) C W. N 49

If a gentleman entrusts to his own men of business a blank paper duly mped as a bond and signed and sealed by himself in order that the instrument y be duly drawn up, and money raised upon it for his benefit, and if the instrunt is afterwards drawn up and money obtained upon it from persons who have ... ond must in the absence ... up in accordance with ... *Sugra Das*, 5 C 39 ... by X and Y's admission ... property *Chunhunun* ... fusing a registered letter nt by post cannot afterwards plead ignorance of its contents *Leofi ... v ...ree M hun*, 16 W R 223 When a trustee mortgages trust property by serting it to be his own, he will be estopped afterwards from setting up the ust and claiming to recover it from a *bonafide* purchaser for value, without tice in execution of the decree obtained on the mortgage This however will t affect the right of the beneficiaries under the trust *Gul ... v ... Felt*, 6 A. A W N 1883 182 If the heir of a deceased Hindu stands by and allows stranger to enter into possession of the deceased's property, every person aiming under him will be bound by the decree in a suit of which he had notice stituted *bonafide* against the party in possession for the recovery of the debt ue by the deceased to the plaintiff *Uma Sundari v Nityananda*, 3 C L R 57 When once a widow asserted a proprietary right in certain property she ill not subsequently be permitted to enforce her claim for maintenance against uch property in the hands of a purchaser *Golab v Ramthahal*, 1 N. V. P 275

A person having right of pre emption may dispute or affirm the validity of he sale of the land to a third person If, by his conduct towards the vendee fter the sales, he makes the latter believe that he had elected to affirm the sale, e is estopped from attacking the sale or enforcing his right of pre emption ver the property *Buca Lehna v Jigannath* 138 P R 1888 In a pre-emption uit on the foreclosure of a mortgage the mortgagor did not appeal from the oreclosure decree but allowed execution to take place under it. *Held* that such conduct was sufficient to indicate that the mortgagor had acquiesced in the sale being made absolute *Jowaher Mal v Kalandar* 1.. P R 1882 A obtained a decree for pre emption against B on condition that the price should ... was paid A mortgaged ... not pay the price In a ... st his right of pre emption ... *Held*, that B having accepted the mortgage from A and made A believe by such conduct that he treated him as the proprietor of the land in question was estopped from pleading as he did *Gulrang v Vasna* 131 P R 1890

... entered into a mortg ... *Held* it does not lie ... in plaintiff's name ... has mortgaged ...

mortgages property as unencumbered when as a matter of fact, it is subject to a charge, cannot, when he subsequently becomes himself entitled to enforce such charge, set up such charge against the mortgagee *Ridhey Lal v Mahesh Prasad* 7 A 864

If a creditor, in execution of a money decree which he holds against his debtor, sells certain property as that of the latter, he will be estopped from afterwards setting up, as against the purchaser, a previous mortgage which had been created in his own favour of which he had given no notice to the purchaser at the time the property was sold and in ignorance of which the

purchaser bid for the property and paid the full price *Agorchand* v *Rakhma*
upon his mortgage by a mortgagee, and
the decree for paying off the mortgagee,
the mortgagor passes to the purchaser
effect of
may
ort

of a
A mortgagee, who has the mortgaged property
disclosing his mortgage lien,
against the title of a *bonafide*
ad v. *Shib Sahai*, 21 A 309=
ecution of a money decree puts
up property for sale without notice of his mortgage and thus allows an innocent
he is estopped
Ounkar Seth v
the time when
mortgage deed
possession was given to defendants in virtue of an unregistered mortgage deed
and gave their consent to the mortgage, they could be equitably estopped from
claiming possession of the same property under a registered instrument as
against th *Sindu Sudanji*, 5 C P. L R 97
Where a of his decree, property under
his mortga upon it, and misleads the
bidder, an as unencumbered, he cannot
subsequen mortgage rights *Mc Connell*
v *Mayer*, vn by *Lord Denman* in the
case of *Pickard* v. *Sears* (6 Ad. & El 40), that where a man by his words
or conduct wilfully induces another to believe in a certain state of facts, so as
as against the latter
is embodied
ander Roy 4 C

Where a mortgagee relinquished the debt due bond and the
mortgage security in consideration of his getting some other land instead and
the relinquishment was acted upon by a third person to his prejudice the
as against such third
as not made
led also that
ersuance of
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stands by
perty as if it
y to which
was unencumbered, held that by such conduct
the prior date of his encumbrance would, had he acted otherwise, have entitled
him. *Rai Seeta Ram* v *Kishun Dass*, 3 Agra 402 A man who has represented
to an intending purchaser that he has not a security in property to be sold,
and induced him under that belief to buy, cannot, as against that purchaser,
force *Munnoo Lall* v *Lalla Choonee*

of half of a certain piece of land
only two-fifths of the said land the
spectively to a brother and sister This
t was endorsed by his sister
endorsement amounted to an estoppel as against her, or any one claiming
Blaquiere
n empowered
his acquie-
from setting
escence took
induced him
P. R. 1893
to enter into the sale transaction *Nihola* v.
Where without objection, a defendant allowed a purchaser of the plaintiff's
interest in the suit to substitute his name on the record (the original plaintiff

having withdrawn from the suit), he was estopped from contending that the suit had abated *Bir Chandra Roy* v *Bansi Dhar Roy*, 3 B L R A. C 215 An auction purchaser not questioning the acts of his predecessor within 12 years will be estopped from objecting [illegible] *Sibdyal* v *Gouree Roy* 18 W [illegible] the judgment debtor, with the co[illegible] and asked for time for paym[illegible] contest the validity of the sale if [illegible] On his prayer being granted, he without paying the full decretal amount on the day fixed, took further time *Held*, that it would be contrary to reason and equity that he should turn round and repudiate the agreement, and that the agreement estopped him from contesting the legality of the sale *Uttam Chandra* v *Khetra Nath*, 29 C. 577

A purchaser of land, who lies by for five years allowing another person to occupy the land and afterwards to sell it, is estopped by his own conduct from afterwards claiming the land from a *bonafide* purchaser without notice. *Mohesh Chandra* v *Issur Chander*, 1 Ind Jur N S 266 A plaintiff suing to realise his security under a mortgage is estopped from recovering on the [illegible] [illegible]er to buy without notice of [illegible] brought the property to sale. [illegible] a person in execution of a [illegible] hypothecation to his partner, [illegible]aser, and the sale has taken place, obtains an assignment of the hypothecation deed and sues on it, he is estopped from denying that the sale took place free of encumbrances *Kasturi* v *Venkatachalapathi*, 15 M. 412 Where a decree holder, by mistake, put up to sa[illegible] he i[illegible] purc[illegible] purc[illegible] prop[illegible] agai[illegible] 265 [illegible] person who steps in during an auction sale, assumes the character of a principal [illegible]

[illegible]

laches in questioning the alienation, but are also found purchasing the land from the transferor to the exclusion of the other collaterals, or cultivating the lands under the purchasers, or exchanging it with them, they must be taken to have acquiesced in the alienation and estopped from suing to contest it *Amir* v *Zebo*, 42 P. R 1902.

The fact that [illegible]

should have been sued against does not operate as an estoppel against him from contesting its validity in a subsequent suit *Mohunt Das* v *Nil Komal*, 4 C. W N 283

The maxim *caveat emptor* applies to execution sales In execution proceedings a judgment-debtor is not bound to come forward In the absence of any misleading on his part so as to estop him from asserting his title, mere silence on the part of the judgment debtor, or his omission to come forward, cannot operate as an estoppel *Gurupada* v *Irapa*, 14 B 558 A decree altered

by agreement of parties with respect to the mode of payment and the int re t payable, cannot be executed as a decree And the acquiescence of the judgment debtor in ... tion of it Debi I ... ment debtor for ... toppel under section 115 of the Evidence Act so as to preclude him from maintaining that the execution of the decree is barred by lapse of time *Mina Koonuari* v *Jaggat Setani* 10 C 196=13 C L R 385=10 I A 119 P C A judgment creditor by putting up the rights and interest of his judgment debtor in a *talook* for sale in execution is not estopped from afterwards claiming a portion of that *talook* under a different title, *e g* under a mortgage *Chunder Kant* v *P* ... 17 W I ... the sale ... thereby ... at a higl ... anterior ... *Hossain*, 10 C L J 605=4 Ind Cas 739 The auction purchasers at ... the execution of a decree were not estopped from asserting, as against a p r ou claiming to be a mortgagee prior to the sale of the property purchased that in fact the property was their own independently of the auction sale *Pandit Hanuman* v *Mufti Issadullah* 7 N W P 145 There could be no question of estoppel by conduct be ... haser at auction, who derives his title from ... as regards the former *Vasanji* v ... rights as heir, though he cannot prove a Will, under which he claimed a larger share in a former litigation in which no question of inheritance was raised *Moulvie Ahmedoolah* v *Gour Huree*, 15 W R 251 When in a suit for redemption the assignee of a usufructuary mortgage put forward or consented to put forward the original mortgagor as the person entitled to redeem, he is not thereby estopped from afterwards giving for redemption in his own account, for the defendant could not be said to have been in any way induced to alter his position or to do any act in consequence of any conduct on the part of the plaintiff *Mahammad* v *Mannu* 11 A 386=A W N 1889 136 Where a plaintiff, who was the nearest heir, allowed other heirs to join him in a redemption suit and such heirs spent money and actively assisted in prosecuting the litigation the plaintiff could not, after recovering the property assert his superior title as the nearest heir, and that he was estopped by his conduct from asserting such superior title the principle being that where a person has conducted himself so as to mislead another he cannot gainsay the reasonable inference to be drawn from his conduct *Bhagwant* v *Rajju* 9 Ind Cas 415. Where a person brought on the record, at the instance of the decree holder, as the representative ... application ... ent-debtor ... *in Dayal* A W ... rother, ... self ... money should ... indebtedness of ... im claiming the ... brother of his ... had support ... his brother and had also claimed a share and it was then decided that the property was the sole property of the deceased and that neither he nor his brother had a right to a share therein *Rajamannor* v *Venkata Krishnayya* 25 M 351=12 M L J 183 Where a purchaser under a registered instrument purchased the property with full knowledge of the existence of an optionally registrable but unregistered encumbrance thereon the doctrine of equitable estoppel applied and the purchaser could not claim as against the said encumbrancer *Miran* v *Ramasa*, 6 C P L R 112 In a suit for pre-emption under s 9 of the Oudh Laws Act, the defendant, in order to establish a plea of estoppel has to prove that the property was offered to the plaintiff at a certain price and that he expressly consented to the purchase of the property by the defendant

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ven lee and the Court should not be satisfied with anything short of this Some Judges have thought that such a plea should not be allowed at all in a case like this *Bank of Upper India* v *Munshi Hoji Prasad* 10 O C 257 Where tenants have paid, for a period extending over fourteen years an enhanced rate of rent an implied contract to pay at the same rate in future years may be inferred though they now and then expressed discontent without however resorting to the Revenue Courts for redress Their conduct in accepting pattas containing these terms even after protest may operate as estoppel in subsequent years *Ranganatha* v *Rangappa Appa Jan* 17 M 51 A grantee of lands as long as he holds a religious office in a temple is estopped from setting up a title inconsistent with that of the grantor and an alienee from such grantee is similarly estopped and the alienation itself is invalid as against the trustees of the temple *Thayellagam* v *Venkatarama Krishnayan* (1916) M W N 119=33 Ind Cas 858. When a grantor, by a recital is shown to have stated that he is seized of specific estate upon the assumption that such an estate was to pass an estate by estoppel is created between the parties and those claiming under them, in respect of any after acquired interest of the grantor, the newly acquired title being said to feed the estoppel is applicable to Hindu conveyances in cases before the Evidence Act *Krishna Chandra* v *Fasil Lal* 23 C L J 601=21 C W N 218=53 Ind Cas 568 It is not competent to a mortgagee to go behind a mortgage to dispute the right of the mortgagor to enforce redemption *Jugi Ram* v *Sheoraj Singh* 30 Ind Cas 231 In a suit by a creditor to recover money the debtor pleaded that the plaintiff was bound by the terms of a contract arrived at between the debtor and a third person for the purpose of paying off the plaintiff's debt There was no proof that the defendant was induced by the plaintiff to break his contract with the third person In the circumstances the defendant could not invoke the aid of the doctrine of equitable estoppel against the plaintiff and contend that he was bound by the contract entered

... *h Commercial Bank Ltd*
... ompromise is not estopped
... the instance of another
... *v Prosanna Kumar* 31

Ind Cas 858 Acceptance of rent by a landlord from the mortgagee on behalf
... invalidity of
... 764 On the
... of a share

... be allowed but without co ... that the
... leration of the 1st defendant giving up his
... ection 115 does not apply and there is
... *jana* (1915) M W N 237=28 Ind Cas

536 Where land stood in Revenue Registers, and the tax receipts appeared to be in the joint names of husband and wife the very fact that the wife was living on the property sought to have put the mortgagee on enquiry to ascertain what her real interest was So she was not estopped from showing that the land was her sole and separate property *P L R M Mejappa* v *Ma Mejeil* 8 Bur L T 124 Under Hindu Law a son has from birth an indefeasible right as a coparcener in the family property and mere unfriendliness on the part of his father cannot destroy that right unless and until he is regularly separated off and given his share of the family estate He is therefore competent to contest the alienation of ancestral property if opposed to the principles of Hindu Law But he loses his competency under s 115 of Act I of 1872 where he has condoned all that his father has done and he himself ...

5. ... he Court to grant him a declaratory decree ... *Alam Shah* v *Nurjanah Shah*, 63 P ... .8 Ind. Cas 804. An act may involve, and may create an estoppel So, if a man take an active part in carrying out a mortgage on behalf of another, as by signing the deed, his acts may amount to a declaration of the validity of the mortgage as against any claim but his own *Mussammat Buro* v *Mir Muham* ...

... debtors who were jointly liable under the decree in his favour ... under the decree *Held* that the person who omitted to raise the objection was estopped from denying that the judgment debtor was still the owner of the decree ... *operative Town Bank* v *S V K Shunm* ... 0 Rang 265 Persons opposing appeal ... in particular Court is estopped ...

... then accepted the payment of Rs 10 and the case was remanded to the ... The defendant having accepted the compensation money was equitably ...

1584 = A I R 1930 All 8 ... *Sheikh Dhannu* v *Sheolal*, ... *Ram Samej* 134 Ind Cas ... *uadu*, 131 Ind Cas 669 = ... A I R 1931 All 216, *M* ... v. *Tirunarayana*, A I R 1932 Mad 198; *Umrao* v. ... Lah 281

Mistake A mere mistake in a deed common to all parties or on account of which no o ... will not create an estopp ... *Jaynes*, L R. 6 Eq 12 ... either party *Halsbur* ... 1925 Bom 64; *Syed* ... Ind Cas 639 = ...

... whether this ... me of the ... *se*, 26 C ... view was ... *Dharma* ... "On the ... mortgage ... d No 133 ... to have

the deed cancelled on the g[illegible]
was an infant . . . . This co[illegible]
as interpreted by *Ganesh I*[illegible]
that having regard to that section proof of fraud on the part of the infant is not essential. The learned Judge in that case relies on the fact that in *Sarat Chunder* v *Gopal Chunder*, 20 C 296 and in *Mills* v *Fox*, 37 Ch. D 153, no [illegible]

[illegible]

the Evidence Act is
spect, I am unable to
which the learned
Judges in that Court rely as substantiating their proposition when carefully examined appear to one not to warrant the conclusion arrived at This has been pointed out by *Mr. Justice Jenkins*, and concurring as I do in his criticism I need not refer to what he has said The case of *Mills* v *Fox*, 37 Ch D 153 [illegible] *J* said "Then it was
[illegible] Evidence Act by his
[illegible] infant may estop him-
[illegible] would be practically
[illegible] contract
[illegible] by his
[illegible] *ocation*
[illegible] isability
[illegible] out of or
[illegible] it and
[illegible] *Bartlett*
v *Wells*, 1 B. & S 836 It follows therefore that when the present law declares that an infant shall not be liable upon a contract, or in respect of a fraud in connection with a contract he cannot be made liable upon the same contract by means of an estoppel under s 115 I, therefore, agree that there is no estoppel whatsoever in this case founded upon any representation or alleged representation on the part of the plaintiff" On appeal to the Privy Council, their Lordships said "But their Lordships do not think it necessary to deal with that question now They consider it clear that s 115 does not apply to a case like the present where the statement relied on is made to a person who knows the real facts and is not misled by the untrue statement There can be no estoppel where the truth of the matter is known to both parties" *Mohori Bibee* v *Dharma Das*, 30 C 539 (P C)=7 C W N 441 In *Jagor Nath* v *Lalla Prosad*, 31 A 21=5 A L J 674, *Banerjee J* said "I do not however, deem it necessary to express any opinion on the point, although it [illegible]

[illegible]

if it be
to say that
by deed
s imposed
on the capacity to contract So if a person sues an infant upon a contract such contract having been entered into on the faith of a representation by the infant that he was of full age the infant will not be estopped from pleading his minority in answer to a claim to fix him with personal liability for a money

... representation But though this section ... acting on well recognized ... ud" In the latest case of ... 'The question in this appeal ... estoppel against the minor ... d himself to them as a major when he with the ... leed in their favour It is argued on behalf of the appellant that the view of this Court differing from the other High C... a minor must now be held to be ... ons of their Lordships of the Privy Co... *Jai Kishore*, A I R 1928 P C 152= ... the plaintiffs respondents it is argued that the question was expressly reserved by their Lordships of the Privy Council as early as *Mohori Bibee* v *Dharmodas Ghose*, 30 C 539 (P C)=7 C W N 441 and the consistent decisions of this Court from *Ganesh Lal* v *Bapu*, 21 B 198, *Dadasaheb Dasarathrao* v *Bai Nahani*, 41 B 480=41 Ind Cas 180=19 Bom L R 561; *Jasraj Bastimal* v *Sadashiv Mahadev*, 46 B 137 cannot be held to be overruled by the observations in the recent Privy Council case, *Sadiq Ali Khan* v *Jai Kishore*, *supra*, particularly as similar observations of their Lordships of the Privy Council are to be found in *Mahomed Syedol* v *Yeoh Ooi*, 43 I A 256 (P C)=19 Bom L R 163 This last, however, was a case from the Strait Settlements and their Lordships observed 'A case of fraud by the appellant on the subject of his age was set up, but it cannot be doubted that the principle recently given effect to in the case of *R Leslie Limited* v *Sheill* would apply and such a case would fail In that case it was held by *Lord Summer* and other Judges that where a minor by fraudulently representing that he was of full age induced the plaintiffs to lend him money, such an action by the plaintiffs to recover the amount of the advance on the ground that he had obtained it by fraudulent misrepresentation must fail, even though fraud was proved against the minor On the present question, the other High Courts have differed from this Court *Dhurma Das* v. *Brahmo Dutt*, 25 C 616=2 C W N 33 on appeal 26 C 381, *Khan Gul* v *Lakha Singh*, A I R 1928 Lah 609, *Vaikentarama* v *Authimoolam*, 38 M 1071=23 Ind Cas 749, *Jagannath* v *Lalta Prosad*, 31 A 21=5 A L J 674=(1908) A W N 267, *Gangan and* v *Rameshwar*, A I R. 1927 Pat 271=6 Pat 338 As for the observations of the Privy Council in the recent case of *Sadik Ali* v *Jai Kishori supra*, cited for the appellant, the arguments are not reported, but ... lower Courts differed Their ... held that the mort... ecuted by them was a ... t of minority being ... s of the deed founded on is sufficient for the decision of the case such a deed executed by minors being admittedly a nullity according to Indian law and incapable of founding a plea of estoppel' I am unable to interpret this decision otherwise than as overruling the view of this Court and as agreeing with the view of the other H... C... By no ingenuity of argument can the view of this Court be ... uted by minors is incapable of ... his view of the law, even if in ... les minors, the general intention ... the rule of evidence in this section ... substantive law in s 11 of the Contract Act *per Best C J* in *Liverpool* v *Crase*, 5 Bing 177" *Balangowada* v *Gadigeppa*, 31 Bom L R 340=118 Ind Cas 998=A I. R. 1929 Bom 201, see also *Maung Tin* v. *Ma Lun*, A I. R 1927 Rang 108=5 Bur L J 141 If a minor by his conduct, allow his mother to act as the guardian of her sons and manager of the family property and to mortgage it, it is immaterial for the purposes of estoppel that his conduct was due to a mistaken impression as to his age. *Nathubai* v *Mulchahnd*, 3 Bom L R. 525. A minor, who ... to manage his own affairs, and ... covering again the same ... *Singh* v *Sheo Nandan*, ... evidence of fraudulent

representation on the part of the minor, the principle of estoppel cannot be invoked *Kumar Gangunand Singh v Maharaja Sir Rameswar Singh*, 6 Pat 338=8 Pat L T 730=102 Ind Cas 419=A I R 1927 Pat 271; but see *Jasraj v Sadasiv*, 1923 B 169 The mere fact that the purchaser from the guardian of a minor of properties belonging to the minor took a letter from the minor stating that there was necessity for the alienation does not estop the minor from impeaching the sale, so long as it is not shown that the minor caused or permitted the vendee to believe that necessity existed *Sitaram v. Mulchand*, 115 Ind Cas 175=A I R 1929 Nag 221 Where a minor executes a sale deed honestly representing that he was a minor and the vendee believes that representation and acts upon it, the minor is not estopped from setting up his minority and the sale is void as a plea *Koluri v Phumuluri*, 23 L W 521=94 Ind Cas 853=A I R 1926 M 607. This section is no more than a
nullify t
no one
a minor
contract *Pundrik v Bhagwantrao*, 96 Ind Cas 803=A I R 1926 Nag 491 When in a suit a person then alleged to be a minor was represented by his brother with whom he
the suit, he is es
against him in
majority just one
Ind Cas 606=24 A L J 817=A I R 1926 A 673 A minor is not estopped from setting up his minority *Hari v Roshan* 1923 Sind 5=71 Ind Cas 161. The conduct of minors cannot be pleaded in defeasance of their right to repudiate the act of their guardians during their minority But if their guardians had acted for their benefit and after attaining majority they continued to derive the benefit which the transaction conferred on them, it is not open to them to take advantage of the absence of registration, particularly when the parties can
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as a bar to a suit for ejectment on the expiry of the lease *Ponnuswami v Subramaniam*, 53 Ind Cas 412

another that he is a major, and that other lends money on a promissory note signed by the minor the minor may be in a suit on the promissory note estopped from pleading his minority *Jasraj v Sadashiv*, 23 Bom L R 975, see also *Harji Mal v Abdul Halif*, 20 Ind Cas 267, *Lenudomal v Ghurumal*, 14 S L R 104=62 Ind Cas 237, but see *Jambagathachi v Rajamannarsami*, 57 Ind Cas 678 But where there have been no misrepresentations by a minor as to his age or where misrepresentation has not misled the opposite party there can be no estoppel and infancy can be successfully pleaded *Wasunda v Sita*, 1 Lah 389=59 Ind Cas 393 *Gadu*
Kundan v Magan, A I R 1
minor, represented to the
he was a major and sold to h
possession of the house, h
being a person within the contemplation of this section and having by direct declaration intentionally caused the plaintiff to believe that he was a major, was precluded absolutely from denying the truth of that assertion *Dadasaheb v. Bai Nahani*, 19 Bom L R 561=41 B 480=41 Ind. Cas 180 But the law of estoppel must be read subject to other laws such as the Contract Act, and a minor cannot be made liable upon a contract by means of estoppel under s 115 of the Evidence Act *Golam Abdin v Hem Chunder*, 20 C W N 418=32 Ind. Cas 388 As a general rule, except in cases of fraud the doctrine of estoppel is not applicable to an infant, and the Court is never astute to hold

5. that his acts d
his contracts,
admissions of
17 C W N. 10 A min
guardian, though it may
against him is a quest
v *Susila*, A I R 1933

Person "The term 'person' in this section is amply satisfied by holdir
it to apply to one who is of full age, and competent to enter into a contrc
and I cannot bring myself to think that it could have been the intention o
the Legislature, by such
in the law of estoppel in
26 C 381=3 C W N
413=111 Ind Cas 175=
that the person in this
Balangowda v *Godigeppa*
1929 Bom 201, but see
"person" in this section sholud not be narrowed down so as to exclude
Hasinda Ram v. *Sita Ram*, 1 Lah 389=59 Ind Cas 393.

Admission whether operates as estoppel Admissions do not operate by
way of estoppel but it is for the party making them to explain those admissions
Secretary of State of India v *Vidyarah*, A I R 1929 Lah 718 An admission
made by the defendant when both the plaintiff and the defendant were under a
not estop the defendant from proving
Maniyan, 7 L R 201 (Rev)
vious case that he was an ex-proprietary
law cannot create estoppel against
. 5 A 43 (2)

Attestor of a document—if and when estopped The mere attestation of
a party does not estop him from asserting that he had the knowledge of the
contents of a document or that he was not bound by the recitals in the
asserts the facts that are stated in the
thuba Ram v *Ram Pyara Mall*, 116 Ind
Lah 224=112 Ind Cas 89=A I R
agor Singh, 47 C L J 189=107 Ind
N 538=26 A L J 553=A I R 1928
o mere attestation of a document cannot
Sarup v *Kishen Sahai*, A W N 1883, 142,
Abdul Aziz v *Abdulla*, 26 P L R 215=7 Lah
I R 1925 Lah 413; *Azizullah* v *Ghulam*,
Ind Cas
815 Attestation of a deed
whatever except that he
independent
Pandurang
=35 C. L J
7 Ind Cas
264.

Party estopped from pleading fraud It is not open to a party to plead
Ram Lal v. *Har Lal*,
237 Estoppel is an
r of his rightful claims
urther of his rights
patwari to conceal his
to plead that his
shall be allowed
3 A 257 (Rev)
ged, fraudulently
endorses it over to another person, cannot, in a suit by such person for the
recovery of the consideration paid by him for the *hundi*, set up the forgery of it
as a bar to the suit *Bishnu Churn* v. *Rajendra*, 5 A 302=A W N 1883,

S.

A person sued for possession of half the properties on the ground that it was joint property of himself and the defendant The defendant pleaded that the plaintiff's share was sold to him by the plaintiff The plaintiff was held under these [illegible] that the sale was colourable [illegible] to the rule of *pari delictum* [illegible] 38 P. R 1892; see also [illegible] *Nawab Sidhu* v. *Oodhyaram*, 5 W R 83 (P C)=1[illegible] have recourse to the doctrine of [illegible] party who does not come into Court [illegible] 20 C W N 677=33 Ind Cas 762 [illegible] defeated by showing that the attached house did not belong to the judgment-debtor, the judgment debtor cannot claim either the ownership in the whole house and site or the equitable interest to the extent, of the sums spent in building the house *Suba Rao* v *Veeramunay Swami*, A I. R 1930 Mad 298=126 Ind Cas 279

Estoppel [illegible] to give effect to a statut[illegible] against a statut[illegible] Mad 622 [illegible] *Singh* [illegible] 1929 All [illegible] Cal 433; [illegible] *rance Co*, [illegible] law giving rise to the jurisdiction of [illegible] *India Ltd*, A. I R. 1928 Lah 802 [illegible] and unlawful by statute, a party cannot, by representation, any more than by other means, raise against him an estoppel so as to create a state of things, [illegible]

[illegible] cannot [illegible] for on a point of law there can [illegible] asking [illegible] is void [illegible] R 162= [illegible] competent [illegible] such an enactment a thing from which a Court can [illegible] parties, or by a failure to plead to argue the p[illegible] *Briton*, 52 C 408=23 A L J 105=29 C[illegible] any estoppel against a statute nor can the parties contract themselves out of any statute *Jnanendra Nath* v *Nalini*, 87 Ind Cas 565=A I R 1925 Cal 1262 The [illegible] void [illegible] 219 [illegible] of In[illegible] *Motor* [illegible] *Janaadoo*, [illegible] Ind Cas 126 A representation as to a question of law cannot give rise to an estoppel *Rajambai* v *Shanmuga*, 70 Ind Cas 653=

1923 Mad 11 There cannot be any estoppel against a statute and a statutory defence not set up in a prior suit can be set up in a subsequent suit *Nafar Chandra* v *Bhusi Molla*, 65 Ind Cas 851 So there is no estoppel against the

C W N 329=1922 Cal 436=49 C

437=51 Ind Cas 403; *Bangshi* v

umar, 5 *Luck* 731=A I R 1930

R 1930 Nag 191, *Mirza* v *Handa*

Lou v *Sulhana*, 58 C 1453=35

Mal bub Ali, A I R 1931 Oulh

Pat 481=35 C W N 354 P C,

Sibaisubramania v *Subramania*, A I R 1932 Mad 409=55 M L W 390

Bimalabala v *Deb Kinkar*, A I R 1932 Pat 267. An admission on a point of law is not an admission of a "thing" so as to make the admission matter of estoppel within the meaning of s 115 of the Evidence Act *Jogmant* v *Sian* 21 A 285=A W N 1885, 66; *Tel Chand* v *Gopal Devi* 13 Ind Cas 482=46 P R 1912 No estoppel can be pleaded against the directions and prohibitions enacted by the statute law and against the rights accruing to any party by reason of such directions and prohibitions *Chidambarachalliar* v *Vaidili*, 38 M 519

There can be no estoppel against an Act of Parliament or against an Act of legislature ... at the plain provisions of ... 3 Bom 135=35 B 67 ... 2-0= 4 Ind Cas 4 ... *Irlandi* ... and a v *Ripusudan* ... mel is mortgagee t ... *ya Devi* inapplicable v *Haridas*, 42 C 455=19 C W N 208=20 C L J 183

Declaration, act or omission must be of an unequivocal and ambiguous character To create an estoppel against a party, his declaration act or omission must be of ... *Nilo* 6 Bom L R 864 ... uous ... *ank of* it must be ... 83, *India*, 2 B ... clara *Raghunath* ... actor tion, act o ... Just *Astamoorth* ... as an estopped cannot be created by an ambiguous document so too it cannot be created by an ambiguous act *Mamsa* v *Sallappu*, 46 Ind Cas 609 A representation, to found an estoppel, must be clear and unambiguous, not necessarily susceptible of only one interpretation, but such as will reasonably be understood in the sense contended for, and for this purpose the whole

891) 3 Ch 82 C A,

anagh, (1902) A C 117

rd Building Society v

his is merely an applica

"must be certain to

379; see also *Ram* v

25; *Gajanan* v *Nilo*

Lah L J 45

Plea of acquiescence—Necessary elements Where one person constructed a building on another's land ... to him and though the owner of the land w ... same and the building was allowed to ... l, that the owner of land had acquiesced in the construction and that he could not after such lapse of time turn round and ask for a demolition of the building *Mahomed Husain* ... a man of his lega ... 891= A I R ... 235= A I ... an two years w ... sprayet before ... equies- cence, c ... of the

site before building was begun *Mahadeo Patil* v *Narayan*, 101 Ind Cas 565= **S.**
A I R 1927 Nag 318 Acquiescence implies that a person who is said to have
acquiesced did so ... other person acted in the
bona fide belief th... The absence of either of
these elements ma... acquiescence which will

... connotes, among other
... to the person who is
... his right is being
invaded, and that the party relying upon his representation has altered his
position to his detriment under a mistaken impression that he was legally
justified in acting as he has done *Gourlal* v *Ramcharan* 29 C W N 931=52
C 748=89 Ind Cas 801=A I R 1925 Cal 1107 Where a person allowed
another ... though he was not expressly
appointe... wards impeach
his actio... Laches can
be prove... nt or acquies-
cence

A mere delay in filing a suit for the removal of an encroachment does not *per se* constitute an acquiescence *Narayan* v *Laxmanrao* 105 Ind Cas 286 In applying the doctrine of estoppel by acquiescence in a case of erection of buildings, the primary thing to consider is whether the person who acted in contravention of his rights had a *bona fide* belief or not that he did possess a right to erect the building *Mt Lai Rampi* v *Jasim* 101 Ind Cas 630=A I R 1927 All 541 So in order to sustain a plea of an acquiescence and to raise a
bar ... it to show
that ... interfering,
or ... hat he had,

on his part to take the necessary steps to protect his rights, he is estopped from asserting his title *Maung Kyaing* v *P L Ium*, 6 Rang 643, see also *Imami* v *Ibrahim*, A I R 1929 Oudh 292 Coincident with common law
doctrine ... as explained in several
well know... 129 at p 140, *Lord*
Cranworth ... 'If a stranger begins
to build o... erceiving his mistake,
abstain f... severe in his error, a
Court of equity will not allow me afterwards to assert my title to the land on which he has expended money on the supposition that the land was his' In a case of that description the estoppel rests upon the particular basis of actual acquiescence It seem... *Burse*
v *Ali*, 47 L J Ch 381 ... vering
the judgment of the C...) at p
314) 'If a person having a right and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might

otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act " In *Wilmote* v *Barbur* 49 L J Ch 732=15 C ... cence which deprives a man of ... *Jones Brothers* v *Woodhouse*, 9 ... ing in what is done by another, a person may be estopped from afterwards alleging a different state of facts from that which the other assumed to exist *Mold* v *Wheat Croft*, 27 Beav 510, *Fisher* v *Magnay* 5 M & Gr 778 *Rule* v *Jewell*, 18 Ch D 660, *In re Burnad's Bank Peel's Case* L R 2 Ch 671; *Shereden* v *Barret* 4 L R Ir 223, *Thomson* v *Rouske*, (1893) P D 70 It must be shown that it was the duty of the acquiescing party to have spoken (*M'Kenzie* v *British Linen Co*, 6 App Cas 82) and that he had knowledge of the matter in which he is alleged to have acquiesced *Ramsden* v *Dyson*, (1869) L R 1 H L 129, *Lunch* v *Commissioners of Sewears* 32 Ch D 79=55 L J Ch 439; see also *The Gujrat Ginning Co* v I ... *Nambudripad*, 96 Ind Cas 915=A I ... 73 Ind Cas 137; *Paddu* v *Mahabir P* ... 44 Ind Cas 517.

... defence on the ground of acquies... *Joseph* v *Joseph*, 5 Bur L J ...

Where the defendants regarded through mistake certain land to be their own and partitioned it among themselves and there is no evidence to the effect that the plaintiff knew that the defendants were partitioning his land as theirs and the plaintiff kept silent knowing that the defendants were likely to be prejudiced by the partition and by a subsequent claim on the part of the plaintiff, the plaintiff has done nothing and is not estopped from setting up his title and possession to the land by the principle of acquiescence *Mubarak* v *Mahomed*, 97 Ind Cas 268=A I R 1926 All 721 Where a party has derived any advantage and taken benefit under the order of the Court, he is to be deemed to have acquiesced i ... to challenge it at any subsequent proceeding or b ... *Ali*, 95 Ind Cas 10=A I R 1 ... party having an interest to prevent an ac ... at he been done and acquiesces in it ... his consents to it, and the position of ... n he sincerity, he has no more right ... mere would have had if it had been don ... acquiescence is not equivalent to consent, yet consent need not be by word and may be by act, and if consent can be intimated by conduct as well as by act it is clear that acquiescence may, under certain circumstances be taken to be consent *Unaram* v *Pruk*, 85 Ind Cas, 540=A I R 1925 Cal 993

Where a person objected to another putting up a structure on his land and objected before the Municipal authority who however refused to go into the question of title, he cannot in any sense be held to have acquiesced in the act *Kokla Kumar* v *Kahan Mal*, 1923 All 452, see also *Moola* v *Bahosu*, 1923 All 567.

Estoppel by silence Mere omission to speak does not create estoppel in the case of a person who is under no duty to speak *Kanchan* v *Kamala* 21 C L J 441 It is essential to an estoppel that the person estopped should be under a duty to some other person to speak or to act, and that his failure to perform that duty should have caused damages to that other person *Jones Brothers* v ... see also *Proc...* ... rton ... *Laller* ... as it is ... *rayan* ... estoppel ... 510= ... 717; ... C C ... may be cases in which there is deception by omission, but silence may be ... ted as

deception only where there is duty to speak ; in other words, as *Bigelow* points out, 'duty to speak, which is the ground of liability, arises wherever and only where silence can be considered as having an active property, that of misleading' (*Bigelow on Fraud*, vol I, p 597) To take one illustration "The silence of A in the presence of B and C who are negotiating in regard to a sale of property, from B to C, estops A from claiming the property as against C, upon the conclusion of the sale but knowledge by an owner of property that

[illegible]

silence may be treated as a true cause of the change of position, in the other case, it cannot be so considered, The question consequently arises, whether there has been on the part of the defendants a disregard of a duty to speak . . . As was observed by *Lord Chancellor Thurlow* in *Fox* v *Mackrell*, 2 W & T L C 709, [illegible]
has been taken which [illegible]
would not have take[illegible]
obligation on the party [illegible]
to bring his silence [illegible]
[illegible] concealment which [illegible] ase must amount [illegible] tances is bound [illegible] respect to which [illegible] nition of undue
concealment which amounts to a fraud in the sense of a Court of Equity and for which it will grant relief, is the non disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely *in foro conscientiae*, but *juris et de jure*, to know" *Per Mookerjee* in *Joychandra* v *Srinath*, 1 C L J 23 (28)=32 C 357, see also *Mohunt Das* v *Nil Komul*, 4 C W N. 283, *Mle*[illegible] *Dayal Mouji*, 6 Bom [illegible]
one of the three broth[illegible]
knowledge of the ea[illegible]
building on the land [illegible]
fact that they knew [illegible]
asserting their own ri[illegible]
they were consequently estopped from asserting those rights in a suit *Dhanpal Rai* v *Gwanditta*, 2 Lah 258=64 Ind, Cas 520=10 P L R 1922 An abstinence from interference on the part of the owner of land, upon which another man is building does not raise an equitable estoppel against him In order to estop the owner, it must be proved that besides his abstinence there was a mistaken belief in the builder that the land was his own property *Mahammad Umordarga* v *Mora*, 6 A L J 57=1 Ind Cas 821, see also *Ismail* v *Broughton* 5 C W N 846

[illegible]

time, it has no application where the person ag[illegible] be applied is under no duty to speak *Kanchan* v *Kamala*, 21 C L J 441=29 Ind Cas 734 A duty to speak arises whenever a person knows that another is acting on an erroneous assumption of some authority given or liability undertaken by the former, or is dealing with or acquiring an interest [illegible] 7 Moo & C 417

[illegible]

entire or main cause, but one of the causes of the change of position, and whether upon due regard to all the circumstances, it is just that the defendants should be prejudiced in the manner in which they have been prejudiced by the omission of the plaintiff to speak *Thomas Barclay* v *Syed Hossein* 6 C L J 60 When silence is of such a character and under such circumstances that it would be a fraud upon the other party, for the party which has kept silence to deny what his silence has induced, it will operate as an estoppel *Jolpomull* v *Saroda*, 7 C L J 604

Estoppel by omission The acquiescence or estoppel which will deprive a man of legal rights must amount to fraud A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent to set up those rights The element, or the requisites necessary to constitute fraud of that description are these —In the first place, the plaintiff must have made a mistake as to his legal rights ... must have ex pended some money or must have don... defendant s lands) on the faith of the r... the possessor of the legal right must kno... is inconsistent with the right claimed ... it he is in the same position as the plaintiff and the doctrine of acquiescence founded upon conduct with a knowledge of your legal rights Fourthly, the defendant, the possessor of the legal right must know of the plaintiff s mistaken belief of his rights If he does not, there is nothing which calls upon him to assert his own rights Lastly the defendant, the possessor of the legal right must have encouraged the plaintiff in his expenditure of money or in other acts which he has done either directly or by abstaining from asserting his legal right Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it but nothing short of this will do *Hemangini Debi* v *Bijoy Singh* 73 Ind Cas 233, see also, *Bishan Singh* v *Bulanda* 4 Lah L J 419 The estoppel under this section may arise by reason of either a declaration, an act or omission, but in either case there must be an intention on the part of the person against whom the estoppel operates to cause or permit a belief in the mind of another In the case of a mere omission, no such intention can well be imputed unless the true facts are known to the person whose omission is in question, but where there is a deliberate declaration or act causing or permitting such belief and inducing another to act upon it, it must be presumed that such declaration or act was intended to have its ordinary and natural effect upon the mind and actions of the other party *Raith* v *Forbes*, 3 Pat L T 467=67 Ind Cas 741=(1922) P 209 Mere acquiescence on the part of the true owner, or omission to volunteer any advice or assis... ...selves have ascertained the truth by ... ...its of such owner A pers... ...he has acted in such a way as ... ...same The illustration to section 115 of the Indian Evidence Act sets forth that one is bound who intentionally and falsely leads a purchaser to suppose he is taking a perfect title There is an obligation to truth in speech, and act, but no obligation to speak or act where no confidence is given or accepted merely for the purpose of guarding or furthering the interests of strangers proceeding wholly *in invitum* and with an omission to inquire which is equivalent to knowledge *Basantopa* v *Ranu*, 9 B 96

S died leaving three sons and a daughter H who was the plaintiff in this case S died more than 12 years prior to the suit, and upon his death his three ... ...clusion of H It ... d live on amicable ... d ever since, there ... ecuted a deed of ... for recovery of her share of inheritance under the Mahomedan Law, by avoidance of the deed of sale mentioned above The defence to the action was that the plaintiff, having omitted to enter her name in the Government record, was estopped from maintaining her claim against the defendant who was a transferee without notice. *Held*, that there was no evidence on the record to show that the omission on the part of the plaintiff to have her name entered in the Government Revenue

records were intentional within the meaning of s 115 of the Evidence Act or that it was by reason of such omission that the defendant altered his position so as to operate as an estoppel against the plaintiff and that, as the plaintiff's title was admitted, she should get a decree in her favour. *Gobordhan* v *Hisrit*, A W N 1887, 110. The doctrine of estoppel cannot be said to rest absolutely upon any notice of duty on the part of the person sought to be estopped; and the word "omission" used in section 115 of the Evidence Act does not mean only an omission to perform such a duty as is prescribed by law *Munk Ram* v *Ram Autar*, 27 Ind Cas 611

Estoppel by waiver Where a party to a suit agreed to a decree in favour of his opponent on certain conditions which were not afterwards fulfilled and
purpose of
Nor do they
facts in any
Parties may
by their conduct in the course of a suit preclude themselves in a subsequent suit from asserting rights which they have waived deliberately *Jinli* v *Kamalathammal*, 7 M H C 263 A waiver is an intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of
ver unless the person against whom the
re of his rights and of facts which could
or the enforcement of such rights No
ignorant that it has been committed and
confirm it *Dhanuk Dhari* v *Nathuni*,
, 2 B & B 128 *Darnby* v *Londen R. Co*,
H L C 223, *Austin* v *Chambers*, 6 Cl & F 1, *La Banque* v *La Banque* 13 App Cas 11, *Imbula* v. *Whiteuall*, 6 C. L J 111, *Nripati* v *Jatindra*, 91 Ind Cas 407, *Jahandar* v *Ram Lal*, 37 C 440

Order of Court There can be no estoppel where a party acts under a mistaken impression as to the legal effect of an order *Abdulla Sahib* v *Muhammad Husain*, 5 Mys L J 182 An involuntary act done by a person in pursuance of an order of Court cannot operate as an estoppel against him and prevent him from enforcing the remedy given to him by law *Ishar Das* v. *Bula Lal*, 115 Ind Cas 67 = A I R 1929 Lah 42; see also *Mani Lal* v *Durga Prosad*, 5 Pat L T 425 = 3 Pat 930 = 80 Ind Cas 667 = 1924 P 673 = 1924 Pat 254; *Balgobind* v *Sheo Kumar*, 82 Ind Cas 481 = 2 A L J 791 Where a party has adopted an order of the Court, and acted under it he cannot after he has enjoyed a benefit under the order contend that it is valid for one purpose and invalid for another *Jogendranath* v *Khoda Bux* 72 Ind Cas 554

Application of equitable estoppel in case of part performance Where there a permanent lease to the he defendant came into poss on the land but no leas ejec be C I pow the actings and conduct of the parties have carried the incompletely executed engagements into effect The doctrine of case when a Hindu widow even though remains in possession thereof *Raj Baha* Ind Cas 822 = 2 Pat 697 = 4 Pat L T 33 will not fail to support a transaction clothed imperfectly in those legal forces to which finality attaches after the bargain has been acted upon The law of India is not inconsistent with the principles applied by equity in such cases but on the contrary follows them *Mahomed Musa* v *Aghore Kumar*, 19 C W N 251 When in pursuance of an agreement to transfer property the intended trans- had not been ecuted subject ained between time as the

5. subsequent legal question falls to be determined *Gajendra Nath* v *Moulari*, 27 C W N 159, see also *Pitamber* v. *Ramchurn*, 28 C W. N 157

Estoppel and Adoption In a suit by reversioner for a declaration that an adoption, by a widow is invalid, no estoppel arises as against the plaintiff by reason of the mere fact that he concurred in the adoption which was supposed ' valid *Gurlingasuamy* v *Ramalakshma* delivering the judgment on this point ppel can arise from ignorance of law which low The adoption took place in 1859 table con siderations consequent on the growth of operty under an invalid adoption concurred in e It both of a religious act option generates with the in

1 by marrying him to a girl of her own ce 1 the funeral ceremony of her husband estops her he adoption *Kannabumal* v *Virasami* 15 M *Vinayakrao* v *Lalshmibai* 11 B 381 A widow represented that she had authority to adopt, and the ceremony of adoption was carried out on the faith of the representation and the marriage of the adopted son was celebrated by the adoptive mother, the adoption was then challenged by a reversioner and the adopted son in order to defend his right incurred heavy responsibilities, *held*, that the adoptive mother was estopped from maintaining a suit for a dec *Dharm Kunuar* v *Balwant Singh*, 5 519, see also *Durga* v *Khuspalo*, A 1, 15 M 397=5 M L J 66

The rule of estoppel by conduct does not apply to a case where no doubts were enter made by him, and all tha n for a belief in sequent conduct contributed to the persistence of the adoption in that belief, and that in consequence a share in the inheritance 3 (F B) Where an adoptic permission from her decease nying it by the circumstance n adoption *ab initio* invalid the ground of estoppel only when, by a course of conduct long continued on the part of the family which has purported to affiliate him, his situation in his original family has been so altered that it would be impossible to restore him to it *Parvathibogamma* v *Ram Krishna Rau* 18 M 145=5 M L J 41; *Kateri* v *Babaji* 19 B 374 Where a person is treated by another in such a way as leads him to believe that he is the adopted son of that other and on that footing and on account of such acquiescence and by reason of such encouragement he severs his connection with his natural family or undergoes a change of circumstances in such a way that when restored to his natural family his position would be very different from what it would have been if he had never left it the pe through him will be es *Puruk Chand*, 85 Inc *Ghulam* 96 Ind Cas 7. ough an adoption is invalid, circumstances may arise in which the likelihood of hardships to be caused to the adopted boy in upsetting the adoption on which that it would be the person person who sets up the estoppel to prove conclusively that he was in fact adopted by the father resiling from the story of the adoption, but it is enough damnified if he

proves to the satisfaction of the Court that the likelihood of his being prejudiced by the alteration of position was so great that the Court will presume that the adopted boy must have been damnified Also, estoppel being simply a principle of the law of evidence, it creates no substantive rights of an absolute character but commonly operates to close the mouths of certain people who have acted in a certain way from se[illegible]
will operate only [illegible]
Parasuramayya v [illegible]
I. R 1927 Mad 7[illegible]
in the manner customary among the Agarwallas The story of the regular Brahminical adoption of the same boy previous to the Agarwalla adoption was invented with the object of giving to latter adoption the rights of collateral succession The acts and representations of the plaintiffs were set up as estopping them [illegible] that the [illegible] that the [illegible] *Dhan-* [illegible] J 273=49 M L J 173 (P C) Where a person executed a registered document declaring he had adopted another, and in mutation proceedings described himself as the [illegible] into a compromise wherein for [illegible] ion of repudiating such adoption, [illegible] no adoption *Kunwar Dutt* v [illegible] on a matter of law i e as to the validity of an adoption creates no estoppel *Rajamal Amma* v *Shanmuga*, 70 Ind Cas 653=1923 Mad 11

[illegible] under s 115 [illegible] osition of law [illegible] supported the [illegible] a representa- [illegible] an estoppel [illegible] arrangement [illegible] as partitioned [illegible] ng a son and [illegible] y be the legal position as regards the validity of the adoption B was estopped from questioning the validity of the same *Ichhnun* v *Banwari*, 114 Ind Cas 711=A I R 1929 Lah 16 But where a person was at best a mere witness for the adoption of a boy by a Hindu widow and [illegible] tion in the matter to which [illegible] validity of the adoption an[illegible] *Amarendra* v *Banamali*, 10 P[illegible] I R 1930 Pat 417

Estoppel by acts of Government officer A Government officer had no authority to waive the rights to which the [illegible] escheat, and a decree founded thereon by a com[illegible] operate as estoppel *The Collector of Masulipatam* [illegible] 2 W R 61 P C=8 M I A 529

Inconsistent pleas It is an elementary rule that a party litigant cannot [illegible]

[illegible] Pat L J [illegible] Ind Cas [illegible] A person who successfully sues another for rent cannot subsequently be heard to impugn that the defendant was a tenant *Jitan Mahton* v *Lala Bhagwan*, 64 Ind Cas 262

5. Neither he nor his representatives Where a person by his own solemn and deliberate act wilfully induces another to believe the existence of a certain state of things, and to deal with him on the faith of it, he and as a general rule his heirs or those who claim ur ... tation so made and will never ... other *Moonshee Syeed A* ... the exection sale acquires ... and does not consequently ... judgment debtor does in the ... v *Jogendra Chandra* 23 ... *Nandu* v *Jogendra* 70 Ind ... is his legal representative *Syed Md Hasan* v *Syed Ali*, 10 O & A ... 1929 It is not open to the representative of a lessor to prove that the status of the original lessee was other than what was described in the deed of lease *Iswor Chandra* v *Goursunder*, 1933 Cal 603 Where the conduct of a grandfather has given rise to estoppel, the grandson claiming through him is bound by it *Moman* v *Dhanu* 1 Lah 31 = 55 Ind Cas 869 A subsequent mortgagee is bound by the representation made by the mortgagor to prior mortgagee and is estopped from challenging the validity of the prior mortgagee so far as it affects *the share which was subsequently mortgaged* *Gurdayal* v *Taid Husain* 51 Ind Cas 766 A mortgagee who purchases the property at a sale in execution of his decree on the mortgage is bound by an estoppel that would have bound his mortgagor *Kalidas* v, *Prasanna* 15 Ind Cas 189 The doctrine of estoppel is applicable to persons claiming under those whose conduct had led to change of position *Rajah of Deo* v *Abdulla* 45 C 909 = 45 I A 97 (P C), *Badri Bisl al* v *Brij Nath* 5 O L J 458 = 47 Ind Cas 934 *Jagannath* v *Syed Abdulla* 16 A L J 576 = 35 M L J 46 = 20 Bom L R 851 = 22 C W N 591 = 28 C L J 162 = 45 Ind Cas 770 (P C) The equitable doctrine of estoppel as laid down in 11 B L R 46 which applies to any person is equally binding on the purchaser of his right title and interest at a sale in execution of the decree *Mohamed Mozaffer* v *Kishori Mohan Day* 22 C 909 (P C) = 22 I A 129 = 5 M L J 101 In *Debendranath Sen* v *Mirza Abdul Samed* 10 C L J 150 (165), *Mookerjee J* said 'It was ruled by this Court in *Kishori Mohun* v *Mohamed*, 18 C 188 (198) contrary to the principle deducible from *Richards* v *Johnston*, 4 H & N 660 and *Herne* v *Rogers* (1891) 1 Q B 230 that the estoppel that would bind A would also bind the execution purchasers of his interest This view was subsequently affirmed by their Lordships of the Judicial Committee and they rested their conclusion on the ground that the principle of estoppel, founded in that case upon the decision in *Ram Coomar* v *Moqueen* L R 1 I A sup Vol 40 applied not only to A but also to the execution purchasers of the interest of A who were equally bound by it as they had purchased only his right title and interest This is in accord with the statement of the rule by *Kay L J* in *Mad i* v *Thomas* 18 W R 2 1 No doubt, the statement sometimes has been made by text writers (*Hukum Chand on res judicata*, 204 and *Caspers on estoppel* 2nd Ed 66) apperently on the basis of judicial dicta of the highest authority that as there is no privity between the purchaser at a sale in execution of a decree and the judgment debtor whose property is sold, the purchaser at the execut on sale is no ... judgment debtor ... Thus in *Anundo Mo* ... observed that the ... on the same footing as the title of the mortgagor or of a person claiming u voluntary alienation from the mortgagor Again in *Imrit Koer* v *Debee Pershad* 18 W R 201 *Sir Richard Couch* remarked with reference to purchaser at an execution sale that they were not in ... conveyance direct from the party and were therefore ... might have stated on some previous ... the observations of *Sir Barnes Peacock* in *Dinendra Nath* v *Gour ...* 7 C 107 = 8 I A 65 'There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree Under the former the purchaser derives title through the vendor and cannot acquire a better title than that of the vendor In the latter, the purchaser, notwithstanding he acquires merely the right, title and interest of the judgment debtor acquires that title by operation of law adverse to the judgment debtor and freed from all alienations or incumbrances effected by him subsequent to the attachment of the property

sold in execution'. On the authority of these observations it was ruled by this Court in *Parlu Lal* v *Mylu*, 11 C 101 that a purchaser at an execution sale was not the representative of the judgment debtor for the purpose of the rule of estoppel Substantially to the same effect are the decisions in *Ringo Monee* v *Raj Coomaree* 6 W R 197, *Gour Sunder* v *Hem Chander*, 16 C 355 and *Bishi Chander* v *Enayet Ali*, 20 C 236 There can be no question, however, that the rule so widely formulated in these judicial dicta, is neither supported by authorities nor defensible on principle It will suffice for our present purpose to refer to the judgment of the Full Bench of this Court in *Ishan Chunder* v *Beni Madhab*, 24 C 62 in which it was pointed out that the view taken in these cases

the decisions of the Judicial

I I A 101 and *Dinendra* v.

" See also *Radha kanta* v

Ildramal, 18 M 13;

, *Lepin* v *Jogeshwar*, 31 C.

; *Nandalal* v *Jogendra*, W N ; *Sashibhusan* v *Debnath* 60 Ind Cas 705, *Prolyot* v *Jori*, 16 Ind Cas 792 A person is not estopped from instituting a suit for a share of joint ancestral property by the circumstance that he claims under one who, when sued on a former occasion as trustee, never pleaded that he was a co-parcener *Surnomoyee* v *Gunga* 2 W R 264 An admission by an adoptive mother, in a suit brought by her mother in law to set aside the adoption, that an alleged *unomutteeputtra*, under which her mother in law had previously professed to adopt a son to her deceased husband was valid, would not estop her adoptive son from denying the validity of that instrument in a suit subsequently brought by him for the assertion of his rights under the adoption *Annundomoyee* v *Sheeb Chunder*, Marsh 155 Where a trustee does any act in

by way of estoppel,

Keshavrao, 15 B 625

on son, the real revers

Ind Cas 50

The doctrine of estoppel cannot bar the plaintiff's claim in a suit, when

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necessary implication the interest which he had in the property *Dadabhai* v *Cousji*, A I R 1925 P C 306 A purchaser at an execution sale is bound by the same rule of estoppel as the judgment debtor and consequently he cannot dispute the validity of a mortgage which the mortgagor himself is estopped from questioning *Nandalal* v *Jogendra Chandra*, 36 C L J 421 Where a plea of estoppel is raised a person is bound by the previous knowledge of the former owner *Sharju* v *Shri Radhika*, 15 R D 43 Acts in representative character do not create estoppel on personal claims *Ram Horakh* v *Hanumant*, A I R 1930 P C 249

Constructive estoppel The law knows no such thing as constructive estoppel *Parsotam Gir* v, *Arboda*, 21 A 505 P C = 3 C W N 517 = 1 Bom L R 700 = 26 I A 175

Fraud whether necessary to give rise to estoppel This section embodies the rule of English law on the subject of estoppel 'The doctrine of estoppel is based on a fraudulent purpose and a fraudulent result If, therefore, the element, of fraud is wanting, there is no estoppel There must be deception and change of conduct in consequence" *Ganga Sahai* v *Hira Singh*, 2 A 809 (F B)

Estoppel whether can arise when document is inadmissible The rule of estop

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entry at settlement merely amounts to an admission and there was no change of position of the tenant to his detriment *Chhli v. Naval Mumtaz*, L R 3 A 252 (Rev) A *chatual* ... S.

... brothers owned a house which was attached and sold in execution of a decree against D L obtained a preliminary decree for the partition of his share but before it was made final, the house had been sold The defendant who was a tenant thereupon executed a *Sarkhat* in favour ... rought by the purchaser for ejectment, ... ng executed a *Sarkhat* in favour of the ... the plaintiff's right to get it vacated ... 41 A 651=17 A L J 805=51 Ind. Cas 518 Where a landlord with knowledge of an alienation accepts rents from the alienee, he is as much bound by the alienation as if he had expressly assented to it *Paghubir Singh v Kedar Nath*, A W N 1892, 107; see also *Ganga v Ram Guti*, 2 Agra 48, *Gala v Ramji*, 73 P R 1900, *Fazl v Godar Khan*, 161 P R 1883 An owner of land omitting to sue for demolition of buildings, when the infringement of his right is first threatened or commenced is estopped from claiming demolition, but is only entitled to compensation *Bhagh v Nadir*, 57 P R 1871 A tenant cannot be permitted to object to the terms of a *patta* when he has accepted previously similar *patta* for a series of years; for that constitutes a representation by conduct that the landord may ... were proper ones, which, of course, would ... in so many words *Sree Sankarachari* ... The service of a notice for ejectment under ... of Act XII of 1881, presupposes the existence of the relationship of landlord and tenant between the person who causes it to issue and the person to whom it is served And the landlord cannot afterwards bring a suit for ejectment in a Civil Court to eject the same person from the same land, alleging that it is not tenant but only a purchaser *Baldeo v Imdad*, 15 A 189=A. W. N 1893, 93

The previous acceptance of a *pattah* from one who was neither a registered Yeomiabdar nor lawfully entitled to the Yeomiah; but who performed the service for some time, apparently under a deed of assignment executed in his favour by the previous Yeomiabdar, is a good defence to a suit by lawful owner against the raiyats to enforce acceptance of *pattas*, when the owner's conduct is such as to justify the belief of the raiyats that the assignee was authorised to collect rent from them until the assignment was questioned by the owner and a notice of his title given to them *Khador v Subramanya* 11 M 12 The Rajah of Tipperah granted *Sanad chits* to certain tenants permitting the tenants to construct embankments to a silted up tank and to re excavate the tank, but no rent was reserved for the tank The tenants acting upon that *sanad*, spent money ... g regard to ... the Rajah ... ing that the ... ah *Birenda* ...

ment fro ... previousl ... A party ... cannot i ... *Backergu* ... money deposited by ... decree of rent is ... to a recognition of t ... depositor not havir ... principle of estppel ... 192=11 Pat 257 ... estop the landlord from denying the status of a person claiming rights on the basis of such misdescription *Ganpat v Raghubir*, 12 L R 326 (Rev) Where a person had been in long enjoyment as a co tenant to the knowledge of the Zemindar who also sued him as co tenant, *held* that the zemindar was estopped from disputing the status of the tenant *Hishmat v Wali*, 15 R D,

5 rule that an occupancy tenant who makes usufructuary mortgage of his holding to another man is estopped from alleging that the other man is his sub-tenant has no application where the mortgage is unregistered and so ineffective to pass the mortgagor's rights in the property *Ram Charan* v *Shiva Jagat*, L R 3 A 161 (Rev)

Landlord and tenant Where a landlord wrongly described a person as an ex proprietary tenant in a rent suit, he is not estopped from denying the
nt *Lachchi* v *Bhawani* 8 L R 8 (Rev)
in ejectment and the tenant agreed to pay a
not eject him and the landlord collected
the enhanced r ... *Ram*
Nath v *Bhagwa* ... *bzali*
Shabbir Ali, 8 ... decree
as a rent decree ... thereby
estopped from ... money
decree and not a : ... Cis
882 A misdescription of a person as occupancy tenant in rent receipts and suits for arrears of rent does not amount to grant of occupancy rights or have the effect of estoppel *Ashrofi* v *Kishori Ramanji*, L R 6 All 64 (Rev) A tenant by acquiescing in the payment of enhanced rent is not precluded from raising any objection under section 29 of the B T Act *W H Meyrick* v *Deepa Pandal*, 3 Pat 825 There is no peculiarity in the law of estoppel in India as distinguished from that of England; the law of India is compendiously set forth in s 115 of the Evidence Act Taking of a rent each year under a mistaken belief may bar by estoppel the owner from any claim for mesne profits during the particular year or years for which such rent was received *Mitra Sen Singh* v *Mt Janki Kuar*, 26 Bom L R 1134=40 C L J 468=20 L W 566 (P C)=46 A 728=51 I A 326=82 Ind Cas 946 A grove holder after cutting the trees in the grove was allowed to remain in possession on payment of rent He planted fresh trees and for 3 or 4 years, the zemindar did nothing to prevent it *Held*, he was estopped by his inaction from ejecting the grove holder *Ram Singh* v *Hannu*, L R 4 A 352=9 O & A L R 1057
... and they were not
... rd or his in
... an estoppel
... and that he
... *Madanmoha*
... *Syed Ali* v
Manick Chandra, 27 C W N 969 The granting of receipts in the ordinary course of business by a landlord to his tenant is not an admission of such a formal and deliberate character as to prevent the former from denying the relationship of tenant *Habib* v *Salamat*, L R 4 A 174 (Rev) A decree holder landlord who in execution of a rent decree purchases the holding subject to liability for a second rent d... estopped from proceeding again t
... v *Bhatu Modi*
... ot be permitted to
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described in rent receipts issued by the zemindar does not estop him from denying the tenant's ... L R 4 A 8 Where the
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... *Durga Narain*
... ed from denying
a person's occupancy rights by reason of the fact that he allowed him to be recorded at the settlement as occupancy tenant, because the consent to the

reversioner relinquished his rights to a portion of the inheritance in favour of the widow in consideration of receiving a relinquishment from the widow of all her interest in the remaining portion of the inheritance neither he nor any person claiming through him, could set up that her relinquishment was not binding on him and did not operate on the portion of the inheritance relinquished in favour of the widow *Jogendra* v *Nonindra* 17 Ind Cas 978 The attestation of a reversioner to a document implies only that there was necessity for the alienation and does not create estoppel *Ramaswamy Pillai* v *Kathalingan*, 21 M L T 30 = (1917) M W N 78 = 38 Ind Cas 10, but see *Ganda Singh* v *Sulab Singh* 179 P L R 1911 But where the reversioners induced the purchaser to believe the recitals of the document to be true and to act on them they are estopped by conduct *Bhubaneshwari* v *Hiralhan* 21 C W N 728 In *Hari Kishen Bhagat* v *Kashi Pershad* 42 C 876, the Judicial Committee only laid down that a thoughtless reversioner should have a door of escape from an uncomfortable position rather than bind him down conclusively by the stringency of the equity brought about by his conduct *Parasuramareddi* v *Mahireddi*, 6 L W 250 = 22 M L J 260 42 Ind Cas 196 Where a Hindu widow in possession of her deceased husband's separate immovable property his concubine and his illegitimate daughter with the concurrence of the next reversioner effect a distribution of the property in pursuance of an instrument in writing to which they were parties, and a remoter reversioner attests such instrument and consents to, and assists in the distribution of the property, such remote reversioner would be estopped by his conduct from questioning the legality and validity of the distribution or of assignments made by those who shared in such distribution *See Dasi* v *Gur Sahai* 3 A 362 A reversioner by unknowingly accepting the mortgage of the land in the joint holding sold by a widow to another reversioner is not estopped from contesting the validity or its sale *Sheva* v *Hayat* 32 P W R 1914 = 108 P L R 1914 = 23 Ind Cas 5?? The interest of a Hindu reversioner is an interest expectant on the death of a qualified of
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ped from claiming as a reversioner
R 1930 All 430 Where a rever
claim to property when the succes
nd by that agreement *Raghubir*
11 = A I R 1930 All 498, but see *Polhar Singh* v *Dutar* A I R 1930 All 683 = 1930 A L J 688 = 125 Ind Cas 1

Estoppel by acts of agents The prin[illegible] his agent to cheat a third party acting [illegible] of his a[illegible] A princip[illegible] clothed with a larger authority than that [illegible]e such persons have acted in that belief to their detriment cannot rely upon any secret limitation of his agent's authority or upon any private understanding he may have with him of which the rest of the world must necessarily be ignorant 'Strangers said *Lord Ellenborough* 'can only look to the acts of the parties and to the external *indicia* of property and not to the private communications which may pass between a principal and his broker, and if a person authorise another to assume the apparent right of disposing of property in the ordinary course of trade it must be assumed that the apparent authority is the real authority *Pickering* v *Busk* 15 East 38 (43), *Casperz Estoppel* 177 Similarly in *Ramsden* v *Dyson*, 1 E & I A 128 (158) *Lord Cranworth* said If indeed the principal knows that the person dealing with his agent have so dealt in consequence of their believing that all statements made by him had been warranted by the principal and knowing this allows the person so dealing to expend money in the belief that the agent had an authority, which in fact he had not it may be that in such a case, a Court of Equity could not allow the principal afterwards to set up want of authority in the agent But this equity, where it exists, depends absolutely on the fact that the knowledge on which it rests can be brought home to the principal.'

Casperz Estoppel 178 But an agent cannot set up his own breach of trust *Harris* v *Truman*, 51 L J Q B 338 Where a tenant without Zemindar's permission makes a grave on the *abadi*, the mere fact that the servants of the Zemindar stood by and did not object cannot amount to the agent's acquiescence so as to estop Zemindar from interfering with the grave *Khuda Bakhsh* v *Jaishankar*, 115 Ind Cas 628 An endorsement by an agent of a decree-holder on a ... decree holder ... *mad*, 8 ... his wife by a valid talak on 21 7 1919, and requested the *kazi* to communicate it to the plaintiff, his wife The *kazi* informed her on 24 8-1919 but stated by mistake that the *talak* was dated 2 8 1919 instead of 21 7-1919 The plaintiff's suit for deferred dower was filed on 25-7 1922, more than three years from the real date of the talak *Held* that the defendant was estopped from showing that the date of the talak was earlier than 21 8 1919 *Kathi yumma* v *Urothel Marakhor*, 133 Ind Cas 375 = A I R 1931 Mad 647

Difference between s 115, Evidence Act, and section 43 of the Transfer of Property Act The difference in language between s 43 of the Transfer of Property Act and the language of the illustration to s 115 of the Evidence Act seems to be that, under s 43 of the T P Act, mere erroneous representation will apparently ... ally false whereas the ill... is 'intentionally and fal... he belief of the transferee in the truth of the erroneous representation, whereas the illustration to s 115 implies that the transferee must have believed the intentional and false representation and acted in the faith of such representation *Halthkudar Narain* v *Audar Sayal*, 28 M L J 44 = 27 Ind Cas 785, see also *Ram* v *Baldeo*, A I R 1932 All 643

Family arrangements Where parties settled their disputes amicably and ... ntered into posse... n by ... idity, ... 730 ... and ... it for ... rights ... families to construe acts done out of kindness and affection, to the disadva... of the doer of them Where two surviving brothers constituted a Mitakshara family, and the elder brother naturally and properly treated his younger brother, who had been born deaf and dumb, as a member of the family, and entitled to equal rights, until it became absolutely clear that his malady was incurable, *held* that there was no ground for supposing that the elder brother intended to divest himself of his own property or to waive any rights, accuring to him by reason of his younger brother's incapacity and that there was no principle of law founded on the doctrine of estoppel or laches, or the law of limitation or otherwise, to hold, under the circumstances of the case, that the elder brother's acts and conduct had an effect and operation which he could not have intended or contemplated *Lala Muddun Gopal* v *Khikhindu Koer*, 18 C 341 (P C) = 18 I A 9

One estoppel against another In a case of one estoppel against another the parties are set free and the Court has to see what their original rights are *Juanlal* v *Behari Lal*, 152 P W R 1918 = 45 Ind Cas 68

Benami Where a father, whether Hindu or Muhammadan purchases a property in the name of one of his sons the ordinary presumption is that it is a *benami* transaction and not that it is an advancement in favour of the son ... indications which ... aim at the time ... hat the father ... *hulam Dastgir* ... 67 If parties ... ative character,

they cannot come in on his death under Order 22, rule, 3 *Doraisami* v. *Chilamboram*, A I R 1930 Mad 221=58 M L J 48

Estoppel by election Where a man has an option to choose one or other of two inconsistent things, when once he has made his election, it is final and cannot ' . ' . L R 7 App Ca 360 . . . . . *potest* Co Lit 146 a . . . . ie time. *Caspers on Estopp* . . . . . it both eat your cake and return your cake *Per Crompton J* in *Clarke* v. *Dickinson*, E B & E 152 To illustrate the doctrine of election, suppose by A Will or deed, gives to B property belonging to C, and by the same instrument gives other property belonging to himself to C, a Court of equity will hold C to be entitled to the gift made to him by A only, upon the implied . . . he provisions of the instrument, by renoun- : favour of B, he must, consequently make rmed he is put to his election, to take either under or against the instrument, if C elects to take under, and consequently to conform with all the provisions of, the instrument, no difficulty arises, as B will take C s property, and C will take the property given to him by A, but if C elects to take against the instrument, that is to say, retains his own property and at the same time sets up a claim to the property given to him by A an important question arises whether he thereupon incurs a forfeiture of the whole of the benefit conferred upon him by the instrument, or is merely bound to make compensation out of it to the person who is disappointed by his election *W & T Leading case* Vol I p 312 It is an obligation imposed upon a party to choose between two inconsistent alternative rights or claims, in cases where there is clear intention of the person, from whom he derives one, that he should not enjoy both Every case of election, therefore presupposes a plurality of gifts or rights with an intention, express or implied of the party, who has a right to control one or both, that one should be a substitute for the other The party who is to take has a choice, but he cannot enjoy benefits of both *Story Eq Jur* § 1077; see also section 35 of the Transfer of Property Act (IV of 1882) and, section 180 of the Succession Act (XXXIX of 1925) "The doctrine" says *Fry L J* in *In Re Vardon's Trusts*, 31 Ch D 275 (279) "rests, not on the particular provisions of the instrument which . . .

and general intention ' But the election must be a volutary act, not forced upon him by circumstances over which he had no control *Asia* v *Nurjan*, A I R 1933 Cal 39

Estoppel by negligence It is true that there can be no negligence unless . . . 776 Before . . . onduct, there . . . the general . . . *ifone*, 19 Q B D 68; . . . nd essential condition . . . he transaction itself, . . . d that it is impossible to treat them separately is that the negligence must not only be calculated to have the misleading effect attributed to it but must be proximate or real cause of that result *Bank of Ireland* v *Evans' Charities in Ireland*, 5 H L Cas 389 *per Parke B*, *Swan* v *North British Australian Co*, 7 H & N 603, 633

Other cases After the right to get either recission or reformation of the contract is barred, it is not competent to a party to a contract enjoying the benefit under it to say that he is not bound by one of its terms *Sashi Kanti* v *Gendu Sheil*, 82 Ind Cas 970=A I R 1925 Cal 389 Admission in a different proceeding that one had sold the land does not act as estoppel so as to do away

with the necessity of registering the document *Maung Po Yin* v *Maung Tet Tu*, 86 Ind Cas 205 = A I R 1925 Rang
property made by a number of donors joint
of the donors had no right to make the g
85 Ind Cas 546 = A. I R 1925 Mad 990
of certain shares from a widow during her life time he is estopped from denying the truth of the representation in suit between himself and the representatives of the lady *Mahamed Hasan* v *Ali Haidar*, 85 Ind Cas 509 = A I R 1925 Oudh 337 = 12 O L J 1 Estoppel is purely personal and will not affect others in so far as they claim a title otherwise than through the person primarily *Umaram* v *Purukh*, 85 Ind Cas 540 = A I R 1925 Cal 993 A defendant cannot be allowed to set up his own fraud in defence Where a plaintiff claiming a title by purchase sues for declaration and possession, it is not open to the defendant to show that it was she who provided funds for the purchase by means of a fraud on the reversioner to which she and the plaintiff were parties *Pachayammal* v *Devanaiammal*, 22 L W 313 = A I R 1925 Mad 1016 A man who has represented to an intending purchaser that he has not a security and induces him under that belief to buy, cannot, as against that purchaser, subsequently attempt to put his security inforce *Jia Lal* v *Saeia Bibi*, 99 Ind Cas 2 = A I R 1927 Oudh 104 Although the house of an agriculturist is ordinarily unsaleable, still the conduct of the agriculturist judgment-debtor may estop him from pleading that the house is not saleable *Ganga Bishun* v *Jogmohan*, 6 P 251 = 102 Ind Cas 616 = 8 Pat L T 563 = A I R 1927 Pat 233 Where the question arose whether a company was liable to be assessed to companies' tax ly
... written a *letter* to
...sed on its
...ability of

the assessment by a suit in the civil Court *Bombay Co Ltd* v *Municipal Council of Dindigul*, 108 Ind Cas 26 = 27 L W 243 Even if the compromise is beneficial to a party's interest, but he has not taken any benefit out of or under it, that
... from challenging it
I R 1928 Cal 334
interest purported to
ng his right as a raiyat
but the purchaser at an execution sale of that person's right and interest who got his name mutated in the *sherista* of the superior landlord on payment of an enhanced rent is not so estopped *Jaladhar Mandal* v *Amrita Lal Roy*, 105 Ind Cas 641 = A I R 1928 Cal 87 A *muafidar* who has mortgaged his *muafi*
... ejected his want of
had expressly enacted
recognised 50 W
mortgagee cannot deny
987 = A I R 19 8
ar in the cau e title by
mistake but claiming to be a proper party to a legal proceeding, takes step for
... be really
party If
instances
may be
... as 837 =
... osseses on
(1925) M W N 654 = A I R 1925 Mad 990 If a person ... of certain property as a *mutawali* and holds possession of it on that basis, he cannot afterwards turn round and say, that the *wakf* being void, he was in possession in his own right and claim the property as his own as against the beneficiaries *Bulya Banu* v *Najira Banu* 55 C 448 = 32 C W N 218
... took part in
... he purchased
... to establish
... er was a party
his title under a ...
... *rasad* v *Pooran*, 26 A L
... basis of investment in
commercial speculations cannot claim on another basis when he finds the first basis prejudicial to him He cannot both approbate and reprobate *Hiraram* v

Madan Gopal 33 C W N. 193=49 C L J 335=27 A L J 106=A I. R 1929 P C 77 Where a person admits execution before the Registrar after the document has been

he was ignorant of

W N 407=29 I

purchase the property of his other co sharer, he is estopped from exercising his right of pre-emption *Rameswar* v *Ghanshyam Prasad*, 27 A L J 665=A I R 1929 All 731 For purposes of estoppel an order by consent, not discharged by mutual agreement, and remaining unreduced is as effective as an order of the Court made otherwise than by consent and not discharged on appeal. *Charles Hubert* v *Edward Keith*, 118 Ind Cas 7=A I R 1929 (P C) 289=57 M L J 429 (P C) A party who takes advantage under partition, is estopped from pleading impartibility *Narendra* v *Nagendra*, 50 C L J 267=A I R 1929 Cal 577 Where a County Court Judge has tried an action which he had no jurisdiction to try, and the unsuccessful party appeals the respondent is entitled to raise the point of jurisdiction notwithstanding that it was not raised below, and the fact that no objection was taken to the jurisdiction in the county Court does not create any estoppel by conduct *Simpson* v *Crowie*, (1921) 3 K B 243=90 L J K B 878 Where in prior land acquisition proceedings there was a declaration that minerals beneath a particular land could be used by the Government for the purpose of construction of a bridge and the owner of the land received compensation on that footing and after the completion of the bridge he sued for a declaration that he was entitled to the remaining mineral in the land, *held*, that he was not estopped

cannot be heard later or after the sale to plead that the figure was unduly low and the sale should therefore be set aside *Ramanatham* v *Ramanathan*, 117 Ind Cas 705=30 L W. 995 A person creating a charge or a mortgage is estopped from saying that he is not entitled to create the charge or mortgage on the property *Shankar* v *Ganpat*, 31 Bom L R 439=119 Ind Cas 186=1929 Bom 227

A usufructuary mortgagee cannot deny the title of the mortgagor and set up adverse possession unless he actually leaves the holding and enters under a different status *Jai Nandan* v *Umrao* 119 Ind Cas 568=A I R 1929 All 305

Where a widow makes a gift of her husband's property in her possession

promise which amounts to a settlement of a doubtful claim, it is binding on him, even though at the time when he entered into it he was a mere reversioner There is nothing to prevent him from so acting as to estop himself by his own conduct from subsequently claiming a property to which he may succeed *Moti Shah* v *Chandharp Singh*, 48 A 637=96 Ind Cas 595 Where an order directing the payment of the decree by instalment was passed at the request of the judgment debtor who subsequently acted upon it, he is precluded from contending that the order was not binding on him *Fielding* v *The Firm of Janaki Das*, 95 Ind Cas 243=A I R 1926 Lah 465

A Hindu widow executed a mortgage as guardian of her adopted son, subsequently she sold the properties to the plaintiff as her own The plaintiff

hat the plaintiff was not estopped from

took a lease of the properties from the third person In a suit for redemption of the mortgage, *held*, that the mortgagee was estopped from setting up the plea of tenancy *Gauri* v *Mangla*, 7 L R 171 (Rev)=A I R 1926 All 463 As between a mortgagor and his mortgagee, neither can deny the title of the other for the purposes of the mortgage, but the estoppel does not arise in a suit

neither based on nor connected with the mortgage *Deo Kali* v *Ranchoor Bir* 92 Ind Cas 19=13 O L J 208=A I R 1926 Oudh 253 Where in case of an alienation a person entitled to challenge it is present at the mutation proceedings and when there is every opportunity of objecting to it does not object he cannot challenge the alienation subsequently *Ram Sarup* v *Ram Saran* 96 Ind Cas 915=A I R 1926 Lah 650 Where a person purchases certain property in execution of a money decree expressly subject to a mortgage on it and admits the existence of the mortgage it is not subsequently open to him to challenge the mortgage in a suit on the mortgage by the mortgagee *Govindrao* v *Hirchand* 95 Ind Cas 563=A I R 1926 Nag 146 Where the owner of a property keeps quiet when his property is being sold as belonging to the judgment debtor in executio[illegible] hment and sale, he is estopped [illegible] *Singh*, 27 P L R 260=A I R [illegible] successfully pleaded in the Small Cause Court that the suit was one triable by the regular side he ought not to be allowed when the suit is filed on the regular side to turn round and plead that it ought to have been filed in the Small Cause Court *Kartar Singh* v *Nanda* 95 Ind Cas 846=A I R 1926 All 664 Where a lease is taken on the understanding that it would be for the benefit of the local public and this formed part of the consideration for the lease, the lessees cannot afterwards turn round and claim an absolute interest in the lands leased and deny rights to the public *Peary Lal* v *Surendra Nath* 88 Ind Cas 505=A I R 1925 Cal. 1233 A mere undertaking may operate as an estoppel, though it may not amount to a contract *Shailesh Chandra* v *Bechai Gope* 84 Ind Cas 124=A I R 1925 Cal 24 Where mortgagor [illegible] higher interest to get extension [illegible] mortgagee for execution of the [illegible] nt could not be enforced in [illegible] is 723=48 M L J 121 There can be no estoppel in favour of a party who was not misled except by his own ignorance of the law *Amjad* v *Ashraf* 2 O W N 83=87 Ind Cas 445=A I R 1925 Oudh 568 A person is not precluded from setting up an inconsistent case in a subsequent litigation The contention put forward in the previous [illegible] itself become a foundation for any [illegible] L W 551=90 Ind Cas 124= [illegible] ion to arbitration through Court [illegible] proceedings on the ground that the [illegible] on *Tuanj* v *Sona Hangh* 5[illegible] 7 Ind Cas 633=A I R 1925 Cal 812 The person to whom a notice has been given to the effect that a property is going to be sold and who intimates his refusal to purchase can not be allowed after the sale has been made after his refusal to turn round and seek to enforce his right of pre emption through the Court The doctrine of estoppel applies to all sorts of cases including pre emption cases *Don Mahomed* v *Bint Zohra* 87 Ind Cas 414.

A person is not entitled to give an undertaking to a criminal Court to abstain from certain action to go and file a civil suit for declaration that the undertaking given by him was of no effect *Ramsaran* v *Seo Pratab* 89 Ind Cas 586=A I R 1925 All 605 Where the vendee under a contract for sale of immovable property stated to the vendor that his (the vendee's) money was ready and that the title deed was being engrossed and where those two matters alone were wanting to complete the sale and where the vendor gave five days notice to the vendee to complete the sale the vendee was estopped from denying the truth of his statements *Motilal* v *Haji Moora* 41 C L J 331=88 Ind Cas 41=27 Bom L R 814

Where a prior vendee induced a subsequent vendee to believe that notwithstanding prior sale deed the vendor continued to be owner and to purchase property in that belief he is estopped from claiming priority under his sale [illegible] N 596=90 Ind Cas 87=A I [illegible] in the settlement record may [illegible] mount to estoppel *Mal[illegible]* v *Pitamber*, L R 6 All [illegible] (Rev) [illegible] possession of land claiming under a deed or Will he cannot afterwards set up another title to the land in question against the Will or deed though it did not operate to pass the land in question

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and if he remains in possession till 12 years have elapsed and the title of his testator's heir is extinguished, he cannot claim by possession an interest in the property different from that which he could have taken if the property had passed by the Will or deed *Jogeswar* v *Panduranj*, 7 N L J 82=78 Ind Cas 810=A I R 1924 Nag 73 Where there is a contract for sale no decree for possession can be given unless *the title is completed by a registered deed* and an agreement between parties
to do away with the necessity
expressly requires it *Maung*
68, *Dharam Chand* v *Mujt S*
20 C W N 307 But an undertaking may operate as an estoppel though in the absence of consideration it cannot amount to a contract Situations may arise in which a contract should be held to be an estoppel as in cases where only an adequate right of action would exist in favour of the injured party if estoppel were not allowed *In such a case estoppel may sometimes be available to* prevent fraud *Shailesh Chandra* v *Lechu Gope* 10 C L J 67=1925 Cal 91 The donee of a property is not esto
not belong to the donor but was
Moolchand, 76 Ind Cas 1?8=1925
sign the award and as a result
would otherwise have prosecuted the other party is estopped from contesting the validity of the award *Monoharlal* v *Mt Ilma* 77 Ind Cas 41

It cannot be said that a Mahomedan tenant in common can be held to be represented by another Mahomedan tenant in common merely because their *interests are identical* *Karim Baksh* v *Wahaj Uddin* 46 A 211=L R 5 A 5 (Rev)=22 A L J 73-78 Ind Cas 1035 A mortgagor is estopped from pleading in a suit on the mortgage that he had no title to the property at the date of the document But if the mortgagee is proved to be well aware of the
rty, the plea of estoppel
924 Nag 363 Where the
names and the son on
t to alienation, he is there-
be deemed to have re-
Habibullah, 1924 All 721.

Where a person gets another's name recorded as owner of a moiety of the *property, and on the faith of that another purchases it at an auction sale the* former can not later on claim ownership of the same *Mathura Prosad* v *Anandi*, 21 A L J 498 L R 4 A 5?=74 Ind Cas 911 A dispute under s 145 Cr Pro Code relates only to possession of the properties and consequently a compromise of the proceedings does not estop a party from denying the title of the other *Gopi Das* v *Madho Lal*, 45 A 162=1923 All 77=23 A L J 932

In order to maintain a plea of estoppel in a pre emption suit, it must be proved that *the plaintiff believed the representation made* and brought his suit on the basis of it *Banke Behari Lal* v *Manna Lal*, 73 Ind Cas 372 Where the mortgage deed clearly purports to be executed by the mortgagor as the proprietor of the property in his own interest he is estopped *from denying the* interest which he represented as his own proprietary right in the deed *Brij Tarun* v *Raghunandan* 71 Ind Cas 941 (1923) Pat 49

Where a co sharer had been allowed by other shares to treat certain land as his exclusive holding and he grants a perpetual lease of a small portion of the land so as to confer occupancy right on the tenant and at a subsequent partition the land was allotted to another co sharer *held* that the co sharer was estopped from disputing the title of the occupancy tenant to the land *Tej Singh* v *Munshi*, L R 4 A 54=9 O & A L R 435

Even where the mortgagors are trustees acting in a public capacity and not for their own benefit they are estopped from denying their title and cannot set up *as a defence against the mortgagee that the property so mortgaged is trust*
Brij Ratan v *Raghu*

sion of certain plots
sis upon title after-
Held that there was
Chandra, 4 Pat L J,

730 A statement in the Court of an Assistant Collector during the mutation proceedings to the effect that the plaintiff and two others were in possession of the property in equal shares and that mutation of names may be made accordingly, does not prevent the plaintiff from asserting his right to the entire property in Civil Court subsequently *Ramratan* v *Binda*, 9 O & A L R 20 = 72 Ind Cas 832 Where in execution of a money decree the decree holder under a *bonafide* mistake brought to sale certain of his own properties as those of his judgment debtor and the sale was confirmed and delivery of possession was made to the purchaser, *held* that the decree holder was estopped from setting up his own title to the properties as against the auction purchaser

mistake was *bonafide* *Ram Swami* v

Though a lease of
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and even allowed the sale to be confirmed, they are estopped
on the ground
Ind Cas 797
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mortgage from a person in possession and obtains possession he
not permitted to question the mortgagor's title *Surendranath* v *Khulu ra Mohan*, 29 C L J 434 = 52 Ind Cas 59 A mortgagee brought a suit for possession of the mortgaged property against a person whom he treated as the
decree, subsequently when
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ating his right to represent
Cas 356

ty by estoppel must satisfy
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ence Act affords no definition
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as 969 = 9 L W 318 = (1919)
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mortgages land which is afterwards sold in Court auction at the instance of the

mortgagee, can sue on behalf of the temple to recover the landlord's interest, S.
which . claim
agains . *Sahib*
v *Ek* . Ind
Cas 197 Where a person by his conduct in a redemption suit had elected to affirm the sale and to act upon it, he is estopped from suing for the cancellation of the sale of equity of redemption on the ground of fraud *Chanham* v *Behari Lal*
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Ind Cas 997 It is not open to the les
his ejectment by the auction purchaser
to question the validity of the mortg
Cas 705 Where a person after his
tolls in a Municipality has been accepted, represents to the Municipality that he bid on behalf of himself and another person and asks that such other person should be regarded as co contractor and the latter joins in this petition of representation and pays money on which the chairman officially accepts the amount *tendered by both the person who did not join in the original bid is*
isputing his liability under the contract
uction *Municipal Council* v *Kannu-*
600 The admission of liability under
a decree obtained against the ward does not create an estoppel and debar the Court of wards from challenging the validity under the Court of Wards Act not having been complied with the decree was not validly obtained *Punjab Court of Wards* v *Lala Kanwar Bhan,* 126 Ind Cas 796=31 P L R 719=A I R 1930 L
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acquiesced in the decree, and therefore is not estopped from prosecuting the appeal *Kaikalbad* v *Khanhalla* 124 Ind Cas 839=31 P. L R 668=A I R 1930 Lah 26 Where a lease granted by one co sharer confers no right upon the lessee there is nothing to prevent the grantor from joining the other co-sharers to eject the lessee who is found to possess no right in respect of the land in dispute *Panchanan* v *Anant,* A I R 1932 All 457. If the grantors
so that any person
were the absolute

real transaction
conveyance *Ts*
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certain rights, which they allege they have in consideration of certain proceedings in Court being brought to an end, they cannot thereafter allege the continuing existence of those rights *Mahomed Ibrahim* v *Chandan Singh* 63 Ind

plaintiff was estopped from denying the right of the defendants under s 115 of the Evidence Act *Ananta Murarrad* v *Gunu Nitha,* 22 Bom L R 415=57 Ind Cas 143 A dispute was settled by arbitration Subsequently two of the arbitrators purchased the interest of one of the parties to the dispute and sought to upset the arrangement arrived at as a result of the arbitration In the circumstances they were estopped from doing so *Budhai Singh* v *Karan Singh,* 55 Ind Cas 506 When a person appeared at the time of the mutation in respect of the sale in dispute and expressed his consent to it he cannot subsequently come forward to impugn it *Muhammad* v *Wali,* 2 Lab L J 306 Where some of the motgagees led a subsequent purchaser of a portion of the mortgaged property and a puisne mortgagee of the remainder to believe

that the whole property was unencumbered, they were precluded by the do trine of estoppel from setting up their rights under the prior mortgage against the ... effect of the estoppel was to postpone them in ... mortgagee *Sakhiudlin* ... account, a party is estopped from suing for ar ... Vol II ... interest ... judgment ... the decretal debt as well as interest ... m the Court to enable him to pay the amount he (the judgment debtor) cannot at a later stage of the proceedings dispute the *item of interest, and is bound to pay interest from the date on which he* admitted his liability to pay interest *Narayan* v *Raoji*, 6 Bom L R 417=28 B 393. A party cannot take benefit of a transaction and at the same time repudiate it when the transaction is one and indivisible Where the property of a judgment-debtor is sold in execution of a decree and the sale-proceeds go in satisfaction of the decree, and the judgment-debtor accepts the payment of the decree, he cannot impeach a part of the sale *Annapurnabai* v. *Ramchandra*, 43 Ind Cas 178 Where two persons embark upon a joint adventure for the purpose of extinguishing a prior mortgage and taking a first charge on the property it is the legal duty of each to inform his co mortgagee within a reasonable time that he had still an outstanding claim under the prior mortgage and the omission to give the information amounts to such an omission as is contemplated by s 115 of the Evidence Act and operates as estoppel *Pandurang* v *Narayan*, 44 Ind Cas 517 A judgment-debtor got an execution sale postponed on undertaking that he would not raise any objection on the ground of regularity or irregularity ... to set it aside on the ... the time he ... the sale ... with that ... ng brought ... s 558 A ... n transfer ... 82 without ... not, by ... *dnapur* ... *Zemindary*, 27 C L ... nd in a prior suit brought against him by the defendant agreed to give up possession of ... the deed of ... es and the parties enjoyed the ... in pursuance of that arrangement but its validity was sought to be questioned after the death of the mother by the executants themselves *Held* that they were est ... A I R 1930 All 687 ... a Will cannot ... erest to another ... of the Contract Act ... *Jacob* v *The* ... ty of nearly five years prior to the suit for rescission of contract on the ground of defect in title of plaintiff's vendors and onerous covenants is highly prejudicial to the defendant's vendors, especially when the plaintiff was previously seeking to enforce the contract against his vendees notwithstanding the defects Plaintiff's conduct in enforcing the contract against his vendee and laches of five years work out an estoppel against him and equally debar him from enforcing his claim *Soralji* v *Tarachand*, A I R. 1930 Sind 66 A purchaser at a Court sal ... the judgment debtor ... at all The ... at he is buying ... st the property

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but it does not mean that the encumbrance charge or any other claim against the property has been established In connection, therefore, with the sale of immoveable property subject to an encumbrance the auction purchaser is entitled to contest the factum and the validity of the encumbrance There is no rule of of estoppel which can prevent him from impeaching the charge on the property *Mt Man Kuar* v *Ishar Das* A I R 1930 Lah 40, see also *Fatunnisa* v *Pirtab Singh*, 31 A 583 = 36 Ind Cas 203 (P C), *Aga Sultan* v *Mohabbat Khan*, A I R 1921 All 79 = 43 A 480, *Ganesh Moheshwar* v *Purushottam* 33 B 311 = 11 Bom L R 26, *Narayan* v *Umlar* 35 B 275 = 13 Bom L R 307 = 10 Ind Cas 913 The fact that after the death of the successful pre-empter the vendor himself has become the legal representative is not enough to estop the latter from taking the benefit of the decree *Brindaban* v *Durag Singh*, A I R 1920 All 220 The mere fact, that a corporation has granted license under certain chapter of a Municipal Act does not preclude it from refusing to grant a different license under some other provisions of the Act *Corporation of Calcutta* v *Siemens Bena* 35 C W N 831

116 No tenant of immoveable property, or person claiming through such tenant shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy, a title to such immoveable property and no person who came upon any immoveable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given

Estoppel of tenant, and of license of person in possession

Principle "Where a man having no title obtains possession of land under a device by a man in possession who assumes to give him a title as tenant he car

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plaintiff, and then refused to pay his rent under an idea that he might contest the plaintiff s right, but the plaintiff could not be supposed to come to trial prepared to meet such a defence and to make out his title, such an action as the present does not involve the question of title In the same case *Grose J* said 'It has been said that the rule of not giving in evidence *nil habuit in tenements* in an action for use and occupation is a technical rule, but in my opinion no rule is better founded in justice and policy than this The general rule is admitted that in such an action as this the tenant cannot dispute the landlord s title, se '
'The principle i the
contrary, it is hi out
of possession 41

Scope of the section The estoppel of a tenant is one of the most notice-
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6. tenancy," from denying that the landlord had "at the beginning of the tenancy," a title to the property, the subject of the tenancy The words of the section leave it open to the tenant to show that his landlord's title has expired subsequently *Balakushaba* v *Abai Amrita*, 11 Bom L R 1093 In the same case *Batchelor J* in delivering his judgment said "The law on this branch of estoppel is contained in s 116 of the Evidence Act, which in express terms limits the unassailability of the landlord's title of the continuance of the tenancy, and during the continuance of that the tenant is not permitted to deny that his landlord [illegible] tenancy.' These words leave it open to [illegible] has expired and in these respects [illegible] een the law in England see for instance *Delany* v *Fox*, 2 C B N S 768 and *Neale* v *Moss*, 1 Bing 60 And that this is the clear meaning of the section has been accepted in India *Ammu* v *Ram Krishna Sastri* 2 M 266 and *Subboraya* v *Krishnappa*, 12 M 422 So the tenant is not estopped from showing that the title of his landlord has expired since the tenancy commenced, or that the land in question is not [illegible] the land and at [illegible] one of the [illegible] ween landlord [illegible] former The [illegible] the tenant in [illegible] only recognised as landlord either by express agreement or by attornment, or formal acknowledgment by payment of rent he may always show that his conduct was due to mistake or ignorance of facts relating to title, misrepresentation or fraud" *Ketudas* v *Surendra Nath* 7 C W N 596; see also *Gregory* v *Doidge*, 3 Bing 474, *Rogers* v *Pitchers* 6 Taunt 202 In *Williams* v. *Bartholomew*, 1 B & P 326, *Buller J* said "If the tenant could have proved that his attornment proceeded from misrepresentation of him who claimed as remainder man he might have proved that another was still alive an entitled" A tenant cannot allege that his landlord has only an equitable interest *Francis* v *Doe d Harvey* 4 M & W 331, *Dolby* v *Iles*, 11 Ad & El 335; *Board* v *Board*, L R 9 Q B [illegible] as trustees of the [illegible] s for [illegible] quire [illegible] ded [illegible] n by

Possession must be given to th[illegible] estoppel landlord's permission *Bigelo*[illegible] in the p 100 The principle upon [illegible] law, to wit, that one [illegible] another will not dispute the title of [illegible] done *Bigelow on Estoppel* 5th Ed [illegible] & S 318 at p 319 *Dampier J* said [illegible] to the lessor and then disclaimed But he ought to give back the possession to the lessor, and after that the defendant may have her ejectment It has been ruled often that neither the tenant, nor any one claiming by him, can controvert the landlord's title He cannot put another person in possession, he must deliver up the premises to his own landlord This I believe, has been the rule for the last twenty five years, and as I remember was so laid down by *Buller J* upon the western circuit" That case was decided in 1815 So this rule is not a very ancient one See also *Doe d Bristow* v *Pegge*, 1 T R 758

Where a person entitled as co-partner, made a lease of the whole land, the tenant, after having entered and paid rent was estopped from denying that the heir and privy in blood to the lessor was entitled to the whole *Weeks* v *Birch*, (1891) [illegible] not a lessee, the latter [illegible] only *Thom*[illegible] ed, the lessee, [illegible] cannot questi[illegible] ed and tenant is also virtually created, so far as the question of estoppel is [illegible] paramount [illegible] der whom [illegible] 5th Ed

pp 515-517 But this section does not debar one, who has once been a tenant, **S.** from contending that the title of his landlord has been lost or his tenancy has been determined I

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tenancy *Ammu* v

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recover possession of a house from the defendants alleging that they were his tenants under a lease which he had granted to them, and that though the term of the lease had expired they refused to vacate, the defendants having passed the *Kabuliyat* to plaintiff could not be heard to deny the latter's title as ground for refusing to give up possession *Patel* v *Hargovan,* 19 B 133 Plaintiff alleging a purchase of land from A and B and that he afterwards granted them a *patta* and retained them in possession, sued to recover possession on the ground of the tenancy having expired He tendered in evidence a consent decree obtained against B for arrears of rent *Held* that the decree worked no estoppel against B by virtue of s 116 of the Evidence Act and did not relieve the plaintiff of the necessity of proving his case completely *Sollur Monlal* v *Nilcomal,* 1 C L R 528 Two persons mortgaged certain property and five years later joined with anothe

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party

him five years after, estopped from showing that the mortgagors were not, at the date of the lease, entitled to the whole of the property comprised in the mortgage *Prosunno Kumar Sen* v *Mahaborat,* 7 C W N 575 A person who obtained possession of property from another is estopped from denying the title of that other to the property at the time he was so let into possession But where the defendant obtained possession of certain property under a rental agreement from one S who was the manager of certain charity to which the said property was attached *held* that the defendant ... although he was entitled to manage the pro ... Will and

43 Ind Cas 47 A tena ... expiration of the tenancy, deny his land ... enly surrendering possession to him *Ma* ... 50 Ind Cas 591 (35 Ind Cas 7, 24 C L ... 97, 37 All 557 foll), see also *Ekoba Go* ... = 55 Ind Cas 353, *Ilah Baksh* v *Lal Khan,* 67 Ind Cas 269, see also *Mahomed* v *Uberoi* 89 Ind Cas 590 = 12 O L J 501, *Mahomed* v *Zahiruddin,* 101 Ind Cas 771 *Pundlik* v *Urkuda,* 97 Ind Cas 992, *Dayalal* v *Ko Lon,* 6 Rang 657, *Sidik* v *Mahomed,* 21 S L R 185, *Vertannes* v *Robinson,* A I R 1928 Rang 162, *Currimbhoy* v *L T Creet,* A I R 1933 P C 29 A person who executes a lease in favour of another, is estopped from denying that other's title to grant the lease It is immaterial whether he was the tenant of some other person before the execution of the lease *Chandoo* v *Purbhoo,* 59 Ind Cas 707 A person entering into a covenant in his *Kabuliyat* is bound to recognise rights so recorded even if such rights were incorrectly recorded and had no real existence *Midnapore Zemindari Co Ltd* v *Nares Narain,* 38 C L J 317 = 63 Ind Cas 161; *Samsuddin* v *Aga Syed* 9 O & A L R 1041

... a landlord from the *Talquzar* *Seth Sujun* ... Entries in revenue ... correctness which has ... under s 42 of the ... *Jai Kuar* v *Lathu,* ... it not under circumstances which would establish a relationship as between the parties of landlo

S. 116. and tenant, the tenant is not estopped from showing that the person to whom he paid the rent is not the landlord *Abdul Razzak v Promada Sundari*, 80 Ind Cas 22 Tenant in possession prior to lease also is estopped *Mool Ram v M Bholi*, A I R 1925 Lah 60 Where a property is leased by a person without title to it and the lessee is ejected by the true owner it is not open to the lessee in a suit by his lessor against him to deny the plaintiffs' title *Moti Lal v Yar Mahomed* 47 A 63=85 Ind Cas 756=A I R 1925 All 275

Though the t [illegible]
and show that his [illegible]
Such a plea does [illegible]
confession and avo[illegible]
on the ground that the lessor s title has been defeated by a title paramount [illegible] the case of complete eviction [illegible] as the question of continuance [illegible] by title paramount terminating the [illegible] nd But in the case of a partial eviction dem[illegible] the distinction is quite apparent [illegible] but "attornment" in the sense in w[illegible] a mere agreement in favour of a third party to pay rent but has been defined a the act of the tenant putting one person in the place of another as his landlord *Jogendra Lal v Mahesh Chandra*, 55 C 1013=32 C W N 559=112 Ind Cas 172=47 C L J 387 Where the rights of the vendors of the plaintiff had become extinguished by adverse possession of a plot of land by defendant for more than 12 years, the defendant will not be estopped from pleading acquisition of title by adverse possession and denying plaintiff's title to plot even though the defendant, after purchase of the plot by the plaintiff had obtained his permission to occupy the plot *Maung Ba Than v Maung Sein Win*, A I R 1929 Rang 170 Where the mortgagees in possession allow the mortgagors to remain in occupation of the mortgaged properties as tenants and the mortgagors duly execute and reg[illegible] [illegible] landlord and tenant subsists between t[illegible] [illegible] plead that the lease [illegible] *v Krishna Chand* [illegible] *Woods*, L R 3 Q [illegible]

The mere fact that a person has taken a lease from the Municipal Board cannot estop him from setting u[illegible] who was no party to that lease If any es[illegible] between the lessor and the lessee *Tika* [illegible]

[illegible] corporeal hereditament [illegible] therefore, this section [illegible] R 939 Whatever may have been the nature of a person's possession prior to a lease, once he takes a lease deed in respect of the land from another he is thereafter estopped from denying the ti[illegible] [illegible] L J 907=L R 3 A 623 [illegible] property only. *Maung Kyaw v* [illegible] ing 91

No tenant. "The true ground of estoppel is" according to the judgment of *Vice-Chancellor Sir P W Page Wood*, in *Longford v Selmes*, 3 K & J 220, 229, "that a tenant may not dispute the right of his landlord by saying that he had nothing in the property It is equally clear" he observes, "that he may, nevertheless, show that the landlord had an interest at the date of the lease, which has since determined" The ground of the doctrine, as stated by *Lush J*, in *Morton v Woods*, (1868) L R 3 Q B 658 at p 671, is that "inasmuch as the parties have agreed that they should stand in the relation of landlord and tenant, and the one accordingly receives possession from the other and enters premises, so long as he continues in possession, he cannot be heard to deny the state of facts which he has agreed shall be taken as the basis of the arrangement; in other words, he cannot set up that the landlord has no legal title" The principle is exactly expressed by *Palles C B* in *Wagan v D* (1883) 12 L R Ir 69, 72,—"The defendant is estopped from alleging that his lessor had not at the time of letting, any estate in the premises He may however, on proper pleading show, that the estate which the lessor had at the time of letting had expired before the commencement of the action." A tenant

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may dispute the title of one from whom he did not get possession, and to whom he has not attorned, in the strict sense of the word, at the request or with the privity of the person from whom he did get possession *Gregory* v *Doidge*, 3 Bing 474 *Cornish* v *Searell*, 8 B & C 471, *Lall Mahomed* v *Kallines*, 11 C. 519 A tenant who has repeatedly acknowledged that a person in possession of the proprietary right was entitled to receive rent and who has in fact attorned to him cannot afterwards be allowed to question the validity of the title of such person for the reason that the instrument by virtue of which possession of the proprietary right had been obtained was unregistered *Shums Ahmed* v *Ghoolam Moher*, 3 N W P 113 A tenant who was not let into possession by the person seeking to eject him is not estopped from denying the plaintiff's title, he may show that the title is in some third person or in himself *Venkata* v *Ayyanna* 31 M L J 712=20 M L T 157=36 Ind Cas 817 (F B) A grantee of lands so long as he holds a religious office in a temple is estopped from setting up a title inconsistent with that of the grantor, and an alienee from such grantee is similarly estopped and the alienation itself is invalid as against the trustee of the temple Section 116 of the Evidence Act is not exhaustive of the law of estoppel *Thayellayam* v *Venkatarama Krishnayam*, (1919) M W N 49=33 Ind Cas 898 This section applies not only to tenants let into possession at the beginning of the lease but also to tenants who are already in possession and continue in it *Harat* v *Dindi*, 25 Ind Cas 615 An adverse action taken by a third party, whether that third party be the Government or some other rival claimant cannot have the effect of terminating the relationship of landlord and tenant and the tenant will be estopped by this section from denying the landlord's title *Kunhunni* v *in Kannu Thara*, (1918) M W N 376=8 L W 41=45 Ind Cas 655 Under this section a tenant is precluded from denying the title of the landlord, but it is open to him to question the status of his landlord *Lokoram* v. *Budya Rai* 53 Ind Cas 43 A tenant who has executed a lease but has not been let into possession by the lessor, is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessors' title or that his execution of the lease was procured by fraud, misrepresentation or coercion *Malham* v *Busakhi*, 123 P R, 1919=50 Ind Cas 591 A tenant inducted of land by one person cannot alter by the character of his possession and make it adverse to the landlord going over to another person and paying rent to him *Abdul Halim* v *Pana Mia*, 51 Ind Cas 494 A tenant cannot deny the right of the person from whom he took the tenancy *Janki* v *Ram Sahai*, L R 4 A 398, *Sital Prasad* v *Badri*, 69 Ind Cas 647 A tenant can prove cessor of landlord's title by ouster by ... he latter on ouster *Ramaswami*, v ... ee also *Alagapillai* v *Ramaswami*, 49 Ind Cas 892, *Hopcroft* v *Keys*, 9 Bing 613

Where in a suit by ... has been admitted, the ... landlord's title *Rattirai* ... 626 The section of th... who has been put in pos... of English law which enacts that a tenant who was so let into possession could not deny his landlord's title The plea of estoppel is of no avail where tenants are ... ain members of the ... egal position or by ... possession of their ... effect upon their ... *Pal Singh*, 4 O W N ... estopped ... =29 Bom ... applies to ... v *Asurn*, ... tenant, it does not lie ... e of the lessors *Keso* ... I R 1927 Cal 94 ... at 281 "The rule" s ... prohi-

nts a tenant from disputing in a Court of law the title of his landlord, is a w[illegible] rule tending to general convenience I am aware that there is a qualification of this rule, if qualification it can be called, and that there are cases in which the tenant has been permitted to show that a landlord could not justify a distress in all of these, however, the right of the landlord to demise has been admitted, and the plea has been either that his title has since expired, or that the tenant has been compelled to pay sums which he was entitled to deduct from the rent, these cases therefore rather confirm than impeach the general rule, but the tenant here broadly disputes the lessor's right to demise"

Or person claiming through such tenant When the relation of landlord and tenant is once established, it attaches to all who may succeed the tenant immediately or remotely, and the succeeding tenant is as much affected by the acts and acknowledgments of his predecessor as though they were his own. *Crease* v *Larrat* 1 Croup M & R 919 The assignor of a lease is estopped equally with his assignor *Taylor* v *Needham*, 2 Taunt 278; *John on* v *Mason*, 1 Esp 89, *Doe d Bullen* v *Mills*, 2 Ad. & El. 17, *Doe d Manton* v *Plomer*, 9 Bing 41 But a third person not claiming possession of the land who has brought goods on to the land by the licence of the tenant, is not estopped from disputing the lessor's title *Tilman* v *Henman*, (1893) 2 Q B 168 So persons not claiming possession of land through the tenant are not estopped from denying the title of the lessor *Maharaja of Jaipur* v *Sujan Singh* 44 A 671 = 20 A L J 615 = (1922) A 333 Where the lessors accepted and acted upon the *Kabuliyat*, the lessors as well as the persons claiming under them are equally estopped from denying the validity of the lease *Ram Mand l* v *Durjodhan*, 91 Ind Cas 661 = A I R 1926 Cal. 882 The estoppel operates against persons claiming through the tenants, as for instance sub-lessees. *Caspers on Estoppel* 107, *Doe d Knight* v *Smythe*, 4 M & S 347, *London and N W Rail Co* v *West*, L R 2 C P 553; *Barwick* v *Thompson*, 7 T R 488 An under tenant is bound by estoppels as against his lessor under s 116 and is estopped from denying the title of the original landlord Where the lessor obtains a decree for ejectment against the lessee he can execute the decree against the sub-lessee also *Sheikh Yusuf* v *Jyotish Chandra*, 35 C W N 1132 = A I R 1932 Cal 241 This section which enacts the rule of estoppel of a tenant is not exhaustive of all principles of estoppel as between landlord and tenant. The basis of the principle is the fact of the letting of the tenant into possession which creates the estoppel If a tenant consents to give up possession to a party claiming title adverse to the land lord's title that party is estopped as the tenant would have been from disputing the landlord's title *Ajitulla* v *Bilati*, 35 C W N 652 = 54 C. L J 151

During the continuance of the tenancy A tenant cannot, in the absence of fraud or mistake, question the title of a person to whom he has attorned (*Gravenor* v *Woodhouse*, 1 Bing 38, *Hall* v *Butler*, 10 Ad & El 204; *Doe d Marlow* v *Wiggins*, 4 Q B 367), or paid rent [(*Carlton* v *Bowcock*, (1885) 51 L T 659)], or at whose hands he has submitted to a distress, (*Panton* v *Jones* [illegible] 1 Bing N C 45) A tenant is as has already [illegible] title has expired [illegible] 32, *Doe d Marriot* v [illegible] *oe d Strode* v *Selor* [illegible] *e* v *Watson*, 2 Stark [illegible] & C 529, *Doe* v [illegible] 307; *Clark* v *Dlic* [illegible] "during the cont[illegible] "at the beginning of [illegible] the subject of the tenancy The words of [illegible] enant to show that his landlord's title has [illegible] *a* v *Abai Amrita*, 11 Bom L R 1093, [illegible] 422 The words 'continuance of tenancy" [illegible] in question in the same suit in which the [illegible] us tenancy *Nagin Das* v *Bahalal* A I R [illegible] Where the defendant is adjudged a tenant [illegible] of the pl[illegible]tiff he is estop[illegible] this section from denying the title of the pl[illegible]nt [illegible] the beginnin[illegible] nancy *Chhadammi* v *Parbati*, A W N 19[illegible] tenant canno[illegible] contin[illegible] the tenancy, be permitted

to deny ... The relation ... eased *Devilraj* ... *nta* v *Dukkumalla*, 25 Ind Cas 721 A tenant who has been let into possession cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord *Mussamat Bilas Kunwar* v *Desring*, 19 C W N 1207 P C = 29 M L J 335; *Mahomed Mumtaz* v *Maurang*, 60 Ind Cas 502 = 3 Lah L J 227 In a suit brought by the plaintiff in ejectment on the expiry of the lease, it is not open to the defendant under s 116 of the Evidence Act to say that the plaintiff is not the sole landlord, when the defendant had been inducted on the land by the plaintiff and when the lease in favour of the defendant had been executed by the plaintiff alone *Alimuddin* v *Alanaddin*, 38 Ind Cas 531 This section only operates as an estoppel during the continuance of a tenancy and not after it has come to an end. A tenant is liable to pay rent to the person who has the real title *Mahadeo* v *Jainarayan*, 62 Ind Cas 850 But it is open to the tenant to prove a subsequent cessor of the landlord's title, and one way in which the tenant can show that the title had determine ... such an e ... who has ... a term of years cannot set up during the continuance of such relation any title adverse to the landlord inconsistent with the legal relation between them and however notoriously and to the knowledge of the other party, acquire by the operation of the law of limitation title as owner of any other title inconsistent ... *Faruq*, ... d) The ... against him in ejectment during the continuance of the tenancy and is decreed against him *Vertaunes* v *Robinson* A I R 1928 Rang 162 A tenant is not estopped even before or after the expiration of the term from showing that his lessor's title has determined *Downs* v *Cooper*, 2 Q B 256, *Langford* v. *Selmes*, 3 K & J. 220, 229, *Gippins* v *Buckland*, 1 H & C 236; *Wogan* v *Doyle*, 12 L R Ir. 39; *Sergeant* v *Nash Field & Co* (1903) 2 K B 304, 312 C A But if the tenant came ... h ... *Doe* v. *Smythe*, 4 ... , p 401; see also *K* ... 313, *Ajitulla* v. *B* ... 11 Oudh 174 = 8 C ... r s 116 which p ... ment action was temporary only and ceased to operate when he gave up possession of the land and when his tenancy accordingl ... be decided as the case could ... *Agabeg* v *James Golder*, 57 I A ...

At the beginning of the tenancy. The words "at the beginning of the teancy" in this section only apply to cases in which the tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession *Lal Mahomed* v *Kallanus*, 11 C. 519 (explained in *Ketudas* v. *Surendra* 7 C W. N 596); ...

... that relationship ceases ... A 226 = 33 Ind Cas 97. ... dlord had no title at a ... that since its commencement it has expired or has been defeated because the bar operates only during the continuance of the tenancy *Rama Swami* v *Alanga Pillai*, 79 Ind Ca 881 = 1925 Mad 143 Where under s 116 of the Evidence Act a tenant duri

the continuance of the tenancy is not estopped from denying that at the beginning of the tenancy his landlord had any title to the demised premises it is open to a tenant in a suit for recovery of rent to show that the title of his landlord has expired or have legally determined *Ram Ralha* v *Munna Lal,* 32 P L R 338=A I R 1931 Lah 243 This section only provides that a tenant cannot be permitted to deny that the landlord at the beginning of the tenancy had a title to the property He is not estopped from saying that on the death of the lessor the property did not devolve on the plaintiff but devolved on some body else *Madan Lal* v *Mt Gour Dasi* 26 A L J 1255=110 Ind Cas 376=A I R 1928 All 650 A tenant attorning to the mortgagee and paying rent to him will be estopped from questioning the mortgagee's title in a suit for ejectment by the mortgagee *Nagindas* v *Bahalal,* A I R 1930 Bom 391=32 Bom L R 692

How a relationship of landlord and tenant is created A relationship of landlord and tenant can be created either by written contract or by verbal contract, when the landlord has put the tenant in possession of the land It may also be inferred from the
Casperz on Estoppel, 102 I
established between the pa
the landlord's title There r
must be put into possession by the landlord in order to estop the tenant from disputing the landlord s title The question in each case is whether a new tenancy has arisen Of course in support of the contention that there was no relation of landlord and tenant between the parties the tenant may assert that the contract of tenancy is void or voidable on account of misrepresentation or fraud *Shanker* v *Jagannath,* 30 Bom L R 741=111 Ind Cas 911=A I R 1928 Bom 165 Payment of rent is evidence of permissive occupation, and in all cases furnishes a strong presumption against the tenant It furnishes the landlord with a *prima facie* case, but the circumstance is always open to explanation, and where rent has been paid under a mistake or upon misrepresentation, it is open to the tenant to rebut the presumption *Gravenor* v *Woodhouse* 1 Bing 38, *Rogers* v *Pitcher,* 6 Taunt 202, *Casperz on Estoppel* 113, *Williams* v *Bartholomeo,* 1 B & P 326, *Doe* v *Clarke* Perke Ad Cas 239, *Fenner* v *Duplock,* 2 Bing 10, *Doe* v *Barton,* 11 Ad & El 307; *Doe* v *Francis* 2 M & R 57, *Doe* v *Brown,* 7 Ad & El 447, *Hall* v *Butler,* 10 Ad & El 204 *Carlton* v *Boucock,* 51 L T 659, *Serjent* v *Nash,* (1903) 2 K B 304 C A, *Knight* v *Cox,* 18 C
title in
per on
ock, 51
strong

Landlord is a benamidar In cases where the doctrine of estoppel does not come into play, it is open to the tenant-defendant to urge that the *plaintiff,* as *benamidar* for the beneficial owner, is not entitled to claim rent from him *Rahimannessa* v *Mahadeb* 12 C L J 428 In that case at page 431, *Mr Justice Mookherjee* said 'The District Judge, as we have already stated, has held
hat the plaintiff was a mere
isequently claim rent from him
judicial decision, but in fact,
series of decisions of this Court
ses of *Donnelle* v *Kedarnath*
ckerbutty v *Donnelle* 20 W R
V R 44 and *Kailash Mondal*
also, reliance may be placed to
some extent upon the case of *Jaynarain Bose* v *Kadambini Dasi* 7 B L R 723 In some of these cases, there are expressions to be found in the judgments to the effect that the doctrine of estoppel recognised in English law should not be adopted in this country It is not necessary for us to consider, whether this view is not too widely expressed, and whether such a position could be maintained in view of the provisions of section 116 of the Indian Evidence Act It is sufficient for us to hold that in cases where the doctrine of estoppel does not come into play, it is open to the tenant-defendant to urge that the plaintiff, as *benamidar* for beneficial owner is not entitled to claim rent from him *We may*

S.

143 and *Gregory* v *Deridge*, 3 Bing 471" But in a suit for rent, instituted by
the person, in
s 116 from rai
somebody else
nature *Bogar*
1907 ; see also
Charan, 9 Ind
Cas 89 But t
is executed by

general law, has no
nant can deny his right
also *Kuthaperumal* v.
I L J 597.

A party obtaining possession
ng those premises
title against the
has collected rent
th v *Narayan*, 13
M 335

Acceptance of lease under coercion, etc A person who, under coercion, takes a lease, is not bound by his acceptance, nor is he estopped, by paying rent to the person granting the
unless the payee let him into posses
estoppel would be confined to th
was given *Collector* v *Suraj Baksh*
made to a Collector for a tenure liable to pay revenue on account of an estate,
waste, and cannot create

can deny his landlord's title existing at the commencement of the lease, the rule only applies where the tenant has been let into possession If through ignorance or mistake a tenant has executed a rent note and has been put in possession by the lessor it seems that he can dispute the lessor's title *Mt Luxmibai* v *Devi* 72 Ind Cas 855 A tenant who has executed a lease but

attornment was made by payment of rent But the *onus* of proving want of title is on them *Chengtu Soohor* v *Jaheruddin Mondal*, 91 Ind Cas 669 = A I. R 1926 Cal 720 Where a tenant being already in possession has made an attornment or acknowledgment of the tenancy, he may show that he did so

S. through ignorance, mistake or the like *Bishen* v *Fide Husain*, 112 Ind Cas 382

Assignee of landlrod A tenant is not prevented from questioning the title of the alleged assignee of his admitted landlord *Ranee Tillessurce* v *Ranee Ashmedh*, 21 W R 101. *Cornish* v *Scarell*, 8 B & C. 471; *Coleridge* v *Maclenzie*, 4 M & G 143 The defendant mortgaged in 1895 an unrecogni ed sub-division of a Narwa but remained in possession of it under a rent note executed in favour of the mortgagee. The mortgagee assigned his rights to the plaintiff Plaintiff sued defendant in ejectment and the latter pleaded that the mortgage, the lease and the assignment were void *Held* that the defendant having attorned to plaintiff it was not open to him to contend in the ejectment suit that plaintiff had no right to let out the property on rent *Darilas* v *Shamal*, 22 Bom L R 149=58 Ind Cas 595 But in the case of an assignee of the lessor, though he is to all intents and purposes in the same situation as the lessor, and takes the benefit of and is bound by a lease by estoppel, the ... that the lessor had no such title as he ... person cla m ng to be the assignee is not ... arker v ... agrave ... Franco ... hls, 11
7 L J O S 18, *Jue* v *Wood*, Cr ... M & W 337, 343; *Doe* v *Wiggins*, 4 Q B 367, 375; *Sturgeon* v *Wingfield* 15 M & W 224; *Cuthbertson* v *Irving*, 4 H & N. 742; *Halsbury Vol* 13 p 405

Disclaimer of right to evict The authorities show that a tenant in India is not precluded by an admission of tenancy from showing that the nature of the tenancy asserted by him to the knowledge of the landlord has been for the ... the right to evict ... by the tenant to the ... of a right incon ... is a tenant at will or ... e *Vivian* v *Moat*, 16 Ch D 730 A landlord merely be receiving rent cannot preserve his right to other claims continuously denied by the tenant The fact that such assertion ... adverse character when ... *itsugn* v *Banaji* 27 ... *Ployd*, 15 W R 233, ... *Durga Prosad*, 12 B ... *Ngapa*, 7 B. 96, 99, *Mahara* v *Narayana*, 3 M 244, *Narayana* v *Yamunabai*, P J. 136; *Sankaran* v. *Periasami*, 13 M 467

Whether sections 116 and 117 are exhaustive Sections 116 and 117 of ... toppel by agreement, ... of a bill of exchange ... has been argued in part of the analogy of the tenants' estoppel It has however been correctly ... doctrine of estoppel by ... 97) 1 Ch D 440 on appeal ... which is not provided for ... 747=3 C L J 629=33 C ... ; see also *Ajuana* v. *Bhan*, 35 C W N 652=54 C L J 151 The principle of the rule in such cases is that where property is taken under an instrument and the taking possession is in accordance with a right which could not have been granted except upon the ... possessor should not ... l, there is an ... 1 20 Ind Cas ... a dictum in ... erty to dispute ... Evidence Act ... y Statute, Act ... ker v *Small*, ... s 116 and 117 ... applies The ... e Act are not

exhaustive in force in British India *Bhaiganta* v *Himmat*, 20 C W N 1335=21 C. L J 103 In
decided by this Cour
that sections 115 to
of the late *Chief Justice Sir Richard Garth* to which I wish to draw attention is at p 678 There he is reported to have said 'It has been further contended by the Appellants, that ss 115 to 117 contained in Chap VIII of the Evidence Act lay down only rules of estoppel which are now intended to be inforce in British India, and that those rules are treated by the Act as rules of evidence; and that
which th
would in
ing any
of sectic
administration of the law' I desire to point out that the principle of law which was laid down by *Chief Justice Tindal* (*vide notes* under *principle, supra*) to which I have
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claiming by him can controvert the landlord's title He cannot put another person in poss
This I believe,
down by *Bu*
758n) This e
v *Gomme*, 2
(1893) 2 Q B
v *Bradley*, 5 (
of the argume
an estoppel except during the term? *Serjt, Byles* answered A tenant is at all times estopped from disputing the title of his landlord and referred to a long line of cases, including *Doe* v *Smythe* 4 M & S 347 At a later stage of the argument, *Mr Justice Vaughan Williams* repeated the question, 'whether the estoppel does not end with term' *Serjt Byles* answered the estoppel is limited in point of extent; but there is no authority for saying that it is limited in point of time' *Wilde C J* then intervened with the following observation "In Co Litt 47(6), it is said that 'if a man take a lease for years of his own land by deed indented, the estoppel doth not continue after the term indeed, for, by the making of the lease, the estoppel doth grow, and consequently, by the end of the lease the estoppel determines The only qualification I am aware of that has been engrafted upon that rule, is,' that if the tenant com
possession before he disp
pointed out in *Accident*
when the tenant had p
permission is the foundat
dispute the title of his
existence of the estoppel
conditions are present,
such possess

long line of decisions
v *Guru Prosad*, 9
s impliedly recognised
ugurnath, 7 W R 25,
v *Rasmonee*, 14 W R 85 and *Jamsiram* v *Kalambini*, 7 B L R 723 n We have further the weighty opinion of *Sir Subramanya Ayyar C J* expressed in the case of *Muthaniyan* v *Sinna Sama Vaiyan*, 28 M 526 that

S. 116. the law has not in this respect been altered by the Indian Evidence Act, and that now, ... estoppel from denying ... (see also *Ram Chandra* ... that this view is erroneous and that the law as ... Indian Evidence Act is an intentional dep... subject In my opinion, there is no foundation for the contention that the ... into this country the archaic ... ction 116 does not by ... ly provides that, during the continuance of the tenancy, a tenant of an immoveable property or persons claiming through such tenant, cannot be permitted to deny that the landlord of such tenant, at the beginning of such tenancy, had no title to the immoveable property This does not imply that after the expiration of the tenancy the ... on with the

... by a rule of substan... of evidence, not being ... are not excluded by ... ection does not contain the whole law of estoppel Thus the tenant's estoppel operates even after the termination of the tenancy *Majibar* v *Isab Surati* 32 C W N 867=A I R 1928 Cal 546.

Licensee of a person in possession There is no distinction, so far as concerns the law of estoppel, between a licensee and a tenant, and a licensee who has obtained possession by aid of the license, before he can show that his ... possession of the premises ... Vol 13 p 404 In ... obtained possession ... in the garden, and ... title In delivering ... case of a person who ... *Doe d Knight* v *Lady* ... up possession to the party ... iming through him, has a ... was held in that case, not that the party claiming as landlady to the tenant was altogether estopped from trying the right, but that the tenant must first restore possession If the defendant here has any right, she might, in the first instance, have brought ejectment, or have entered on Mrs Johnson and disseised her But she takes neither course She fraudulently obtains permission to go upon the land, and ... holding the land ... extends also ... as a servant." ... veen the case ... ng permission, ... pp 106 107 ... had ... en to ... isting ... aran ... mere ... cense ... inder ... sbury ... se of Vol 13, 424 The respondent came upon the land in dispute by the ... the appellant, who caused M T to redeem it from mortgage, after which it was held jointly by the families of M T and the respondent About 15 years

subsequently according to the respondent, the appellant made over the land altogether to him and M T. The respondent also raised the question of the appellant's title. The burden of proof being entirely on the respondent and no limitation being establish

ndant is proved to be permissive, he is estopped from denying plaintiffs' title under this section *Mah Hla v. Maung*

1.

Consequently the licensee is not prevented from asserting that he must not be turned out *Uthdeiksa v Ma San Me*, 7 R 617 = A. I R 1930 Rang 29

Estoppel between mortgagor and mortgagee Where a mortgagee is put into possession by the mortgagor in pursuance of the contract of mortgage, he is estopped from denying the title of his mortgagor during the continuance of the mortgage The principle of estoppel between the mortgagor and the mortgagee works in favour of and against both of them The mortgagor is estopped from denying his own authority to mortgage the property' On the other hand the mortgagee is estopped from denying the authority of the mortgagor to mortgage his property *Ibad As*
11 O L J 722, see also *Lakshmi*
Surendra v *Khitindra*, 29 C L J 434,
Kadakan v *Oothunan*, 10 Ind Cas 2
Jadunandan, A I R 1925 All 758, *Deb*
med v *Hanya*, 35 B 507, *Gulab* v *Diwan*, 48 C 591 (P C), *Jogini* v *Bhutnath*, 31 C 146, *Shamacharan* v *Mokhoda*, 15 C W N 703, *Ranjban Saha* v *Dhiku Singh*, 16 C L J 264 = 16 Ind Cas 246; *Kanara Venkata* v *Ramaswami*, 35 M 75, *Mahar*
is estopped from
long as he has
tives *Rajnaraya*
I. R 1925 All
the date of the mo
death of the mortgagor persons who are his heirs under the Hindu Law did not succeed to his occupancy rights in accordance with the special rules laid down in Act 12 of 1881 *Mahadeo* v *Ram Raj*, A I R 1930 All 108

Estoppel by landlord A landlord is estopped from alleging his want of title to the premises (*Trevivan* v *Lawrence* 2 Smith's L C (13th Ed) 605), against tenant, though not, it has been held, the invalidity of a lease granted by him in good faith, but without necessary consent *Canterbury Co* v *Cooper*, 73 J P 225, *Phip Ev* 659

Estoppel of acceptor of bill of exchange bailee, or licensee

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it, nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

Explanation. (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn

Explanation (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

7. ... In ... on are estoppels by agreement.
... nts As has been well
... based on a conventional
state of facts that, for that very reason, the parties never in practice come to
any express agreement about them at all and the estoppel is nothing but the
carrying out of what the parties as honest men must have intended if they
thought about the matter at all at the time they made the bargain (*Cabal's Estoppel*, 12, 21) The parties are deemed to have dealt with one another on
the basis of their rights being regulated by a conventional state of facts The
tenant and lice ...
the terms that th ...
without whose ...
of a bill amounts to an undertaking to pay to the order of the drawer ... and
all are instances of estoppel ... ilar
therefore of the estoppel n ... sur
transaction in each case" I
Chunder, 3 C L J 629.

Negotiable Instruments ... ntly appl ed
in the case of the acceptance ... by such act
admits the genuineness of the sig ... mpetency of
the drawers to assume that re ... 86, see also
Phillips v *Im Thurn* L R 1 C P 463 "The object of the law merchant" says
Byles J in *Swan* v *North British Australian Co*, 2 H & C 175, "as to bills
and notes made or become payable to bearer, is to secure their circulation
as money; therefore honest acquisition confers title" So whenever one of
... he who has enabled such
... *Ashurst J* in *Lickbarrow* v
... is thus laid
... ut question
... signature
that it is incumbent upon ... handwriting of his
... drawer's name
... late the accep-
... *onal Bank*, 46
... he same case it
... nature of the
... has been unl
... case of a bill
paid upon presentment, as to one accepted and afterwards paid" The rule is
thus stated by *Stephen* "No acceptor of a bill of exchange is permitted to
deny the signature of the drawer, or his capacity to draw, or, if the bill is pay
able to the order of the drawer, h ... though he may
deny the fact of ... tion, the
authority of the age ... of the
principal, though ... bill is
accepted in bank, the acceptor may not deny the fact that the drawer endorsed
... owledge
... other
... The
... r, 10
... bills without
... drawers If
... hey must be
... who actually
... But in India
... ination L In
... really drawn
... at liberty to
... d by sections
... ction 41 runs
... s not relieved
... knew or had
reason to believe the indorsement to be forged when he accepted the bill"

Section 42 says: "An acceptor of a bill of exchange drawn in a fictitious name ... that such name is fictitious,
an indorse-
to be made
lay down
imptions as
regards consideration, date, time of acceptance, time of transfer, order of endorsement and stamp This section further authorises the presumption that the holder is a holder in due course Section 119 provides that the Court shall, on proof of the protest presume the fact of dishonour Section 120 makes provision for estoppel against denying original validity of instrument by the maker of the promissory note, drawer of a bill of exchange or cheque, and acceptor of a bill of exchange Section 121 makes provision for estoppel against denying capacity of payee to endorse Under section 122, no endorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the instrument In an action on a pro note or a bill of exchange against a person whose name properly appears
defendant to show that the sign
principal, whether the defend
Co v *Dewan Chand*, 117 Ind

Bailor anc ... goods is estopped
to claim that ... *Burr Jones* § 285,
Wilson v *Ande* ... v *Griffin*, 10 Bing
246, *Henderson*
and those with whom pro
bears a close resemblance
vide section 116 supra
the bailment is determ
paramount *Biddle* v

do not question the general
... *aiten* in *Cheesman* v *Enall*,
n connection with wharfs
possession of property were

... iere has been no special
to that of a tenant who,
estopped from denying
1 he is evicted by title
the same, whether the

acti
Rog
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thir
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delivered the property to the true owner, who had the right to possession upon demand by the latter, even before legal proceedings have been commenced Such demand by the true owner is equivalent to eviction by title paramount *Burr Jones* § 285 *Stephen* thus states somewhat differently, the general rule "No bailee, agent or licensee is permitted to deny that the bailor, principal, or licensor, by whom any goods were entrusted to any of them respectively was

laid down in Biddle v. Bond, supra by Lord Blackburn, in a considered ... a Judge who knew ... laid down there ... ordinary contract of ... r non-delivery of ... ady delivered them ... for an interpleader ... I defend the action ... the goods' ... party, on behalf of ... ules' If he takes the latter c... upon but he must prove it; ... that says Lord Blackburn, ... of that person ... laid down, and it seems to me rightly ... Therefore, I am of opinion that ... on the right and title and by the ... have not named any such person or ... or that any person has such a right ... terms that they are not defending ... for themselves only As between ... have no defence Therefore, if we ... plaintiffs and the defendants, ... succeed in the action." Rogers ... 318 (325) In the same case ... several rival claimants to the copper

Lindley L J said ... proceedings against the rival ... St Kathrine's the ... Robinson v claim ... of bailment Dock ... this case" Jenk ... "A bailee the ... bailor to the

See also Civil Procedure Code ... shew that the title of ... may, however, equally with a tenant, ... Thorney v Tilbury, 3 H & N 534 So goods has expired since the bailment ... f the facts shew that there has been what ... Shelbury v Scotsford, Yelv ... and there has been ... the jus tertii, if no eviction, the bailee may ... authority of the he defends his possession upon ... In that case, tertius Biddle v. Bond, (6 B & S 233) is an authority ... said (at p 233), Blacburn J delivering the judgment of the Queen's Bench, said ... may set up the jus tertii is "We think that the true ground on which a bailee may set up the jus tertii ceases ... Shelbury v Scotsford, Yelv 22, viz, that the estoppel ceases ... is founded is determined by what is equivalent ... It is not enough that the bailee has become aware of the title of ... person We agree in what is said in Betlley v Read, 4 Q B 511 517 that 'to allow a depository of goods or money, who has acknowl... title of another who makes no claim ... to keep for himself ... himself whatsoever ... so that he ... that is said by may be entitled to relief under an interpleader ... that a bailee can set up ... Thorney v Tilbury 3 H & N 534, 537, that a bailee can set up ... and title and by the ... is supported ... ice to produce ... the goods and ... rections of the ... such delivery" ... Thackarseydas, ... other than the ... delivery of the

17 C W N ... he may apply to the Court to stop ... bailor, claims goods bailed, he may apply to the Court to stop ... Contract Act, § 167 ... the title to the goods ... ed with knowledge that another than the bailor ... the bailee cannot set up the claim of such third

In *Exparte Davies*, 19 Ch D 86,
which goods have been taken
by title paramount, and, if

good excuse to him as against his bai
of *Shelbury* v *Scotsford*, Yelv 23 in
thief and had been forcibly taken away from the bailee by the rightful owner,
and it was held that the thief could not maintain an action of trover for the
ground that the eviction of the horse
of his promise to return it to his
ay be able to avail himself of such a
efault If the bailee knowing of the
adverse claim, has said to his
me have a commission, and I
have afterwards set up against his bailor the title of the adverse claimant, because
he would have acted with his eyes open," and *Lush J* added, "I am of opinion
that when a person in such a position, knowing of two adverse claims to goods
elects to take part of one of the claimants and to sell the goods as his, he is
ken this
in the
trustee

Licenses of patentee, etc One who manufactured goods by consent of
and
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293 The United States Supreme Court in an oft-quoted case said "Having
actually received profits from the sales of the patented machine, which profits

ion of the defendants
y an agent or a joint
joint owner cannot
setting up the allega-
s § 285 The analogy
lackburn 'So long
as the lease remains in force, and the tenant has not been evicted from the land,
he is estopped from denying the lessor s title to that land, but he is entitled to
show that a particular parcel was never comprised in the lease So a licensee

stranger can show
ke v *Adie*, 2 App
this rule does not
ot acting under it
284, 289), or a
tage (*A W*) *Ltd*)
by the licensee of
& B 930, *Taylor*
Crossly v *Dixon*,
mith, 26 Ch D.

7. A licensee of a trademark also is estopped, as against his licensor, from questioning the latter's title to the trade mark. *Jagarnath* v *Cresswell*, 40 C 814 In delivering the judgment *Imam J* said: "The first question that I have to consider is whether the defendant can be allowed to deny the plaintiff's title The contract between the owner of a trade mark and his licensee is like a contract between a landlord and his tenant, and as between landlord and tenant so between licensor and licensee the former's right cannot be questioned by the latter In *Clarke* v *Adie*, L R 2 A C 423, which was a case of a patent *Lord Blackburn* said 'Although a stranger might show that the patent is as bad as any one could wish it the licensee must not show that,' and in the same case *Lord Cairr* ... stand here admitting its utility ... In an earlier case *Grover and* ... N S 713 *Wood* *V C* held that the fact of a patent having been found invalid at law in an action between the patentee and a third party, could not be set up against the patentee by his licensee in a suit upon the same patent The ... position as the licensee of a patent ... 49 (154); *Ebrahim* v *Essa Abba* 24 M ... C 214, "In India there is no system of registration nor is there any provision for a statutory title to a trademark so that the rights of the parties must be determined in accordance with the principles of the English common Law" *Per Jenkins C J.* in *British American Tobacco Co Ltd* v *Mahboob Buksh*, 38 C 110 at p 117, see also *G S Woah* v *Messrs Jagannath*, 42 C 262 = 19 C W N 1. When the plaintiffs, the transferees of the trade marks and business of a jute bailor, gave a license to the defendants, the right to use and authorise others to use exclusively the trade marks and to hold the good will of the business of original jute-bailor and the marks without any interference by the proprietors for a particular period on ... to repudiate ... trade ... ndian ... ad at ... ction ... ples ... s had ... ority ... The licensee of a trade mark cannot put an end to the relation of licensor and licensee by repudiatin ... concurrence of the other party is a ... al o ... *Johnstone* v *Milling*, ... opted ... will by a person who is no ... have acquire the property ... 583 = been imported by him ... 39 A 123

Warehouse man A warehouse man who, on receiving an order from the seller of malt to hold on account ... knowledgment ... the that he so holds it, cannot set up ... rred purchaser that by the usage of tra ... the till it is measured and that bef ... ouse seller became bankrupt *Stonord* ... man in possession of goods attorns to the buyer of them, acknowledging that ... pays the price or ... representa ... ound and say ... *d*, 6 B & S ... *Watson* 2 B & C ... 1895) 1 Q B 521, ... stoppel *in pais* is ... *ears*, 6 A & E ... H & N 549, and ... pon this principle ... defendant have

found the- from setting up a title s of *Stonord* v. *Demeh* *iq* v *Birnie*, 7 Bing 339, in which *Tindal C J* stated 'the defendant is estopped by his own admissions; for unless they amount to an estoppel, the word 'estoppel' will be blotted from law' The admission in the present case namely, the statement by the defendant that he held the sugar at the plaintiff's order and disposal, is certainly no less strong than in *Gosling* v *Birnie*; and lastly, in the case of *Knights* v *Wiffen*, L R 5 Q B 660, in which the principle upon which an estoppel *in pais* arises is again enunciated, and it is again pointed out how it applies" The general rule is that a bailee of goods who has acknowledged that they belong to a the title of that person *Hawes* v Bing 337 Where a wharfinger for certain persons, and transferred it was held that he could not resist an action on the ground that they had not been separate property passed to the person who lodged th ossession, sold a quantity of them to

refusal to order by superinte mere pror found an

CHAPTER IX.

OF WITNESSES

118. All persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind

Who may testify

Explanation —A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Witness must be competent Incompetency, denotes the legal incapacity to give many testim *11th Ed* of exc interest, and (2) incompetency from mental capacity On the former ground, not only were parties themselves and their husbands and wives excluded, but also all persons who were in *pari jure* with either party, or otherwise substantially interested in the proceedings Successive statutes have abolished this kind of incompetency, leaving the fact of interest in the proceedings to affect credibility

8. merely *Coel le Cas Ev* 213 The early common law rules of exclus on prevent ... ose who by reason of ... re not suppos l to be ... to the suit (c) The ... was charg d by the ... erested (e) Naturally ... Speal ing generally the trend of those exclusions was absent in the same direction as the present rules excluding persons from acting as jurors, thus giving another illustration of the influence of the old jury system The substantial di appearance of these rules of exclusion may be traced between the years of 1823 and 1853 *Mcl elte j s Ev* § 212

Infidels and Atheists In England formerly all persons not Christians were excluded from testifying, but at the present time there is no exclu on upon the ground of religious belief, or the lack of it The theory of the oath has always been that it gave a peculiar sanctity to testimony and that w thout the oath there was no guarantee of truthfulness Under these circumstances (and the law recognized no substitute for the oath it was quite natural that persons who, by reason of their religious belief, felt no force in the oath should have been excluded from testifying In fact, without a change in the theory it would have been inconsistent and absurl to have allowed a per on who refused to take an oath or if taking it, took it only as a matter of form to give his testimony The broadening of the form of the oath, with the recogni tion that other religious beliefs besides the belief of the establi hed church might exercise the same influence over the mind, and furnish the same guarant e of truthfulness resulted in the final disappearance of this rule of exclusion ... It was hard for the English Courts to ... rs was the ... ht exerc e ... inally came ... laid down ... —have 10 ... early as in ... 13, that the testimony of three witnesses whose depositions had been taken under oath administered in accordance with the *Gentoo* religion should be received There *Lord Chief Justice Willes* at p 45 says, There is nothing in the argument that, as Christianity is the law of England, no other oath is consistent with it and, for the reasons already given, this argument carries no weight with it Though I have shown that an infidel cannot be excluded from being a witness and though I am of opinion that infidels who believe in a God and future rewards and punishments in his other world may be witnesses yet I am as clearly of opinion that if they do not believe in God or future rewards and punishments they ought not to be admitted as witnesses' The principle of this case was subsequently approved by *Lord Mansfield* in *Atcheson* v *Everill* 1 Cowp 382, and thereafter re affirmed in other cases *Rex* v *Gilham* 1 Esp 285, *Edmonds* v *Rowe*, Ryan & Moody 77 It is evident from this that at that time the Courts had found no way to admit the te timony of atheists In the case of the suit of Quakers so obnoxious to the early English Churchman whose members refused to take oath, no little difficulty was experienced in bringing them within the rule of competency, so much, in fact that a special statute was required to extend this privilege Stat 7 & 8 William III C 34 allowed Quakers to affirm where other persons were required to take the oat ... Later however ... or any per on ... Vict C 68) ... 1888 (51 & 52 ... ting to being sworn, and stating as the ground of such objection either that he has no religious belief ... an oath ... he expressly ... *Reg* v *Moore*

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Cl L J M C 80, *Nagh* v *Ali Khan*, 8 T R 411 As regards the question how far it is necessary to follow a statutory form of oath or affirmation, reference may be made to *Salomans* v *Miller*, 8 Ex 778, *Lancaster* v *Heaton*, 8 El & Bl 952, *Wolsely* v *Worthington* 13 Ir Ch R 311, *Camp Rul Cas Vol. XI* p 111

Parties to the suit The old rule as to the incompetency of parties to the suit to be witnesses was founded upon the prejudice supposed to exist on account of personal interest in the result At the present day it has been entirely abolished, except in the one case of an accused person upon trial for the crime charged against him

Husband and wife of party. The husband and wife of a party may testify in all cases, but is not compellable to disclose private or confidential conversations and communications (*Vide s 120 infra*)

Pecuniary interest of a witness Originally persons pecuniarily interested in the suit were not permitted to testify In *Bent* v *Baker*, 3 T R 27, 36, *Buller J defined the rule of exclusion on the ground of interest to* be whether the witness is to gain or lose by the event of the cause This however, has entirely changed except with respect to a witness to a Will who is also a beneficiary under the Will This has been said to be the sole surviver of the numerous exclusionary rules making witnesses incompetent by reason of relationship or pecuniary interest *Best Ev* (*Chamberlain Jur Ed*) p 178, *note* To day a person interested in the outcome of a suit is allowed to testify the same as a disinterested person, but the adverse party may show by cross examination the nature and extent of that interest as affecting the credibility of the witness *McKelvey's Ev* § 216

Sex Inspite of the example of the surrounding peoples notably of Scotland there seems never to have been in the law of England any general testimonial disability based on sex *Wigmore* § 517

Scope of the section Under this section all persons are competent to testify *unless the Court considers that they are incapable of giving evidence*

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to testify as a witness is a condition precedent to the administration to him of an oath or affirmation and is a question distinct from that of his credibility when he has been sworn or has affirmed In determining the question of competency the Court under this section has not to enter into enquiries as to witness's religious belief or as to the knowledge of the consequences of falsehood in this world or the next It has to ascertain in the best way it can whether, from the extent of his intellectual capacity and understanding he is able to give a rational account, of what he has seen or heard or done on a particular occasion If a person of tender years or of very advanced age can satisfy these requirements his competency as a witness is established *Queen Empress* v *Lal Sahai* 11 A 183 *According to English law every sane person* is a competent witness in both civil and criminal cases except a child who does not understand the nature of an oath *Powell Ev* 197 But in India, where a person is competent to testify according to the provisions of this section but is u
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at p 140
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even though under the age of seven years may be sworn in a criminal prosecution provided such infant appears on strict examination by the Court to possess a sufficient knowledge of the nature and consequences of an oath, in

8. other words, a Court has to ascertain from the answers to questions propound to such a witness, whether he appreciates the danger and impiety of falsehoo The course pursued by the Sessions Judge has led to the result that the witnesses were examined in contravention of the provisions of section 6 the Indian Oaths Act On behalf of the Crown, however, it was suggest that the irregularity in the proceeding, if any, may be shown, if nece ar to have been cured by the provisions of section 13 of the Indian Oaths Ac Section 13 lays down that no omission to make any affirmation shall invalid any proceeding or render inadmissible any evidence whatever in or in respe of which such omission took place In support of this view reliance h been placed upon the decision of a majority of the Full Bench in *Queen Sheu Bhogtee*, 14 B L R 294=23 W R Cr 12 On behalf of the Appella this position has been controverted and it has been argued that where there an omission by a witness to take an oath or to make an affirmation by rea o of the deliberate act of the Court, section 13 is of no assi tance The questio raised is by no means free from difficulty, as is amply indicated by divergen of judicial opinion on the subject In this Court, the judicial opinion has n been uniform, as appears from an examination of the decisions in *Queen v Ituaria*, 14 B L R 54=22 W R Cr 11, *Queen v Annunto* 14 B L R 29 (note)=22 W. R Cr 1 and *Queen v Sheu Bhogtu*, 14 B L R 294 *It is furthe* worthy of note that in the case of *Nandolal v Aistaram*, 27 C 428, 440, when i was argued on the authority of some of the decisions first mentioned tha section 13 of the Indian Oaths Act applied to cases where the omi sion *to tak* the oath or affirmation was the result of the deliberate act of the Court or of the witness ... *Justice* ... startling ... rts ... hat ... 103. ... to ... se we prop ... with regard to the second ground urged by the appellant, I reserve my opinion upon the difficult question of the true scope and effect of *section* 13 of the Indian Oaths Act ...

... etween prosecution and defence wit nesses ... =85 Ind Cas 236=3 Bur L J 265= 26 Cr ... The only test of competency is that the w ... om understanding the questions put to him or from giving rational answers to these questions by tender years or other cause *Ram Jolaha v Emperor*, 102 Ind Cas 349=28 Cr L J 541=8 Pat L T 594 Under this section a husband is a competent witness to prove non access *Hoore v Hoore*, 25 M L J 594

How to ascertain competency Incompetency in a witness will not be presumed It comes in the shape ... the witness and if the facts on which it rests are d... ollateral questions of fact, be determined by t... M & W 483; *R. v Hill*, 2 Den L C 254), who, in cases of doubt, is always disposed to receive the witness, and let the objection go to his credibility rather than to his competency *Best Ev* § 133 Mental competency to give evidence depends ... no fixed limit of ... *rvier*, 1 Leach C ... he Court should ... to comprehend ... it to the Court.

If the Court is of opinion that by reason of tender years and defective or ... the particular ... not only ... o examine ... years is ... e rational ... the same ... suitable if ... capacity ... rd a brief

proceeding so that the appellate Court may feel satisfied as to the capacity of the child to give evidence *Tulsi v Emperor*, 110 Ind Cas 799=29 Cr L J 767=A I R 1928 Lah 903, see also *Hanuman Sarma v Emperor*, A I R 1932 Cal. 723=36 C W N 691

Duty of Court in cases of witnesses of tender years In *Nafar Sheikh v King Emperor*, 18 C W N 147 at p 150 *Mr Justice Mookerjee* said 'It has further been argued that under section 118 of the Evidence Act, he was bound to ascertain, before those children of tender years were examined as witnesses, whether they had capacity to understand and to give rational answers Reliance has been placed upon the decision in *Fakir v Emperor*, 11 C W N 51, which, it has been urged, is an authority for the proposition that it is obligatory upon a Judge to test the capacity of a witness of tender years by appropriate questions and to form his opinion as to the competency of such a witness before the actual examination commences It may be conceded that there are expressions in the judgment in the case mentioned which tend to support this broad statement, but in my opinion the proposition thus widely formulated is not justified by the terms of section 118 of the Indian Evidence Act That section lays down that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years The Legislature has not prescribed an inflexible rule of universal application to the effect that before a child of tender years is questioned, the Court must by a preliminary examination test his capacity to understand and to give rational answers and must form an opinion as to the competency of the witness before the actual examination commences In fact the case of *Queen v Whitehead* L R 1 C C R 33 shows that the incompetency of the witness may very well appear in the course of his examination in chief and that the evidence of a witness so found to be incompetent may at any stage be withdrawn from the jury The true rule on the subject is concisely stated by *Brewer J* in *Wheeler v United States*, 159 U S 523 in these terms The decision of this question (whether the child witness has sufficient intelligence) primarily rests with the trial Judge who sees the proposed witness notices his manner his apparent

trial The question of the capacity of the witness to testify is a question for the Judge himself to decide and not for the jury although after he has decided in favour of the competency of a witness it is for the jury to determine the amount of credit to be given to the statements made by such witness *Queen v Hossein* 8 W R Cr 60 A Judge can act on the evidence of a child of tender years if he is impressed by its intelligence and demeanour and the

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should for the sake of
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that (whether sworn or
of credit, and it is
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been in fact made It may turn out in the course of the examination at the
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capacity of
-3 Pat 91=3

Pat L T 649 = 66 Ind Cas 73 = 23 Cr L J 233 In the case of a child of tender years produced as a witness the Court should examine it after being satisfied that the child is intellectually sufficiently developed to enable it to understand what it has seen and to afterwards inform the Court thereof *Dhani Ram* v *Emperor*, 13 A L J 1072, *Ghulam* v *Emperor*, A I R 1930 Lah 337; *contra*, *Nafar* v *Emperor*, 41 C 406 The Judge must form his opinion as to the competency of a witness before his actual examination commences *Fala* v *Emperor* 11 C W N 51

Child witness Children of six or even five years of age have been allowed to testify upon the Court being satisfied as to their capacity to give rational testimony *R* v *Holmes* 2 F & F 788, *R* v *Perkins* — Moody C C 135, *Sheurring* v *Sheurring*, (1892) Times, Nov 11, *R* v *Brasier* 1 East P C 443 While where not satisfied, the testimony of a child of seven (*R* v *Forsyth*, 93 L T Jo 217) or even eight (*R* v *William* 7 C & P 320) has been rejected Where in a murder case a small boy, who was an eye witness to the murder, was not examined in the Sessions Court on the ground of his youth, *held* that the Sessions Judge especially considering the importance of the witness, ought not to have refrained from examining him unless, under the words of section 118 of the Evidence Act, he considered that the boy was prevented from understanding the question put to him, or from giving rational answers to those questions, by reason of tender years *Queen Empress* v *Ram Sewak* 23 A 90 = A W N 1900 211 A child of tender years if a competent witness when such child is intellectually sufficiently developed to understand what it has seen and afterwards to inform the Court about it, this sufficiency may be tested even in examination in chief, understanding is thus the sole test of competency *S Rasul* v *Emperor*, A I R 1930 Sin 179 = 120 Ind Cas 514, *Nafar Sheikh* v *Emperor* 41 C 406 = 18 C W N 147 *Dhani Ram* v *Emperor*, 38 A 49 = 13 A L J 1072 Evidence by child should be accepted with caution *Mannu* v *Emperor* A I R 1930 Oudh 406 Where the Court is of opinion that the child upon whom an offence under s 376 I P Code is committed is unable to give relevant information in the matter by reason of tender years and consequent immaturity of judgment, it should not examine the child at all *Ghulam* v *Emperor*, 31 P L R 612 = A I R 1930 Lah 337

Oath A witness who has taken oath in the usual form may be asked whether he thinks such oath binding on his conscience, but not whether he considers any other form more binding *The Queen's Case*, 2 Br & Bing 284 A person who does not believe in the sanctions of religion will not be bound by an oath Thus, where a witness who had been sworn on the *voir dire* stated in answer to the opposing counsel that she did not believe in a future state of rewards and punishments and regarded the obligation of an oath as no higher than that of her word it was held that the Judge had acted properly in rejecting her evidence *Maden* v *Catanack* 7 H & N 360 It is not enough that a person has a religious belief unless he is able to say what form of oath is binding on his conscience *Nagh* v *Ali Khan* 8 T L R 444 Where in a trial for murder the Sessions Judge deliberately abstained from administering an oath or affirmation to the only eye witness to the murder on the ground that she was only 6 or 7

In every case where a witness is a

the Evidence Act, the provisions of

plied with The only cases in which

ministered are cases in which it clearly

appears that the witness does not understand the moral obligation attaching to an oath or affirmation or the consequence which may arise from giving false

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147 — [illegible] The evidence of a

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the witness was a c ... Act and
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"omission" in section 13, Oaths Act, includes any omission and is not limited to accidental negligent omissions *Empress* v *Sambhia*, 11 C P L R Cr 16 Whether a child understands the nature of an oath or not, he should when examined as a witness be examined on oath or affirmation *Queen Empress* v *Sheoralan*, S C 242 Oudh, *Queen* v *Anunta*, 22 W R Cr 1; *Pua* v *A E*, 2 L B R 322, see also *Queen Empress* v *Marsu*, 10 A 207 = A W N 1888, 86, *contra*, *Golla Chinna* v *Emperor*, 15 Cr L J 161 = 22 Ind Cas 737, *Queen* v *Scua*, 23 W R Cr 12 = 14 B L R (F. B) 294, *Queen* v *Itaary*, 22 W R Cr 14 = 14 B L R 51, *Queen* v *Perumal*, 7 Weir, 827, *Nandalal* v *Nistarini* 27 C 440

Insanity There was a perio
lunatic and idiot, in the superstitic
is an infliction sent from heaven,
at all *Co Litt* 6 (*b*), *Comyn's*
2 Leach Cr C, 3rd ed 482, *Wi*
upon Littleton said "*Non compos mentis* is of four sorts (1) An idiot, which
(3)
... he
hath not unde
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down in 1842
standing may have arisen, nor whether it be temporary and curable, or

ment or ... as a witness, it no
longer e ... *Hill*, 2 Den & P C C
254 = 5 C ... en argued that any

always prompting him In the same case ...
disastrous if mere delusions were held to exclude a witness Some of the greatest and wisest of mankind have had a particular delusion" This broad and rational ... to disqualify must be such
the specific subject of the
In three particular respects
ontent, in two of them the

the subject to be testified about If on this subject no aberration appears the person is acceptable, however untrustworthy on other subjects Thirdly, the mere fact of soundness at the time of trial is no longer sufficient; for derangement or defect at the time of the event to be testified to, may make the person untrustworthy The ir ... as to the other elements, the cap ... 2 Thus in *Durham* v *Durham*, ... instances of persons of unsound ... ts within their own knowledge, and their statements have been acted on But it is evident that statemen ... with caution, and they must be ... vidence of the facts in question"

Idiocy A person incapacitated to such an extent that he is unable to understand the subject in reference to which he is called as a witness is incompetent Naturally incapacitated persons are not permitted to testify This rule has always existed and exists to day The question of whether a person has sufficient capacity to testify is a question of fact for the Judge to decide and he may hear testimony on the point, as well as examine the person himself *McKelvey's Ev* § 217

Drunkenness It follows from modern theory of mental derangement that intoxication even habitual, does not in itself incapacitate a person offered as a witness The question is, in each instance, whether the witness was so bereft of his powers of observation, recollection, or narration, that he is thoroughly untrustworthy as a witness on the subject in hand First, then, the capacity of observation at the time, of the events to be testified to, may be such as would exclude the witness as untr ... to forget this requisite, and to declare ... alone is to be considered ... be so affected that the wi ... intelligent and truthful narration may appear to be destroyed tempor ... *Wigmore* § 499 But that a witness was drunk on the occasion to which he is called upon to testify goes to his credibility and the weight of his evidence, and not to his competency to testify Drunkenness at the time of testifying is *per se* not sufficient to disqualify the witness from testifying It is for the Court to determine from the present conduct and appearance of the witness, whether he is in such a state as to comprehend the obligation of oath, and to testify intelligibly, or whether he should be excluded *Burr Jones* § 724 'To render the witness incompetent it must be shown that, at the time of his examination he was *non compos mentis*, deranged in mind, from some cause the effect of liquor, or any other cause No drunken man should be permitted to give evidence, but this never can apply to drinking men, even, though incapable of managing their estates The point of enquiry is the moment of examination; is the witness then offered so besotted in his understanding as to be ... rd drinker, or ... ssed of a sound ...) 235 In that ... len victims of ... losses, in their ... yet sufficiently unimpaired, to recollect and to state the facts, where they do recollect with clearness and intelligence" So a drunkard is a competent witness, when he is free from the influence of liquor *Banks* v *Goodfellow*, L R 5 Q B 549, *R* v *Hill*, 2 Den 254, *Spittle* v *Walton*, L R 11 Eq 420

Accused whether competent witness Section 342 (4) of the *Criminal Procedure Code* provides that no oath shall be administered to the accused See also sections 5 and 6 of the Indian Oaths Act As no oath can be administered to an accused person so he can not be examined as a witness In the Full Bench case of *Emperor* v *Nga Po Min*, A I R 1932 Rang 190=10 Rang 511 (F B) *Page C J* said "At common law an accused person cannot be either examined or cross examined (*R* v *Payne*, 1 C Cr 347) and the reason is that there can be no sanction that such a person will speak the truth In India an accused person is 'competent to testify' within s 118 Evidence Act (I of 1872), but such a person is incompetent to be a witness, for an oath cannot be

administered to him, and all witnes . . S.
affirmation before they can lawfully .
any Court *In judicio non creditur nis*
and 6 Criminal P C (5 of 1898), .
406=20 Ind Cas 741" Thus where several accused are tried jointly one accused cannot be sworn and therefore cannot be examined as a witness against other co accused *Reg v Hanmantha* 1 Bom 610; *Empress v As* . *ig Emperor* 45 C 720 *Queen Empress v* *v King Emperor*, 20 Cr L J 342 But an accu in support of an application for transfer of the case under section 526 *Ghulam v Emperor*, 3 Lah 46=23 Cr L J 399, see also *Gallaghar v Emperor*, 54 C 52 So in India an accused person is not entitled to give evidence on his own behalf In England the disqualification of the accused in criminal cases to testify for himself seems not to have been questioned in policy until Bentham's time But his arguments in this respect took longer for their fruition in legislation than any other of his proposals for abolishing witnesses' incapacities By the Criminal Evidence Act 1898 (61 & 62 Vict C 36) the disability of the accused to appear as a defence witness has been removed Before that time, it had become customary in England to allow the accused to make a statement to the jury *i e* to tell his story not on oath and not as a witness but in the guise of an address or argument on the testimony and the whole case *R v Malings* 8 C & P 242 *R v Walking* 8 C & P 243 *R v Dyer* 1 Cox Cr 113 *R v Williams* 1 Cox Cr 363 *R v Shimmin* 15 Cox Cr 122, *R v Millhouse* 15 Cox Cr 622 That the formal grant of competency then was so long withheld was due rather to a hesitation founded on the supposed interest of the accused himself His failure to use the right of testifying would (it was believed) damage his cause more seriously than if he were able to claim that his silence was enforced by law But chiefly, his exercise of the right to testify would (it was believed), in subjecting him
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Criminal Law Vol I p 442 said I am convinced by much experience that questioning the accused or the power of giving evidence is a positive assistance and a highly important one to innocent men and I do not see why in the case of the guilty there need be any hardship about it Similar remarks also occurred in *Lord Alverton's* Recollections of Bar and Bench where at p 176 he said It will be convenient here to refer to the effect of the passing of the Act which enables prisoners to give evidence I had long been impressed with the absolute necessity of such a measure in the interests of justice for the protection of the

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the prosecution may comment upon any evidence given under the Act by a person charged [*R v Gardner* (1899) 1 Q B 150] but he must not comment upon the failure of any such person or of the wife or husband of such person to give evidence Stat 61 & 62 Vict C 36 s 1(b) But it has been held that the Judge may comment upon such failure *R v Rhodes* (1899) 1 Q B 77, *R v Smith* 84 L J K B 2153 31 T L R 617 There are, however many cases in which it would not be expedient or calculated to further the ends of justice so to do *Kops v The Queen* (1894) A C 653 A person discharged by the police and not brought before the Magistrate is not an accused person In India the evidence of such a person is admissible although he has been illegally discharged by the police *Queen Empress v Mona Puna*, 16 B 661

Counsel engaged in a case A police officer or advocate conducting a prosecution should never be sworn, unless he is called as a witness, and if so

called, he should be allowed to depose only to those facts which he knows and of which he is, in accordance with the ... witness *Empress* v *Kenlu*, 6 P L ... v *Peary*, 40 C 898 *Lodd Govindass* ... 382, *Chandreshwar* v *Bisheswar*, 5 P 777

Miscellaneous Where a witness gives a satisfactory explanation of his presence on the scene the mere fact that a person is a tailor or weaver by caste is hardly any ground for discarding his evidence *Emperor* v *Ramjan*, A I R 1932 Lah 12 = 32 Cr L J 1130

119 A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs, but such writing must be written and the signs made in open Court Evidence so given shall be deemed to be oral evidence.

Dumb witnesses

Scope At the time when unscientific ideas prevailed concerning mental derangement and defect, the deaf and dumb were so far treated as idiots that they were presumed to be incapable of testifying until the contrary was shown *Hale*, Pl Cr I, 34, *R* v *Ruston*, 1 Leach 3 C & P. 127, *Morrison* v *Lennard* 3 C & P 127 To day this presumption has disappeared *Wigmore* § 498 In *People* v *Mc Gee* 1 Den 21 *Jewett J* said "The woman was of sense sufficient to have ... by signs and m... to her by T... by not able to t... signs" See also *Harrod* v *Harrod*, 1 Key & J 9 Persons affected with these calamities have been found by the light of modern science, to be much more intelligent in general, and to be susceptible of far higher culture, than was once supposed Still, when a deaf mute is addressed as a witness, the Court in the exercise of due caution will take care to ascertain before he is examined, that he possesses the ... nature of an oath ... sworn and give evi... his ideas perfec... satis- factory meth... of his knowledge ... ideas ... 1 Lea 408; *R* v ... v *Hill*, 14 ... place where a deaf ... in Court cannot ... competent witness ... 5 O C 246 A witness who is so deaf and dumb that it is impossible to make him understand the questions put in cross examination, is not a competent witness and his evidence, if taken ought to be struck out, and a conviction based solely on his evidence must be quashed *Venkattan* v *Emperor*, 14 Ind Cas 655 = (1911) M W ... 7 A 385 (F B) ... written questions to which ... are then read to the ... able to understand ... and that he is ... where a deaf ... happening of certain events, and cannot understand questions or communicate the details of the events that he is attempting to tell about, his testimony cannot be taken When the witness, by reason of physical injuries to the throat, was unable to speak, the Court was justified in permitting her to nod for *yes*, and shake her head for *no*, and to write answers for which the simple affirmative and negative signs were inappropriate *Burr Jones* § 719

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness. S.

Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial

Reason of the rule It was a favourite doctrine of common law that husband and wife were one person in the law Since parties were incompetent to testify in their own behalf it followed that, if the legal identity of husband and wife was conceded they are not competent witnesses for or against each other *Burr Jones* § 733 Blackstone thus stated this ground of exclusion 'But in trials of any sort, they are not allowed to give evidence for or against each other, partly because it is impossible their testimony should be indifferent, but principally because of the union of the persons, and, therefore if they were admitted to be witnesses for each other they would contradict one maxim of the law '*nemo tenetur seipsum accusare*' *Black. Com* 443 see also section 3 of Act XV of 1852 and s 14 of Act II of 1855 But even in England by statutes this incompetency of husband and wife has been gradually removed both in civil cases (see 21 Jac 1 C 19 s 6, the County Courts Act 1846, s 83 the Evidence Amendment Act 1853, s 1 and the Evidence Further Amendment Act, 1869, s 3) and to a large extent in criminal trials by a series of Acts culminating in and superseded by the Criminal Ev Act 1898 *Phip Ev* 7th Ed 437, see also *R* v *Lord Mayor of London* 16 Q B D 772, *Director of P P* v *Blady*, (1912) 2 K B 89, 92, *Leach* v *R* (1912) A C 305 This section does away with this rule of the common law In India that bar has been removed by this secti... rule of positive law, and natural justice *Per Sir* ... (25) Cr ... *Mr Livingstone* ... nce, prepared by him for the state of *Louisiana* says "The exclusion of interested testimony having been examined and found to be injurious to the investigation of truth, and its admission to be attended with ... not be reduced to one of a quantity that has n... finds no place in the proposed code, and ... fruitful sources of uncertainty, expense, delay, and inconvenience in the law If the search after truth requires that interested witnesses, and even the parties themselve , should be interrogated to discover it, are there any relations in which the offered witness may stand to the parties that exclude his testimony ' (1) The code now offered does not contain the exclusion of husband or wife, as witn... suffic... or C... i len... this reason fails of course

Civil cases Even before the passing of the Indian Evidence Act, it was held in *Queen* v *Khyroollah* 6 W R 21 Cr (F B) by the majority of Courts that in India, upon trials in the Mofussil, a wife was competent to give evidence for or against her husband, or for or against any person tried jointly with her husband This rule has been incorporated in this section Bastardy proceedings under section 488 Criminal Procedure Code, are civil proceedings within the meaning of section 120 of the Evidence Act, and the defendant thereto may give evidence on his own behalf *Nur Mahomed* v *Bismulla Jan*, 16 C 781, see also *In re Tokee* v *Abdool*, 5 C 5... under section 488 of the ...

states in the witness box that her husband had no access to her at any time when the children now in question could have been begotten, her statement may be taken for what it is worth If her evidence of this alleged fact cannot be exclu[illegible] as inadmissible, then there is no provision of law determining at what stage [illegible] the proceedings [illegible] Charlot Hou[illegible]e, 38 M [illegible] or defe[illegible] dant, gives his [illegible] ty to th[illegible] suit Such a [illegible] 120 of th[illegible] Evidence Act, [illegible] the su[illegible] shall be comp[illegible] Co, 49 C 345=35 C L J 175=68 Ind Cas 993

Criminal cases The theory of disqualification by interest was merely on[illegible] variety of the general theory [illegible] at common law The law [illegible] his Evidence at page, 83 "[illegible] even under the sanction of an oath, who has an interest in giving the propo[illegible] evidence, and consequently whose interest conflicts with his duty This rule of exclusion, considered in its principle, requires little explanation It is [illegible] nature, which is too weak to be [illegible] ligations, when tempted and solicited [illegible] There are, no doubt, many whom [illegible] ty, and their exclusion by the opera[illegible]tion of this rule may in particular cases shut out the truth But the law must prescribe the general rules, and experience proves that more mischief would result from the general reception of interested witnesses than is occasionally by their general exclusion ' For the reception of evidence of parties to suits the following reason is urged in the Second Report of the English Common Law Practice Commissioners "Plain sense and reason would obviously suggest that any living witness who could throw any light upon the fact in issue should be heard to state what he knows, subject always to such observations as may arise as to his means of knowledge or his disposition to the truth The law of England, however, at least until a recent period, proceeded on a very different principle Acting apparently on a distrust both of the integrity of witness and of the discernment of the tribunals, it sought to protect the latter from the possibility of being misled, by carefully excluding from giving testimony not only the parties to the cause, but any one who had any, even the most minute interest in the result Every person so circumstanced, however small and insignificant the amount of his interest, was presumed to be incapable of resisting the temptation to perjury, and every Judge and jury man was presumed to be incapable of discerning perjury under circumstances peculiarly calculated to create suspicion and watchfulness It is painful to contemplate the amount of injustice which must have taken place under the exclusive system of the English law, not only in cases actually brought into Court and there wrongly decided in consequence of the exclusion of evidence, but in numberless cases in which the part[illegible] [illegible] from inability to avail themselves of proof w[illegible] [illegible] s in law inadmissible From the time, h[illegible] [illegible] turned [illegible] nce, the [illegible] between [illegible] ive steps removed incompetency for [illegible] intelligence [illegible] doubtless have [illegible] fit to be enter[illegible] operation [illegible] the bench the [illegible] tribute in [illegible] Common La[illegible] [illegible] promises, [illegible] able to tes[illegible] 23 Vict C

61 provided that on wife's petition for divorce founded on adultery, coupled with cruelty or desertion, both husband and wife are competent and compellable as to cruelty or desertion Section 2 of Stat 32 & 33 Vict C 68 enacts that parties to an
Stat 40 & 41
a civil right on
competent and

may be,
nce at any
or jointly
d shall not
pplication;
or husband
as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution, (c) The wife or husband of the

the position of an accused), the husband or wife of such person, respectively, shall be competent witness But the accused is not a competent witness in a criminal case The complainant or the husband or wife of such complainant is a competent witness in a criminal proceeding, although this section makes no provision for it, because in all criminal cases the crown is always the nominal prosecutor.

Divorce Act
, and shall be
other witness.
Bretton, 4 A.
49 (51) Section 52 of the same Act enacts. "On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband

61 s 6

121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Judges and Magistrates

Illustrations.

(*a*) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate B cannot be compelled to answer questions as to this, except upon the special order of a superior Court

(*b*) A is accused before the Court of Session of having given false evidence before B, a Magistrate B cannot be asked what A said except upon the special order of the superior Court

(c) A is accused before the Court of Session of attempting to murder a police-officer whilst on his trial before B, a Sessions Judge B may be examined as to what occurred.

Principle A *Judge is not bound to leave the bench and testify as to* anything Public policy would authorize his refusal If the Judges are made

competent witnesses, it ... would have a tendency to lower the standard ... ntempt. *Burr Jones* § 764 In *Duke of Buccle* ... 3 E & I App 429 433, *Cleasby B* said "With respect to those who fill the office of Judge it has been felt that there are grave ol ... made subject of cross examination and comme ... put) in relation to proceedings before tl ... properly prove can be proved by others ... may say ... ntlof

Scope of the section Calling the Judge as a witness is an exceedingly rare event Nevertheless, it has sometimes happened that a presiding Judge ... to assume the role of witness in ... inconsistent that the function ... stand as a witness he has ... all the ... of a w ... but not ... a ques ... Court ... return ... arising, ... custody for contempt? The first would be unseemly, if not ... would be passing judicially upon his own case The last would disorganize the ... proceedings Other like results may be conceived as ... proceedings *Rej* v ... give testimony as a ... *Mitchell* v *Justices, K* ... giving evidence upon matters which they saw, when sitting as Judges, unless they arrive at such knowledge by virtue of investigation which they were making as Judges A Munsiff should not be called upon to depose to what took place before him in the course of a trial which he was conducting as a Munsiff *High Court Proceedings*, 27th Nov. 1871, 2 Weir 777 = 6 M H C App 12 The privilege given by this section is the privilege of the witness *i e* of the Judge of whom the question is asked If he waives such privilege, it does not lie in the mouth of any other person to assert it A committing Magistrate, who is cited as a witness in a Sessions Court cannot be compelled to answer questions as to his own conduct in Court, except under the special orders of the Court to which he is subordinate If he does not object to answer such questions, there is no prohibition to his doing so *Empress* v *Chidan*, 3 A 573 = A W N 1881, 37

Judge, whether competent witness In arguing a question as to the duty of the Court not to have rendered a certain judgment, counsel put this case "Sir, let us put the case that one man kills another in your presence, you observing it, and another who is not guilty is indicted before you and is found guilty so as to incur the penalty of death, you ought to respite the judgment against him, for you are knowing to the contrary, and should make further report to the king, to give him pardon No more should you give judgment in this case, before causing those to appear by whose hands the king was paid" *Gascoigne C J* said "Once the king himself asked of me the very case that you say it, ... him just as you say it ... 7 H IV, 41, pl 5 ... mmons, 13 How St Tr ... saying, cited the above ... dge do not think in his ... of that private know ... I think that Judge might ... and sure I am, now he ... private knowledge ought ... whereby the prisoner

might be convicted or acc ... S.

then get a pardon

"A Judge" says Mr Taylor "before whom the cause is tried must conceal any fact within his own knowledge, unless he be first sworn (*R* v *Anderson*, 7 How St Tr 874, *Hurpurshad* v *Sheo Dayal*, 3 I A 259, 286); and consequently ... witness (*Roos* v *Bul* ... may then be sworn ... (181) In this last case, the proper ... a witness, should l ... because he can hardl ... missibility of his c ... *Ross* v *Buhler*, 2 M ... exercise judicial functions may give evidence in a case pending before him when such evidence can and must be submitted to the independent evident judgment of other persons exercising similar judicial functions sitting with him at the same time So also a Sessions Judge is a competent witness, and the giving of evidence by him does not preclude him from dealing judicially with the evidence of which his own forms a part *Queen* v *Mookla Singh*, 13 W R 60 Cr *In a case in which a Deputy Magistrate took an active part in* the capture of parties charged with having been members of an unlawful assembly and where he tried them on that charge, *Phear J* said "It has been held ... which govern the co ... person is not necess ... juryman upon an inquiry into or investigation of facts, because he may have been himself a witness of some of the facts which are the subject of the inquiry or investigation, if he does do so he, so far from being under any such obligation as that which the Deputy Magistrate seems to have referred to, is bound to state to the prisoner or other person concerned, or to make known to him so far as he can, what are the facts which he himself observed, to which he himself can bear testimony Ard, moreover, the prisoner who is being tried by a Judge in this ... the Judge who, ... ewed as a witness, ... in our opinion,

Court It is always dangerous for any man in whose right conduct others are concerned to set up and endeavour to carry out a fiction such as this It is most specially dangerous for a Judge, who is under the grave responsibility which attaches to the office of a Criminal Judge, to attempt anything of the kind The Deputy Magistrate if he thought it right, as he did, to take upon himself the duty of trying the prisoners in this case, ought to have made no pretence whatever of any sort, he ought to have frankly avowed and openly stated in his Court all the part which he had taken, and the facts which he had observed, and made his own evidence part of the record in the case The awkwardness of a Criminal Judge being the principal witness in the case which he has to try is no doubt, most apparent, this however, is reason for his declining to try the case, not for his endeavouring to assume an unreal character" *Hurro Chandra Paul and ors*, 20 W R 76 Cr

In *Empress* v *Donnelly*, 2 C 405 the question arose whether a Magistrate can himself be a witness in which he is the sole Judge of law and fact In answering the question in the negative *Marlby J* said As to the second point, whether the conviction is illegal because the Magistrate himself gave evidence, that question seems to me to resolve itself into this Is a sole Judge of law and fact competent to decide a case in which he has himself given evidence? It has been strongly contended on the part of the Crown that he is so, and that there is no impediment in law to a Judge giving evidence, and then disposing himself of the case by his sole opinion. No instance of this kind has, however, been

found and no authority of any Judge or text writer has been cited in support of such a proposition. The English cases (they are very bad and very old) do not go farther than to establish that a person having to exercise judicial functions may give evidence in a case pending before him when such evidence can and m[illegible] other persons, exercising similar [illegible] ame (*per Norman C J* in *Que*[illegible] o case in England is cited in which even under the circumstances a Judge has been called as witness in a trial on which he was sitting later than the trial of *Lord Stafford* Two cases [illegible]—one the case of *Queen v Tarajcisal* [illegible]

occasion very fully, [illegible]
to the conclusion t[illegible]
he lays down as the result of the English cases [illegible]. In the absence, therefore, of any authority for the position that a sole Judge of law and fact may give evidence, and then decide a case in which he has been a witness [illegible]

If he gives his evidence upon any matter of importance, the party against whom his evidence tells could not venture to test his credibility either by cross [illegible]

B L R A Cr 15 are conclusive that one who is sitting as a sole Judge is not competent also to be a witness" See also *Queen v Manikam*, 19 M 263

Although a Magistrate is not disqualified from dealing with a case judicially merely because in his [illegible] to initiate the proceedings, [illegible]
there is no necessity f[illegible]
offence and initiated the prosecution, and where he is one of the princip[illegible] witnesses for the prosecution *Queen v Bholanath*, 2 C 23; see also *Sudhama v Queen E*[illegible] *Grish v Queen Empress*, 20 C 857 In the ca[illegible] *Mudh* 24 C 167; *Sardar Khan v Emperor* 21 [illegible] 4, *Alimuddin v Emperor*, 29 C. 392=6 C W N [illegible]

It is one of the oldest and [illegible] sense [illegible]
le to him out of [illegible] *Balusa*, 22 M [illegible] dge and belief [illegible] *v Sheo Dyal*, [illegible] *Khodee Narain* [illegible] *v Emperor* 50 Ind Cas [illegible] *Kishore v Ganesh*, [illegible] W R [illegible] *v Ganga* 25 W R 121

Where a Magistrate, trying a case of riot, made a local inspection of the scene of the alleged offence and was influenced by such inspection in arriving [illegible] was incom[illegible] 725= [illegible] *Kishore* [illegible] same [illegible]
v Abdul, 21 C. [illegible]

person cannot both be prosecutor and Judge *Queen* v *Nadi*, 24 W R Cr. 1; *Queen* v. *Gangadhar*, 3 C 622, *Queen* v *Doki* 2 A 806, *Girish* v *Queen Empress*, 20 C 865, *In re Het Lal*, 22 W R Cr 75 **S.**

Jurors It was formerly held that jur
te timony of a witness given before them
at the trial *12 Vin Abr 20 (tit Evidence)* I
Act they are competent witnesses to give evidence of material facts. But where it was alleged that the verdict of the jury was arrived at by casting lots and the Sessions Judge held an enquiry into the matter in the course of which he examined, besides other persons, all jurors, *held* that the statement of the juror as to what happened in the jury room is inadmissible *Emperor* v *Harkumar*, 17 C W N 787=40 C 693=14 Cr L J 392=20 Ind Cas 216 "The necessity for securing to the grand jurors an absolute freedom of deliberation and decision, immune from apprehension of injury from the person charged by them, demands a guarantee that by no legal process will the disclosure of their votes and expressions of opinion in the jury room be compelled It forbids that any grand juror shall be compelled to disclose his own utterances or permitted to disclose the utterances of his fellows"

Communications during marriage

122. No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

General Principle of Priviledged communications Looking back at the principle of Privilege, as an exception to the general liability of every person to give testimony upon all facts require[illegible]
view that preponderance of extrins
tion of any such exception four
necessary to the establishment of a
cations between persons standing in
must originate in a confidence that
of confidentiality must be essential to the full satisfactory main[illegible]nance of the relation between the parties, (3) The relation must be one which in the opinion of the community ought to be sedulously fostered, and (4) The inquiry that
ommunications must be
rect disposal of litigation
be recognized, and not

Nature of the claim The p
or of another, whom he represents,
and in the latter he will not be
disclose the protected matter *Phip Ev 193*

Principle underlying this section The policy which should lie at the foun[illegible]

Husband and wife—Old rule of excluding their evidence The principle ... with the old disability of husband ... The record of judicial ratio ... ounds and policy of this privilege forms one of the most curious and entertaining chapters of the law of evidence It is curious because the variety of ingenuity displayed, in the invention of reasons *ex post facto* for a rule so simple and so long accepted, could hardly have been believed but for the recorded utterances" *Wigmore* § 2228 The reason of the privilege is thus given by *Buller J* in his trials at *Nisi Prius*, 286 Husband and wife cannot be admitted to be a witness for each other, because contrary to the legal policy of marriage In *Barker v Dixie*, Lee Cas to Hardwicke, 264 *Lord Hardwicke L C J* said 'The reason why the law will not suffer a wife to be a witness for or against her husband is to preserve the peace of families' The following reasons are stated by *Sir William Blackstone* in his commentaries 'If they are admitted to be witnesses for each other they would contradict one maxim of law *nemo in propria causa testis esse debet* , and if against each other, they would contradict ... reason is ascribed by *Lord* ... here he said The r... h a bias on their minds ... that they are not to be permitt... or or against each other

Most of these reasons" says *Prof Wigmore* ' do not call for particular dissection their very statement is void of force " 'Hard', 'hardship' 'policy', 'peace of families', 'absolute necessity', some such words as these are the vehicles says *Mr Jeremy Bentham* ' by which the faint spark of reason that exhibits itself is conveyed These are the leading terms, and these are all you are furnished with , and out of these you are to make an applicable a distin t and intelligible proposition as you can [As to the 'policy' of the situation ... omes of injustice ... m and (if that ... wife injustice in ... olific, would in ... e, grant to every ... e and with the ... the family and ... stle ... s! ... s but ... ther ... ghts ... p an

nality of which it ... or a principal crime ... arried state criminal, is itself ... ehaviour, a was one object o... e in their wife and children ... r antiquity own nature) so many pledges ... The policy of feudal barbarism of the ages which gave birth to this immoral rule, is to convert that sacred condition into a nursery of crime The reason now given was not I suspect the original one Drawn from the principl of utility, though fr... savours of a late and polished r... ely to have been the original ... f the identity of the two persons thus co... erson in law On questions relative to the ... is the fountain of all reasoning' ... IX Pt IV, C V , *Wigmore* § 2228 But this ... subject.

The Commissioners on Common Law Procedure, *in their second report at p 13* said ' The question how far communications of married persons inter se should be a matter of testimony in Courts of Justice stands on a different ground (from that of compelling one to testify to facts against other) So much

S.

of such testimony would have a powerful tendency to disturb the peace of families, to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence, which is the most endearing solace of married life *Taylor* § 909

Scope of the section ... 17 Vict C 83, which ... to disclose any communica... and no wife shall be compellable to disclose any communication made to her by her husband during the marriage" The protection afforded by this section is greater than that conferred by the English Statute There only the husband and wife are protected from disclosing any communication made to him to her by his or her marriage partner But in India, he or she is not permitted to disclose that communication *Steph Dig Ev art* 110, *Markby Ev* p 93 As according to the rule of interpretation, words importing the masculine gender includes feminine, the word he" includes the word she' and the word 'him" includes the word 'her" So this section confers the same privilege on the wife that it confers on the husband *Markby Ev* p 93, *General Clauses* Act (X of 1897) s 13 The words "compelled to disclose" or 'permitted to disclose' clearly imply that the party concerned is not made or allowed to say or do something by ...
Per Subramaniya Ayya...
the same case *Boddai*...
declining to receive in...
defendant to his wife...
house under a search w...
to such a case A document even though it contains a communication from a husband to a wife or *vice versa* in the hands of third persons, is admissible in evidence, for in producing it, there is no compulsion on or permission to the wife or husband to disclose any communication The section protects the individuals, and not the communication if it can be proved without putting into the box for that purpose the husband or the wife to whom the communication was made For these reasons we think the exhibit V was rightly received in evidence' A third person who has overheard a conversation between husband and wife while it was going on may testify to it *Greenl Ev* 15th Ed Vol I p 347, but see *R* v *Pamenter*, 12 Cox Cr 177 The principle applies quite irrespective of whether either spouse is a party to the cause Moreover the death or divorce of the other member does not affect the policy of prohibition Again, the other member may always waive the privilege *Greenleaf* § 333 (C) A c... because the other spouse was also ... So also conversation at which a t... may be proved by him *R* v *Sn*... P 510, *R* v *Barrett*, 7 C & P ... conversations or communications, and the question may thus arise whether certain conduct by one spouse in the presence of the other—such as the payment of money or the signing of a note—is to be treated as a communication *Greenl Ev* § 254

... the communication sought ... it the seal of the ... h pass between ... 435 *Docker* v ... 1897 It extends ... involved, as well ... It is, however, limited to such matters as have been communicated during marriage *Taylor* § 909 A This section is limited to such matters as have been communicated

"during the marriage"; and, consequently, if a man were to make the most confidential statement to a woman before he married her, and it were afterwards to become of importance in a civil suit to know what that statement was the wife, on being called as a witness, and interrogated with respect to the communication, would as it seems be bound to disclose what she knew of the matter *Taylor* § 9[illegible] ... that the relation of husband and ... vidence is required to be g ... Act of Parliament, and had married another person, was offered as a wit... against her former husband, ... the coverture *Lord Alvanley* held he ... characteristic energy 'It never can ... has created while the parties remained in the most intimate of all relations, shall be broken, whenever, by the misconduct of one party, the relation has been dissolved" *Monroe* v *Twistleton*, Pea Add Cas 221 explained and confirmed by *Lord Ellenborough* in *Aveson* v *Ld Kinnaird*, 6 East, 192, 193. Where there is no 'representative in interest' who can consent, under this section, to the ... husband to his wife during ... even if willing, to disclose such ... and is not his "representative in interest" for the purpo... t The prohibition enacted by the section rests on no technicality that can be waived at will, but is founded ... of high import which no Court is entitled to relax *Narah* ... 91 No statement of an incriminating nature ... guilt under section 302 I P Code to her husband *Ishanan* v *Emperor*, 1923 Lah 40 In *Mussamat* ... 914 Cr = 261 P L R 1914 = 15 Cr L J 613-25 ... convicted of murdering her step son on the strength of a confess... by her to him alone of the body ... is not admissible, as ... husband within the meaning of s 122, Evidence Act ... the wife of an ac... respect of the one ... with which he is c... tative in interest consenting to th... sible under this section *Millhi*... 705 Cr = 14 Cr L J 273 An ... ated to injure his ... and does not ... e father ... L R ... nication ... without ... incum... given ... J 316 = ... of one ... band is of the accused as to certain communications between ... section *In ola Sal at* v *Crown*, 34 P R 1914 Cr = 27 ... munication made by an arbitrator to ... hat he had accepted bribe from a ... evidence only if the requirements of ... *Khambatta*, A I R 1930 Lah 290

... has for its object the ... a of which ... on therefore ... ning being ... munications ... ore, on the ... such On ... ay in fact ... may become ... a pa kage ... n the fourth

desk drawer," in effect communicates to her not only the words but also the act of placing the package While his domestic acts are ordinarily not to be treated as communications, nevertheless it is always conceivable that they may by special circumstances be made part of a communication To formulate a precise test would perhaps be impracticable It is clear however, that the mere doing of an act by the husband in the wife's presence is not a communication of it by him, for it is done for the sake of the doing not for the sake of the disclosure There must be something in the way of an invitation of the wife's presence or attention with the object of bringing the act directly to her knowledge Except in such cases, the privilege cannot cover anything but an utterance of words, spoken or written *Wigmore* § 2337.

Evidence as to affairs of State

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the Officer at the head of the department concerned, who shall give, or withhold such permisson as he thinks fit

Principle On the principle of public policy, the official transactions between the heads of the departments of state and their subordinate officers are in general treated as privileged communications *Greenleaf Ev* § 251 In *Beatson* v *Skene*, 5 H & N 838, 853, *Pollock C B* said We are of opinion that it cannot be laid down that all public documents, including treaties with foreign powers and all the correspondence that may precede or accompany them,

Foreign Affairs in this country, containing matters injurious to the reputation of a foreigner or a British subject, can it be contended that the person referred to would have a right to compel the production of the letter in order to take the opinion of a jury whether the injurious matter was written maliciously or not? We are of opinion that, if the production of a state paper would be injurious to the public service the general public interest must be considered paramount to individual interest of a suitor in a Court of Justice'

Scope of the section This section follows the English law as laid down by the majority of the Court in *Beatson* v *Skene* 5 H & N 838 instead of the view of *Martin B* in that case and of *Field J* in *Hennessy* v *Wright*, 21 Q B D 509 and makes the public officer the Judge of whether a communication made to him in official character should or should not be disclosed So under this section the Judge is bound to accept, without question, the decision of the public officer referred to This view is confirmed by s 162 ...

p 94

evidence

Beatson

service—an enquiry

in public, may do

appears to us therefore that the question whether the production of the document would be injurious to the public service, must be determined, not by the Judge, but by the head of the department having the custody of the paper; and if he is in attendance and states that, in his opinion, the production of the document

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public interests and not that the documents are confidential or official which alone is no reason for their non production; nor that their production might prejudice the crown's own case or assist the other party which is rather a
luction unless overborne by some plain over
Henry Green Robinson v *The State of New*
=1931 A C 701=61 M L J 943 P C; see
& G 183 In *Poulett* v *Att Gen*
'The party in this case ought to
ing is the fountain and head of justice
and equity and it shall not be presumed that he will be defective in either, and it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him" See also *Esquimalt* v *Wilson*, (1920) A C 358, 366 But privilege in matters under s 123 should not be claimed unnecessarily *Mehtab* v *Secretary of State*, A I R 1933 Lah 157

Affairs of state would, no doubt, be held to include any matters of a public nature with which the Government is concerned *Cun Ev.* 354. So no person will be required to testify with regard to state secrets or as to correspondence between Government officials on matters of public business, if in the opinion of the head of the department, such disclosure would injuriously affect the public interest *Best Ev* 537 But any officer having the custody of records, not being records of which the production may, on special grounds be refused, is bound to produce them on receiving summons to that effect 2 Weir 781 Statements made by witnesses in the course of departmental enquiry into the conduct of
upon their trial on charges of taking
under s 123, 124 or 125 of the Evide
N 431=16 Ind Cas 77 Statements made before the Income Tax Collector
overned by section 123 of the
317=32 M 62=
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Official records relating to affairs of state The protection of documents
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official, which alone is no reason for their non production *Asiatic Petroleum* v *Anglo Persian Oil Co* (1916) 1 K B 822=85 L J K B 1075 A libel case by a lieutenant colonel, who was eng
against one of a
Court of enquiry appointed by the
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Home v *Bentinck*
2 B & B
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v *May*, 2
Where the docu
duced *Anderson*
nbers of the House
nnot be disclosed
t v *Cobbett* 5 Esp
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... Vaughan Williams J said "I agree although not perhaps exactly on the same grounds" "State papers, despatches, minutes, or documents of any such description which relate to the carry

of a public nature and in the possession character as Secretary of State were held no India Company, 11 L J Ch 71, correspo

privileged Tower may accurate or

A report of an accident made by a railway company to the Ministry of Transport was held protected *Ankin* v *L & N E Ry Co* (1930) 1 K B 527, so also reports by an Inspector to the Local ... (*Att Gen* v *Nottingaam*, 20 T L ... Inland Revenue to his superiors (*Hughe* ... Government Analyst to the Home office as to post-mortem examination of corpse (*Williams* v *Star Co*, 72 J P Jo 65); police report under the Irish Crimes Act (*R* v *McCornack*, Crimes Act Cas 244, *Ashton* v *Waterfort* 42 Ir L T Jo 77) as well as communications between the Director of Public Prosecution and his Assistant (*R* v *Benson*, 151 C C C Sess Pap 705) are held protected *Phip Ev* 190 Where letters add- ... see, those letters would nc ... s 123, Evidence Act, and ... nd decide under s 162 ... *late*, A I R 1933 Lah 157 In a prosecution for pe... that the *Kabuliyats* in question on which they were written did not the date of the *Kabuliyats* of Stationery, Calcutta depo on his own experience but o in respect of which privil prepared to let the Court or of the witness was not admissible *Emperor* v *Joffrel Hossain*, 59 C 1046 = 36 C W N 514 = A I R 1932 Cal 468

Who determines the necessity of secrecy Although the party who relies upon a public document may be prepared to lay before the Court the original or such secondary evidence of it as has been raised by statute to the rank of an orig... of any public department of stat... *iralty Commissioners* v *Aberde*... his op... should be produced in open document shall not be put in department is alone competent to judge whether the disclosure of a document will be injurious to the public interest, he alone is competent to take this objection

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3 depends will furnish to the designing officials too ample opportunities for abusing the privilege The lawful limits for the privilege are extensible beyond

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that the public interest

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Secretary of State v *Saminatha Nadar*, 119 Ind Cas 718 Where certain statements were made to a station master of a State Railway but there was nothing to show that they were made to him in official confidence, the communications are not protected *Emperor* v. *Bhagwati*, A I R 1929 Oudh 543=6 O W N 937 In a recent Madras case the Court observed "The question for decis 1 and 7 are open to the lower Court' 1 by *Irwin* v *D J Reid* 48 C 304 which *try's Laws of England* Vol II, pp 84 ned and the Judge is to decide whether the evidence referred to shall be given or withheld If the objection is taken by the proper person, the Court will not go behind it" *Secretary of State* v *Saminath Nadar*, A I R 1930 Mad 312, see also *Garudachar* v *Abbas Khan*, 8 Mys L J 474

But in *Henny Greer Robinson* v *The State of Smith Australia*, 35 C W N 1121 (P C) at p 1126, *Lord Blanesburgh* after reviewing all the previous cases said "The power of the Court to call for the production of documents for which this privilege is claimed and to determine the validity of the claim for itself was much discussed in argument The result of the discussion has been, as their Lordships think, to confirm the view of *Griffiths C J* in *Marconi's Wireless Telegraph Company* v *The Commonwealth*, 16 C L R 178, where in effect he concludes that the Court has in these cases always had in reserve the

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thing ' Lindley M R for example, in *Joseph Hargreaves, Ltd* [(1900) 1 Ch 347] was not prepared to set any limit to the power of the Court to call for production of a document for which this privilege is claimed The propriety of *Field J's* own practice in the matter as described by him in *Hennessy* v *Wright*, (21 Q B D 509), has, *pace* the observations upon it of *Isaacs J* in *Griffen's Case* not been challenged, and hitherto, it has usually been in cases where the state was not itself a party litigant that the difficulty has been suggested whereas

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particular case the manner in which the claim of privilege shall be made if the claim is to be allowed It may, in one case, if thus advised accept the unsworn

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it ought to appear that the mind of a responsible Minister had been brought to bear on the question of the expediency in the public interest of giving or refusing the information asked for, and Lord Coleridge insisted on an affidavit being produced from the President of the Board of Trade himself In the present case their Lordships are not required to make upon this subject any

one that has not been expressed inadvisedly or lightly or as a matter of mere departmental routine, but is one put forward with the solemnity necessarily attaching to a sworn statement. Lastly, the privilege the reason for it being what it is, can hardly be asserted in relation to documents the contents of which have already been published"

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure

Official communications

Principle In *Hennessy* v *Wright*, L R 21 Q B D 509, 512, *Field J* said "There are two aspects of this question First, the publication of a state document may involve danger to the nation If the confidential communications made by servants of the
or by inferiors to superiors in the
liable to be made public in a Co
thought proper to say '*fiat justitia*
involve the country in a war
be injurious to servants of the Crc
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conceded There ought to be a protection for 'secrets of State' in this narrow sense But this done, what remains? In only three or four of the precedents has there been even a pretence that the matters actually preserved from disclo
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4. the ... furs of public business ... sclosure when material ... Ordinarily they are not In any community under a system of representative Government and removable ... secret with that solidity ... with the veil of ... common routine ... eyes of every intelligent man and every ... can seldom be legitimately desired It is ... of partisan politics or personal self interest The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption . . . To concede to them a ... which ... been ... ideal to obstruct investigation into facts which might fix him with a liability" *Wigmore* § 2378

Scope of the section There is a marked difference between this section and section 123 This section is confined to public officers, though who are such is not defined Section 123 embraces every one This section makes the officer himself the judge of the propriety of waiving the privilege In no case has the Court any authority, if the objection is raised by proper authority Section 123 is ... such restriction though it ... held by the Governmen... excluded *Nort Ev* 310 Statements whether oral or written, made by an officer summoned to attend before a Military Court of Inquiry are not part of the minutes of the proceedings ... delivered to the Comma... were in ... and on grou... *Dawkins* v *Lord Rol*... I said ... " No office... between ... the govern... only person up... , were suffered to be disclosed" ... L 55, 69 Section 123 excludes onl... any affairs of State except with the ... while under section 124 in the other ... privilege may exercise his own discr... *angir* v *Secretary of State* 6 C. W N ... al confidence" used in this section import no special degree of secrecy and no pledge or direction for its maintenance, but include generally all matters communicated by one officer to another ... *Nagaraja Pillai* v *Secretary of State* 26 Ind Cas ... the privilege as to the production of public do... extends even to those which ... with no ... privilege ... *Ibid* ... officers ... docu... ... 1920 Bom 690

When he considers that the public interest would suffer by the disclosure This section follows the English law and makes the officer the judge as to ... should not ... disclosure ... *Hanuman* ... C W N 246 An officer's refusal to disclose a document on grounds of public policy is final It is not competent to the Court to call for and examine the secret archives of the state in order to satisfy itself of their confidential nature *Lala Tribhuban* v *Deputy Commr*, 47 Ind Cas 225 = 5 O L J 291; but see *Collector of Jaunpur* v *Jamna* 44 A 360 where the Court observed "It is for the Court to decide whether or not a particular document for which

privilege is cl ... the officer in official confidence" ... of the document. Beatson v Sk... ...dicrous Is it to be ... ordinate ... of the

dependent upon a party, who knows or must know, the contending parties, and may have the most cogent reasons for ... to anoth... Judge is ... flimsy pr... some pet... In the case of the Judge, you have sacred guarantees; in that of a politician you have none External pressure will curb down the politician, whilst you will behold the Judge more e... ...ting and baffling its baneful influence ... left to the Judge on the Bench, in ... instead of allowing a secretary, or any member of the Government, to silence him, to interfere w...

Whe... interest of ... (1911) 2 M... in official ... disclosure ... it ... the ... In ... *Bhagwati*,

... public policy, the official ... and their subordinate ...ations *Chatterton* v ...unications between a provincial governor and his attorney general on the state of the colony, or the conduct of its officers (*Wyatt* v *Gore*, Holts N P Cas 299), or between ... v *Maxwell*, ... the Com- ...30), and the ...y of State ..., 1 Cranch ...state will

5 P W R Cr 1913=5 Ind Cas 714 The customs superintendent could not claim privilege as [illegible] what took place between [illegible] *Ruku mali* v *Emperor*, 2 [illegible] Where the secondary evidence of certain documents had been admitted in the Court [illegible]

[illegible] section in correspondence between President [illegible] to the Government *Padmanbhiah* v *Town* [illegible] 53 It is dobtful whether a Railway station master is a public officer within the meaning of this section *Emperor* v *Bhagwati*, Ind Rul (1930) Oudh 174 During a police investigation under s of the Bombay District Police Act K, an Excise Inspector, in reply to enquiries by the police wrote a letter creating what he knew of an alleged offence under s 296 Penal Code *Held*, that K for the purpose of the case must be considered to be a private person, that he was not a person to whom the communication was made, he was the person by whom it was made and the letter did not fall under s 124 of the Evidence Act *Barjorji Frameje In re*, A I R 1932 Bom 196=34 Bom L R 258

125.* No Magistrate or police-officer† shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenues.

Information as to commission of offences

Explanation.—"Revenue-officer" in this section means any officer employed in or about the business of any branch of the public revenue.

Principle A genuine privilege for communications, on the fundamental principle of privilege, must be recognized for communications made by informers to the Government [illegible] encourage-ment, and becaus [illegible] ons can be created only by [illegible] of the informant's identi [illegible] Tr 99, *Earle C J* said [illegible] ven to discuss the truth [illegible] a rule which has universally obtained on account of its importance to the public for the detection of crimes that those persons who are the channel by means of [illegible] very unwilling to stop it, but it does not appear to me that there is any necessity for it in this particular case " So it is absolutely essential to the welfare of the state that the names of parties who interfere in situation of this kind should not be divulged; for othewise, be it from fear, or shame, or the dislike of being publicly mixed up in inquires of this nature,—few men would choose to assume

* This section was substituted for the original s 125 by the Indian Evidence Act (1872) Amendment Act, 1887 (3 of 1887)

† [illegible] has under s 125 of this Act have [illegible] in command of military police in [illegible] of 1887, s 13)] and in Bengal (vide [illegible]]

the disagreeable part of giving or rece
the consequence would be that many
Dallas C J. in *Home* v. *Bentinck*, 2 B
Trial, 32 How. St Tr 102; *R* v. *O'B*
Briant, 15 L. J. N S Exch 265 These matters are either those which concern the administration of penal justice, or those which concern the administra-
s the same,
hat subject

Scope of the section The law recognizes the duty of every citizen to communicate to the government and to its officers such information as he may have concerning the commission of offences against the laws, and for the purpose of encouraging the performance of that duty without fear of consequences, the Courts have long held that when the Government is immediately concerned ... and to
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Thus,
in
former
[*Rex* v *Akers*,
informer
Att Gen v *Bryan*
has been
applied in cases
Watson,
32 How St Tr
C 726),
larceny, (*State*
ised upon
charging the plaintiff with misconduct
Gray v *Pentland*, 2 Serg & R 23, *Home*
May, 2 Smith 3, *Burr Jones* § 763

he related it to a friend,
another quarter, a majority
to be asked the name of that friend, and they all were of opinion that all those questions which tend to the discovery of the channels by which the disclosure was made to the officers of justice were, upon the general principle of the convenience of public justice, to be suppressed, that all persons in that situation were protected from the discovery, and that if it was objected to, it was no more competent for the defendant to ask the witness who the person was that advised him to make a disclosure, than to ask who the person was to whom he made the disclosure in consequence of that advice, or to ask any other question respecting the channel of communication, or all that was done under it *R* v. *Hardy*, 24 How St Tr 808, *Greenl Ev* § 250 It may now be taken as settled rule that witnesses for the crown in criminal prosecution undertaken by the Government are privileged from disclosing the channel through which they have received or communicated information (*R* v *Watson* 32 St Tr 1, *R* v *Richardson*, 3 F & F 693, *A G* v *Briant*, 15 M & W 169, *Marks* v *Beyfus*, 25 Q B D 494) but it has been ruled that a detective cannot refuse on grounds of public policy to answer a question as to where he was secreted *Webb* v *Catchlove*, 3 T L R 159 In *R* v *Berrard* 1 F & F 240, when objection was taken to a question put to a witness, whether he had gone to a certain place as a spy, *Lord Campbell*, allowed the objection to prevail, on the ground that the question was not ... that the witness was really called upon to draw
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Amrita v *King I*
In *Weston*
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Q B D 509) A fortiori if objection is taken, it cannot since the law allows
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d the information,
but Cockburn C J ordered him to answer the question, which in the particular instance turned out to be material, the information having been supplied by two girls not called; "they could have stated," said the Judge ' how it was they had come to know that the bottle was where it was found, and perhaps could have given some clue to the person who put it there" R v Richardson, 3 F & F 693 So in England the line between public and private prosecutions not being clearly drawn for this purpose, it is for the Judge to decide whether the information is protected or not Roscoe Cr Ev 181 The English rule was followed in an Indian case before the passing of the Indian Evidence Act In re Mahesh Chandra, 13 W R Cr 1 (10) But under this section the rule is applicable both in cases of public and private prosecutions A mere suggestion that the complainant would show that the house raided was not the one referred to
the rule embodied
r the production
Cr L J 447=29
Ind Cas 79

The words "information as to the commission of any offence" in this section, only enacted the rule which, as said by Eyre C J in Hardy's case, 24 How St Tr 808, has universally obtained, on account of its importance to the public for the detection of crimes, that those persons, who are the channel by means of ... e unnecessarily disclosed Queen Empress ... But having regard to the distinction ... Bombay) between a police officer and an officer of the salt department, the latter cannot be considered a Police officer within the meaning of s 125 Evidence Act, and may therefore be compelled to say whence he obtained the information as to the commission of an offence Reg v Gowla, Rat Un Cr C 183 So also a superintendent
ction Queen Empress v Rana
v Emperor, 16 C W N 431=15
between questions which a witness
hich he cannot be permitted to
... The latter class of ques ... but questions
of the former class are in no way ... ght of
refusing to answer such questi ... drawn
from his refusal Mahomed Ali ... 277

126. No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

Professional communication

Provided that nothing in this section shall protect from disclosure—

(1) any such communication made in furtherance of any *[illegal] purpose.

* This word in s 126 was substituted for the original word "criminal" by the Indian Evidence Act Amendment Act (18 of 1872), s 10

(2) any fact observed by any barrister, pleader, attorney **S.** or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, *[pleader], attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation.—The obligation stated in this section continues after the employment has ceased

Illustrations

(a) A, a client, says to B, an attorney "I have committed forgery and I wish you to defend me"

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure

(b) A, a client, says to B, an attorney—'I wish to obtain possession of property by the use of a forged deed on which I request you to sue"

The communication, being made in furtherance of a criminal purpose, is

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tion of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; and hence the law must prohibit such disclosure except on the client's consent *Wigmore* § 2291, *Phip Ev* 170, *Per Mounteney B* in *Annesley* ... 17 How St T 1225 ... *Great Central Railway*, (1910 ... *Anderson* v *Bank* L R 2 ... meaning of the rule is this ... of our law, litigation can only be properly conducted by professional men it is absolutely necessary that a man in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substa... be able to place ... and that the cor... with his consen... al agent) that he ... he mean- ing of ... *enough* v *Gaskel* ... of this rule, is not o... the busines... protection... holden, and

* This word in s 126 was inserted by the Indian Evidence Act Amendment Act (18 of 1872), s 10.

S. aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations, which form the subj ct of all j id ci l proceedings If such communications were not protected no man as the same learned Judge remarked in another case would dare to consult a professional adviser, with a view to his defence, or to the enforcement of his rights, and no man can safely come into a Court either to obtain redress, or to defend himself *Bolton v Corporation of Liverpool* 1 My & K 94 95 No privilege can be thus required for any communication which is made for the purpose of committing a criminal or fraudulent act or of aiding

no part of the client's interests nor within

a legal adviser, were the rule otherwise

he purpose of

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his client for

the purpose of illustrating his criminal purpose *Wills Ev 2nd Ed* p 277 *Russell* v *Jackson* 9 Hare 392, *Follett* v *Jefferyes*, 1 Sim N S 3 17, *R* v *Cox* 14 Q B D 153, *Williams* v *Quebrada* (1895) 2 Ch 751, *Bullivant* v *A G for Victoria* (1901) A C 196, *Ramsbotham* v *Senior*, (1869) 8 Eq 575n, *In re Postlethwaite*, (1887) 35 Ch D 723

Scope of the section the reason of public policy

or attorney of the party cannot be compell

mmunications made to him or letters or entries *Greenough* v *Gaskell* 1 My & K 101 In this *gham* was assisted by consultation, with *Lord Lyndhurst Tindal C J* and *Parke J*, 4 B & Ad 876, and it is mentioned as one in which all the authorities have been reviewed in 2 M & W 100 per *Lord Abinger* and is cited in *Russell* v *Jackson*, 15 Jur 1117 as settling the law on the subject *Greenl Ev* § 237, see also *Berd* v *Lovelace* 19 Eliz in Chancery Cary's R 88 *Austen* v *Vesy* Cary's R 89, *Kelway* v *Kelway* Cary's R 127 *Dennis* v *Codrington*, Cary's R 143 *Wilson* v *Rastall* 4 T R 753, *R* v *Withers* 2 Camp 578, *Wilson* v *Troup*, 7 Johns Ch 25, *Mills* v *Oddy* 6 C & P 728 *R* v *Shaw* 6 C & P 372 "This protection," says *Lord Chancellor Brougham* "is not qualified by any reference to proceedings pending or in contemplation If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity either from a client or on his account and for his benefit in the transaction of his business or which amounts to the same thing if

his behalf matters

the client they are

to hold them and

not be compelled to disclose the information, or produce the papers in any Court of law or equity, either as a party or as a witness *Greenough* v *Gaskel*, 1 My & K 101 In *Pearce* v *Pearce*, 1 Deg & Sm 25 *Knight Bruce*

reat a price to pay for

the privilege remains an

its obstruction is plain

e of a general policy, but

it is nonetheless an obstacle to the investigation of truth It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principles *Wigmore* § 2291, *Broad* v *Pitt* 1 M & M 233=3 C & P 518, *Foster* v *Hall* 12 Pick. Mass 89 97 Communications made by a client to his pleader expressly for the pupose of incorporation in the pleadings are not confidential and are not privileged *Bibi Sona* v *Mir Abdul*, 6 S L R J Under this section a pleader cannot disclose the contents of a document

d not

when

necessary *Balkanla* v *Bhailal*, 1930 Ind Rul. Bom 88 An executor of a client cannot be presumed to give his consent to the pleader stating the contents of it from the mere fact that the executor, had deposed to its contents as a witness *Ibid*

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Privilege is irrespective of litigation beg— ... original theory of privilege the confidences ... when given for the purpose of securing aid in ... tion in which they were given It is obvi ... would be wholly ... ge This ... f a suit, ... *Gains-* ... *illiams* ... for the ... se; ... on it" ... is made ... are not ... *nterden)* ... "with ... was in ... Death, the present ... law ... procee ... *Greenc* ... Ald ... B 4, ... attorne ... 1 Deg & Sm 12 *Knight Bruce V C* said "I suppose *Cromack* v *Heathcote* to be now universally acceded to, as far as any discovery by the solicitor or counsel is conc ... laim, or dispute is immaterial" ... Cas 253 = 26 Bom L R 887, *M* ... v *Corrie*, 8 Q B D 356

Advice sought for miscellaneous non legal purpose A lawyer is sometimes employed without reference to his knowledge and discretion in the law—as where he is charged with finding a profitable investment for trust funds In such ... Madd 47; *Bran* ... W 98, *Doe* v *W* ... it is not easy to fr ... advice Where the general purpose concerns legal rights and obligations a particular incidental transaction would receive protection though in itself it were merely commercial in nature—as where the financial condition of a shareholder is discussed, in the course of a proceeding to enforce a claim against a corporation But apart from such cases, the most that can be said by way of generalization, is that a matter committed to a professional legal adviser is *prima facie* so committed for the sake of the legal advice which may be more or less desirable for some aspect of the matter, and is therefore within the privilege, unless it clearly appears to be lacking in aspects requiring legal advice *Wigmore* § 2296

Barrister, Attorney, plead ... 24 of Act II of 1855, where the ... Under that Act it was held ... *Chandra Kant*, 9 W R Cr Lett ... word "pleader" has been added Now the question is whether the word "pleader" includes Mookteers In construing this section the Court in *Abbas Peala* v *Queen Empress*, 2 C W N 484 (488) = 25 C 766, observed "The pleader for the Appellants contends that the statements made by the accused to the Muktear *Kedar Nath* were privileged, and that without the consent of the accused, Kedarnath ... is placed ... barrister ... in Act I

6. not, without the consent of his client, disclose any communication made by the client to him in the course of his professional employment or any advice given by him professionally to his client, the knowledge of which he shall have

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'express' before the word 'consent' which makes it specially stringent in favour of the privilege Now, there is no suggestion in this case that the accused expressly consented to Kedar disclosing in Court the statement or statements made to him by the accused

that

inasmuch as he was a Muktear he

and that consequently the stater

and we have been referred to a case of the *Queen v Chandra Kant Chakrabutty* 1 B L R A C 8, which proceeded upon Act II of 1855 As we have already pointed out, section 24 of the old Act is different from the section in the present Act The Procedure Codes, Act XXV of 1861 and Act X of 1872 did not contain any definition of the term "pleader" Act X of 1882 for the first time defines the word as follows —"Pleader", used with reference to any proceedings in any Court, means a pleader authorized under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil and an

any muktear or other person

in such proceeding The result

who appear in a Court in any

e purpose of pleading in any

particular case, come within the category of pleaders; and section 126 must we take it, be construed as applying to all persons who come within the category of pleaders as defined in the Criminal Procedure Code It would indeed be a strange anomaly if muktears who act in certain Courts as pleaders were

the Indian Evidence Act and

were not regarded as privileged

cognised position as barristers

We may say that the provision which was contained in Act II of 1855 and which was subsequently amplified by section 126 of the present Evidence Act embodies one of the wise principles of the English law, and that although in England there is no

d to the conditions of

all persons who plead

Now by the amend

ment of section 4 (1) by Act XXXV of 1923, pleader used with reference to any proceeding in any Court, means a pleader, or a muktear authorized under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil and an attorney of a High Court so authorized, and (2) any person appointed with the permission of the Court to act in such proceeding Now the word "pleader" includes not only muktear, but also an advocate,

permission of

ations made to a

r the interpreta

1882 should be

accepted in interpreting the Indian Evidence Act which was placed in the Statute Book as early as in the year 1872 The question is whether the commun

l If we are to accept

en Empress supra even

The reason given by

L R Cr S, in holding

xpressed. "Section

ls, shall not disclose

d 'attorney' in the

are meant, and not

lly follow in their

proper order after vakils There is, therefore, by law no privilege as to communications between muktears and their principals, and the witness's testimony ought to have been received and laid before the jury" "The reasons given for this decision seem equally to apply to the language of the present section" *Woodroffe's*

S. 1

Evidence Act, 8th Ed p 901 But on principle such communications should be excluded and it is anomalous that provisions of this section apply to inter-

are recognized by the Courts and, though not mentioned in the section, they would probably obtain the same protection as the persons mentioned" *Mark Ev* p 96

According to English law, the privilege attaching to confidential professional disclosures is strictly confined to the
protect those made
Wheeler v *Le M*
but see *R* v *Griff*
Duchess of King
agents (*Mosely* v (*Lee* v *Birrell*, Camp 3,
Webb v *Smith*, 1 C & P 337) and friends (*Wheeler* v *Le Marchant*, 17 Ch D 675), *Phip Ev* 170 There is no ground for encouraging the relation of client and
to
the
is
cat
for
circumstance that
Wigmore § 2302.

Shall at any time be permitted, etc In every case the privilege is the right not of the legal
he can alone waive it,
allowed to disclose ar
15 Q B D 114 The legal adviser is not competent to waive the privilege *R.* v *Leverson*, 11 Cox 152, *Wilson* v *Rastall*, 4 T R 758, *Lyell* v *Kennedy*, 27 Ch D 1, *Kay* v *Poorun Chand*, 4 B 631 But it is as client and not as party to a cause, that he is entitled, for the reason of the privilege applies to all clients as such, whether or not they are parties when the disclosure is sought from them Hence, the privilege equally forbids disclosure by the attorney of a client not in any way concerned in the cause *Wilson* v *Rastall* 4 T R 759, *R* v *Withers*, 2 Camp 578 Conversely, when the client is not a party then on general principles the party cannot invoke the privilege *Merle* v *Moore*, 2 C & P 275, *Wigmore* § 2321 The client may claim the benefit of the rule, although no fee has been paid, or although there has been no formal retainer The privilege has been recognized even in cases where the attorney did not consider that he was
to show that the relation
§ 749 But a waiver o
debar him from insisting
And subject to such waiver, when once communications or statements are privileged they always remain so (*Pearce* v *Foster*, 15 Q B D 114, *Bullock* v *Carry*, 3 Q B D 356, *Haslam Foundry etc* v *Hall*, (1887) 3 T L R 776), as the privilege is not destroyed by death but may be claimed by the personal representatives of the client who was entitled to it *Bullivant* v *A G for Victoria* (1901) A C 196, *Wills Ev 2nd Ed* p 285 But although the rule "once privileged always (*Bullock* v *Carry* 3 Q B D 356, *Calcraft* v
Gues ails to this extent that a document
does waiver, this does not affect the
admi matters to which the privileged
docu quiring production has at some
previous time obtained a copy of the privileged document or has perused its contents, he is at liberty to give secondary evidence of them, if due notice to

26. produce the original has been given. *Wills Ev 2nd Ed* 285; see also *Minet* v *Morgan*, 8 Ch 361, *Lloyd* v *Mostyn*, 10 M & W. 478, 481, 482, *Calcraft* v *Guest*, (1898) 1 Q B 759.

Anytime The word 'anytime" in this section is significant When a communication is once privileged it is "always privileged" *Per Cockburn C J* in *Bullock* v *Carry*, 3 Q B D 356, *Per Lindley L J in Calcraft* v *Guest*, (1898) 1 Q B 761 The privilege continues for the purpose of future litigation

change of solicitors, or that the

. *Clinton*, 19 Ves 268), or the

v. *Brown*, 7 Hare, 79), or the

C 196, *Powell Ev* 233 The

urpose of the privilege to secure,

it, when the relation ended, or

ild be compelled to d close the

which the disclosure might not be used to the detriment of the client or his estate *Wigmore* § 2323, *Pearce* v *Foster*, L R 15 Q B D 114, 118, *An Attorney, In re* 84 Ind Cas 353=A I R 1925 Bom 1 (F B), *Wilson* v *Rostall*, (1792) 4 T R 759, *Parker* v *Yates*, 12 Moo P C 520, *Explanation to the section*

Express consent The privilege is designed to secure the client's confidence in the secrecy of his communication; hence, the privilege is not violated by

by his own will permits to be made

s always been recognized that a waiver

al, 21 How St Tr 1, 341, *Merle* v *Moore*,

to the client and not to the attorney

But such waiver can be express or by implication As regards waiver by implication there is some conflict of decisions *Woldram* v *Ward*, Style 449, *Mackenzie* v *Yeo*, 2 Curt Eccl 866, 876 In India the matter is set at rest by use of the words "client's express conduct" The question in this connection may well arise whether there can be a waiver by a deceased client's representatives That an executor or administrator may excise authority over all the interests of the estate left by the client, and yet may not incidentally have the right, in interest of that estate to waive the privilege concealing confidential communications affecting it, would seem too inconsistent to be maintained under any system of law It is generally agreed that in testamentary contests the privilege is divisible, and may be waived by the executor the

the legatee *Wigmore* § 2329, *Doe*

on, 9 Hare 387, 392, *Greenlaw* v *King*,

s" in this section includes "representa

whether the executor of a client can waive this privilege in respect of a will where there are various beneficiaries having conflicting interests under the Will *Baikanta* v. *Bhailal*, 1930 Ind Rul. Bom 88

The consent required by this section should be given on each occasion when a communication of the kind described is sought to be made admissible in evidence A consent given to the disclosure of some privileged matters in civil suit is not sufficient authority for the disclosure of the same matters in a criminal case arising out of the suit *Queen Empress* v *Gulkhan*, A W N 1890, 172 A failure on the part of a client to claim privilege where he is under

nsent" given by him to his

otherwise privileged under

Sind 47 The statement

person without the consent

ery improper on the part

thout his client's consent.

purpose of his

on law that an

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s professional

nications were

1 Myle &

ary 89; *Burr*

S.

Jones 748 This privilege protects from disclosure two classes of communications (i) confidential communications which have passed at any time between the party or witness and his legal adviser in his professional capacity for the purpose of the *former obtaining legal advice for the protection of his interests,* information procured in pursuance of such communications for the same purpose and notes and other records of such communications and information made for the same object, (ii) similar communications, information, notes and [illegible] gation, whether commenced or only [illegible] to counsel or solicitor, cases to [illegible] ared on the client's behalf *Wills' Ev 2nd Ed* 276, *Greenough* v *Gaskell* 1 My & K 98, *Minet* v *Morgan*, 8 Ch 361 *Anderson* v *Bank of British Columbia*, 2 Ch D 644 *Wheeler* v *Le Marchant*, 17 Ch D 675, *Southwark etc Co* v *Quick* 3 Q B D 315 'If the protection was confined to proceedings begun' says *Lord Chancellor Brougham* in *Greenough* v *Gaskell*, 1 My & K 98, 102, 'or in contemplation then every communication would be unprotected which a party makes with a view to his [illegible] although at the time no [illegible] allowed to extend over such [illegible] icient if it only included communications more or less connected with judicial proceedings, for a person often times requires the aid of professional advice upon the subject of his rights and liabilities with no reference to any particular litigation and without any other reference to litigation generally than all human affairs have in so far as every transaction may by possibility become the subject of judicial inquiry The communications may be either oral or written *Pearce* v *Foster*, 15 Q B D 114 A communication with a solicitor for the purpose of obtaining legal advice is protected though it relates to a dealing which is not the subject of litigation, provided it be a communication made to the solicitor in that character and for that purpose' *per Jessel M R* in *Wheeler* v *Le Marchant*, 17 Ch D 682, *Minet* v *Morgan*, L R 8 Ch 361 Absence of litigation or prospect thereof at the time the confidential communications are made is no excuse for disclosure *An Attorney, In re* 84 Ind Cas 353 = A I R 1925 Bom 1 (F B) It is misconduct from [illegible] g consulted in his [illegible] rs of the case as [illegible] the opposite party The fact that there was no definite agreement by the first party makes no difference *Maung Maya* v *Sun Singh* U B R 1897—1901 Vol II 368 On general [illegible] before [illegible] a party [illegible] nature [illegible] draft prepared by a mukhtear of some statements made by the complainants which with some alterations were meant to be incorporated in a petition of complaint to be presented to the Court is a privileged document *Mhajan* v *Emperor* 37 C W N 68

By or on behalf of his client Neither client nor solicitor need act personally [illegible] each other in order that the privilege may [illegible] or ot [illegible] D 61 [illegible] *M R* said He may employ a third person to write the letter, or he may sent the letter through a messenger or he may give a verbal message to a messenger In the second case the same learned Judge also observed The actual communication to the solicitor by the client is of course protected and it is equally protected whether it is made by the client in person or is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his plac [illegible] the solicitor or by [illegible] is protected, if c [illegible] with a view to the [illegible] re v *Lucette* Pea [illegible] r v *Hallman*, 6 M [illegible] Mc N & G

627, 638, *Glyn* v *Gaulfield*, 3 Mac N. & G 463, 473, *Carpmael* v *Powis* 9 Beav 16, *Ford* v *Tennant*, 32 Beav 162, 168, *Goodall* v *Little*, 1 Sim N S 155, 163, *Steel* v *Stewart*, 1 Phil Ch 471, 475

Contents or condition of any document with which he has become ... of a pre existing document ... of the matters volun... ossible, in the language ... 33, 35), to perceive ... a fact to counsel and ... deed or other written ... cation of this sort is not instrument ... Unless, therefo ... confidential it is within the privilege, and the testimony of the attorney on the stand cannot be required *Wigmore* § 2308; see also *Bulstrod* v *Letchmere* Freem Ch 5, *Anon*, Skin 404; *Bottomly* v *Usborne*, Peake Add Cas 99, 101 *R* v *Upper Boddington* 8 Dowl & R 726; *Bate* v *Kinsey*, 1 Cr M & R 38 *Masston* v *Downes* 6 C & P 381, *Wheatley* v *Williams*, 1 M & W 533, *Doe* v *Watkins*, 3 Bing N C 421; *Hurning* v *Clobery*, 1 Phil Ch 91, *Hibberd* v *Knight* 2 Exch 11 *Davies* v *Waters*, 9 M & W 608, 612 A solicitor is not boun... ... the nature or contents of, a ... The mere statement of the solicitor that he receiv... ... not professionally is enough to protect it *Volant* v *Soyer*, ... t may not be such as passed directly between ... if it is of such a nature as ... ly for the purpose of bei... ... submitted to legal advisers, then ... a document *Vishnu* v *Neuyork*, ... quainted with a Will in the course and ... ployment be cannot be examined in a subs... *Bukanto* v *Bailal*, 31 Bom L R 1046= ...

Relevancy or necessity of the communication The Courts have not always used consistent language in answering the question whether the privilege is limited in some way to communications necessary or material or relevant to some purpose of the consultation In *Gillard* v *Bates*, 6 M & W 547 the Court observed "The test is, whether the communication is necessary for the purpose of carrying on the proceeding in which the attorney was employed" The test laid down in *Cobden* v *Kendel*, 4 T R 431, is that the Court should see "whether the communications were made by the client to his attorney in ... ...ting his cause or a mere *gratis dictum* ... 7 How St Tr 1229 *Bowles L C B* said ... in protecting secrets disclosed by the client to his attorney to be, as has been said, in favour of the client, and principally for his service, and that the attorney is *in loco* of the client, and therefore his trustee, does it not follow from thence, that everything said by a client to his attorney falls under the same reason? I own I think not, because there is not the same necessity upon the client to trust him in one case as in the other, and of this the Cou... ... conversation Nor do I see any imp... ... be trusted in one case as an attorney or ... But where the client talks to him at large as a frien... ... intaince ... e way of his profession, I think the Court is not under the same obligations to guard such secrets, though in the breast of an attorney" In the same case *Mounteney B* added If this original principle be kept constantly in view, I think it cannot be difficult to ... any other which may arise upon this ... er either is, or by the party concerned can ... attorney in order to ... the attorney ... not, nor can shall inviolably keep secret ... possibly by any man living be supposed to be necessary for that purpose, that the attorney is at liberty, and in many cases—as particularly, I think, in the present case—the attorney ought to disclose" It is thus further elucidated by *Dawson B* "Nothing that came properly to the knowledge of the attorney in defence of his client's cause ought to be revealed I will suppose an unknowing

man to have twenty deeds by him, and he delivers them all to his attorney to see which were relative to suit he looks them over finds not half of them r ' ' ' npellible to di close the nk it necessary, and I what came to this man s and in the next place that the client could not think it nece sary The te t is therefore, not whether the fact or the statement is actually necessary or material or relevant to the subject of the consultation, but whether the statem nt is ma le as a fact for the purpose of the client to obtain a lvice on that sul ject *Wigmore* § 2310

S.

Communication must be confidential The moment confidence ceases' sa l *Lord Eldon* ' privilege ceases *Parkhurst* v *Lowten* 2 Swanst 194 216 *Greenough* v *Gaskell* 1 Myl & K 98 104 Letters in order to be privileged must be professional communications of a confi le tial character for the purpose of getting legal advice *Gardner* v *Irvin*, L R Exch D 49 53, *Oshea* v *Wood*, (1891) P 237 286 The privilege assumes of course, that the communi cations are made with the intention of confidentiality *Wigmore* § 2311 The law in India on this point is practically the same as in England, and that in interpreting section 126 of the Evidence Act a Court may rightly refer to English cases, is shown by *Westropp C J* and *Sargent J* in the case of *Munon Haji Harun* v *Maulvi Abdul Kasim* 3 B 91 in which Chief Justice *Sir M Westropp* said Communications to be protected by that section (126) of the Evidence Act must we think be confidential The word disclose' shows that common sense seems t ... be confidential or private S ... section 126 of the Evidence ... must be of a confidential n ... Judges in the course of tl ... exactly the principle follov ... L R 5 Ch 703, *Tramj* ... *Bursil* v *Tanner* 16 Q L ... 9 App Cas 81 *R* v *Rolrigu* ... 12 C 265 In *Duyer* v ...

The privilege does not extend to matters of craft which the attorney knows by any other means than confi lential communications with his client, though if he had not been employed as attorney he probably would not have known them The cas ... *Tanner*, 16 Q B D 1 ... ate the name of the clie ... *mji* v *Mohan Singh* ... under s 126 is of a very limited character It protects only such communications as are made to the legal adviser in confidence in the course and for the purpose of his employment And if the communication is not made in confidence then the communication is in no sense privileged *Bhagwani* v *Deoram* A I R 1933 Sind 47 Communications made to legal advisers in order to be protected by this section must be confidential A communication made to a pleader in order that it might be communicated to the Court as one of the statements in a plaint and in order that a decree might be obtained is not such a communication but on the contrary is one made expressly for the purpose of disclosure and express consent to the disclosure was therefore actually given by client *Abdul Hussein* v *Bibi Sona Dera* 4 S L R 85

Communication distinguished from acts client s conduct Appearance Abode etc The question is does the privilege cover only that knowledge or the ... e cl ent's utterances or also that whi ... The question has given rise to a diff ... It is sometimes discus e l as if the word communications was synonymous with utterances of words' that is, those who favour it largest answer repu liate the limits of the word communi cations as if it inclu le l no more than utterances and yet it is of course ... voluntarily di clo ed and conceival ... without any utterance of willingly ... the point of view of the words ... leged knowledge of the attorney

attorney is restricted to that which he obtains by the sense of hearing only, or includes also that which he learns by seeing; and this mode of statement corresponds more closely to the distinction between utterances and acts of the client *Wigmore* § 2306 In *Robson* v *Kemp*, 5 Esp 52, 55 *Lord Ellenborough L C J* said 'The act (of destroying a power (
confidence and communication as an attorne
character One sense is as privileged as
privileged as to what he hears, but not to what he sees, where the knowledge
... y" But in
gham sul
correctness
t, something
o a certain
y other man
v. *Foster*, 1
H & N 736, ... A legal adviser may give evidence of a fact
respect to matters which
swer." *Buller J* in his
over a fact of his own
without being counsel or
produced in the cause,
be shall be examined to the true time of execution, so, if the question were about an *erasure* in a deed or a Will, he might be examined as to the question whether he had ever seen such deed or Will in other plight for that is a fact of
ot to be permitted to discover any confessions
such head" "There is marked contrast
the statement of *Lord Ellenborough* in
Martin, in *Brown* v *Foster*, can they be
hem consistent with *Mr Justice Bronson's*
distinction between a communication and an act? The truth is that each is right, under some circumstances, and all are harmonious, when the proper allowance it made Looking back at the reason of the privilege it is seen to secure the client's freedom of mind in committing his affairs to the attorney's knowledge It is designed to influence him when he might be hesitating between the positive action of disclosure and the inaction of secrecy There is, therefore, by hypothesis, always some voluntary act of dis
otherwise have existed
e hand, then, those data
event, be mere obser
as the colour of his hat
e known by such acts
without any purpose of
as his adviser—such as
in the roll of bills from
the communications of
gham and *Mr Justice*
would have been equally
cognizant On the other hand almost any act, done by the client in the sight of the attorney and during the consultation, may conceivably be done by the
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committed to the attorney, and thus be not privileged . Obviously no fixed form of rule can be stated for the present application of the principle In the

ordinary case, it is only the expressed communications of the client that will be privileged' Wigmore § 2306 For the purposes of section 126 of the Evidence Act, it is immaterial whether the communication which is sought to be protected was verbal that to say, by word of mouth or by demonstration In a suit for the revocation of a patent in which the question for decision was the formation and process of working of a stove owned and used by the defendant the plaintiff tendered in evidence a vakil who had been employed by the defendant in some previous proceedings and had in the course and for the purpose of his employment, visited the defendant's premises at the latter's invitation, in order to make himself acquainted with the working of the stove Held that the knowledge acquired by the vakil as to the formation and process of working of the stove amounted to a communication made to him by his client in the course and for the purpose of his employment and that therefore, his evidence was inadmissible under section 126 of the Evidence Act *Gopi Lal* v *Lakhpat Rai*, 48 Ind Cas 605=16 A L J 987

No adverse reference from claims of Privilege If a client party claims the privilege no inference should be drawn against him as to the unfavourable ... *Per Lord Chelmsford* in *Wentworth* v *Lloyd*, ... Wigmore § 2322, *Weston* v *Peary Mohan*, ... *ananlan* 20 C W N 617 P C Whatever the ... drawing of such ... it is this very dis...

Judge to determine the privilege The claim of privilege being made the trial Judge d... This follows from ... is usually of no ... give to the party's oath in answering a bill of discovery Wigmore § ... Ordinarily an attorney's statement that a document is privileged is sufficient *Volant* v *Soyer*, 13 C B 231 But in *Lyell* v *Kennedy* L R 27 Ch D 1 21, Cotton L J said The Court must be satisfied clearly satisfied, either from admissions or from other documents that the oath of the defendant by which he claims his protection cannot be really available for the purpose for which it is put forward Wigmore § 2323

Third person over hearing The law provides subjective freedom from client by assuring him of exception from its process of disclosure against himself or the attorney or their agents of communication This much but not a whit more is necessary for the mainte... preserving secrecy of communicatic... since the privilege is a derogation ... be strictly construed it would be improper to extend its prohibition to third persons who obtain knowledge of the communications One who overhears the communication whether with or without the client's knowledge is not within the protection of the privilege The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy Wigmore § 2326

Presenc... ... does not destroy privilege ... such friends occupy more ... not destory the privilege alt... ... not having been made in confidence *Bhagwan* v *Deoram* A I R 1933 Sind 47

Joint ... ... privilege attaches to communications between ... persons having a joint interest with the client ... communication—*e g* as between partners (*Re Pic*... *Elison* 59 L T 813) directors and sharehol... *a Woodhouse* v *W* 30 T L R 559), trustee and *cestui qui trust* (*Talbot* v *Marshfield* 2 Dr & S 549 *Re Mason* 22 Ch D 609, *Re Postlethwaite* 35 Ch D 722), even though the party resisting production has paid for the communication (*Bacon* v *Bacon* 34 L T 349), lessor and lessee as to production of the lease (*Doe* v *Thomas*, 9 B & C 288), reversioner and tenant for life as to common title (*Doe* v *Date* 3 Q B 609), two persons stating a case for their joint benefit (*A G* v *Berkeley*, 2 J & W

291), or a husband and wife who are only collusively in contest (*Ford* v *De Pontes* 5 Jur N S 993 *aliter* if the contest is genuine) Nor does an privilege attach as between joint claimants under the same client—*e g*, betwee claimants under a testator as to communications between the latter and h solicitor (*Russell* v *Jackson* 9 Hare 387) But where communications rela to matters outside the joint interest they are privileged even as against a per o bearing the expense of the communications—*e g* communications betwee plaintiff corporation and its solicitors as against a defendant ratepayer as t matters not connected with the rates (*M of B i tol* v *Cox* 26 Ch D 678) c between a trustee and his solicitor as against the *cestui que tr st* where th communication is not mad t but to enabl him to resist litigation by W R 319) I cases of joint interest it ons if one only o J P C 3 4 *ead* 65 L J Ch

Where the consultation was had by sever e joint for joint statements and neither coul be able t obstruct the other in the *Wigmor* § 2328 *In re an Attorney* 887

Joint Attorney There may be a relation, not of an absolute confidence The chief instance occurs a common interest, and each nications are clearly privilege Yet they are not privileged in a controversy between two original i in as much as the common interest and employment forbade concealment by either from the other *Wigmore* § 2312, *Baugh* v *Cradocke* 1 M & R 1 *Perry* v *Smith* 9 M & W 681, *In re an Attorney*, 84 Ind Cas 353 (F B) Bom L R 887 But if a solicitor be employed for two parties a for mortgagor and mortgagee and peruse on behalf of the former his abstracts of the title he cannot as against him disclose their contents (*Doe* v *Watkins* 3 Bing N C 421), and where a professional man was engaged by vendor and purchaser to prepare the deeds, and the draft conveyance was confidentially deposited with him by both parties it was held that he could not produce it at the trial against the interest of the purchaser s devisees though with the consent of the vendor *Doe* v *Seaton* 2 A & E 171 Where two persons having a dispute about a claim made by one of them upon the other went together to a solicitor, when one of them made a statement and instructed the solicitor to write a letter to a third party on the subject of the claim —it was held that in a subsequent action between these two persons both the statement and the letter were admissible in evidence *Shore* v *Bedford* 5 M & Gr 271, *Griffith* v *Davies* 5 B & Ad 502 In all these cases the question would seem to be was the communications made by the party to the witnesses in the character of his exclusive solicitor? If it was the bond of secrecy is imposed upon the witness, if it was not the communication will not be privileged *Perry* v *Smith* 9 M & W 68?, *Pay ott* v *Sprye* 10 Beav 51 *Taylor* § 936 A communication to the opposing party's attorney, as such, is clearly without t nce is repo e nor if reposed could be accepted v *Abl* *Karim* 3 B 91, *Marston* v *Downes* Nev & M 310, *Ainsworth* v *Wilding* (1900) 2 6 595

Time of consultation The privilege exists not for the sake of the legal profession in general but for the sake of clients needing legal advice It therefore assumes that the relation of client and adviser has been formed (or is forming) for a particular person as client i e communications are protected not merely when the person consulted is a professional legal adviser, but when th e a communi relation was *Gaskell* 1 communi seem plain not certainly predict the attorney s acceptance of the employment, the former must be protected in his preliminary statements when making the overtures, even if the overture

be refused It would further be immaterial that the refusal was due to a disagreement as to fees ... of the fee demanded, for upon preliminary statement the privilege covers the preliminary statement Wigmore s 2304

Any advice given by him No legal adviser is permitted, whether during or after the termination of his employment as such, unless with his client s express consent to disclose any advice given by him to his client during, in the course, and for the purpose of such employment *Steph Dig Ev art* 115 So not only communications made to an attorney, but any advice given by him to his client is also privileg... client are also within the privilege has seldom been brought into for securing ... enting the use of hi ... rences of the tenor ... being hearsay state ... 0

Crown case—Communication between prosecutor and attorney Commu

Proviso (1)—Communications in furtherance of any illegal purpose Professional communications are not privileged when such communications are for an unlawful purpose having for their object the commission of a crime Then they partake of the nature of a conspiracy or attempted conspiracy, and it is not only lawful to divulge such communications but under certain circumstances it might become the duty of the attorney to do so The interests of public justice require that no such shield from merited exposure shall be interposed to protect a person who takes counsel how he can safely commit a crime *People* v *Van Alstine* 57 Mi Ch 69 Moreover no such enterprise falls within the just scope of the relation between legal adviser and client The case of *William* v *Quebrada Ry etc Co* (1895) 2 Ch 751 was considered one of unusual gravity and importance and *Kekewich J* in delivering the opinion of the Court said It is of the highest importance in the first place that the rule as to privilege of protection from pr... which pass between a litigant should not be in any way depa... that it is essential to the due adminis... be upheld On the other hand where ... or approaching to fraud especially in commercial m... st good faith the whole transaction sh... akedness to the light of the Court ... dvise his clients in what manner they may commit crime or fraud with impunity hence the privilege does not extend to communications made in furtherance of prospective criminal acts If ... his duty t... dispense w... every des... the public wel... In *Gartside* v ... n be no confid... *ower* *L J* said ... legal purpose w... ere a solic... I m... sol c... to n...

Wood ... *C* said I should first beg leave to consider whether an attorney may be examined to any matter which comes to his knowledge as an attorney If he is employed as an attorney in any unlawful or wicked act his duty to the public obliges him to disclose it No private obligations can dispense with that universal one which lies on every member of the society, to discover every design,

S which may be formed contrary to the laws of the society, to destroy the public welfare For this reason, I apprehend that if a secret which is contrary to the
ommit treason murder, or perjury—comes to
in a cause where he is concerned the obliga
ith the private obligation to the client
o define the boundaries of this limitation It has not always been kept in mind that the privilege, in its very fundamentals presupposes what Bentham so drastically censured—the furnishing of legal advice to the culpable client, as well as to the worthy one i e to a client who if the law were duly enforced would lose in the litigation How, then can the privilege continue to exist at all, if any exception is to be made by which the
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conclusion They predicate the need of confidence on the part not only of injured persons, but also of those who, being already wrong doers in part or all of their cause are seeking legal advice suitable for their plight The confidences of such persons may legitimately be protected, wrong doers though they may have been, because the element of wrong is not always found separated from an element of right, because, even when it is, a legal adviser may properly be employed to obtain the best available or lawful terms of making redress, and because the legal adviser must not habitually be placed in the position of an informer But these reasons all cease to operate at a cert in point namely, where the desired advice refers not to prior wrong doing, but to future wrong doing From that point onwards no protection is called for by
Upon this much there has been a fair consensus
themselves upon the subject But certain minor
practical rule for disclosure it to be settl l
e be sought for a *knowingly* unlawful end? (2) Must not that unlawfulness be either a crime or civil wrong involving a moral turpitude? (3) Must not the attorney have
attitude as to have become by assent to the de
intended wrong? *Wigmore* § 2298 The la
by *Brouson J* in *Coveney* v *Tannahill*, 1 Hill, ...
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his presence towards the perpetration of the fraud One who is charged with having done an injury to another, either in his person, his fame or his property may freely communicate with his counsel without the danger of having his confidence betrayed through any legal agency But when he is not disclosing what has already happened, but is actually engaged in committing the wrong he can have no privileged witness In *Annesley* v *Earl of Anglesea*, 17 How St Tr 1229, *Mounteney B* said A man (without any natural call to it)
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entioned
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he must
never discover this declaration, because he was retained as attorney This pro-
secutor applies in the same manner to a second, a third, and so on, who st ll

refuse, but are still to keep this inviolably secret. At last, he finds an attorney wicked enough to carry his iniquitous scheme into execution And after all, none of these persons are to be admitted to prove this, inorder either to bring the guilty party to condign punishment, or to prevent the evil consequences of his crime with regard to civil property. Is this law? Is this reason? I think it is absolutely contrary to both.

"Looking at the reasons for the privilege," says *Prof Wigmore*, "and construing it as strictly as possible, the first of the above three questions should be answered in the affirmative, but the second and the third in the negative The decisions apparently reach this general
pect, where there is an inclination to mark
fraud, yet it is difficult to see how the law
defy the law and oust another person of his rights, whatever the precise nature of those rights may be" ... word "illegal" has been substitu ... the Indian Evidence Act Amenc ... v *Jackson*, 9 Hare 329; *Kelly* v *J*

Statements and ... of a crime already committed, made by the party who committed it, to an attorney, consulted as such, are privileged communications, whether a fee has or has not been paid, and whether a prosecution or litigation is pending or not The question was raised in the United States Supreme Court in *Alexander* v *United States*, 138 U S 353, which was a trial for murder of a partner, and reliance was placed on a leading English case (*Reg* v *Cox*, L R 14 B D 153), as holding the doctrine that where a communication is made to counsel in furtherance of a scheme to commit a crime, the client is not entitled to the privilege "This case, however" said *Mr Justice Brown* "is clearly distinguishable from the one under consideration, ir
with regard to a scheme to defraud, for
indicted and tried, and the testimony
case the consultation was had after the c
in evidence as an admission tending to show that the defendant was concerned in the crime, or rather as a statement contradictory to one he had made upon the stand Had he been indicted and tried for a fraudulant disposition of his partner's property, the case of *Reg* v *Coxe* would have been an authority in favour of admitting his testimony, but we think the rule announced in that case should be limited to cases where the party is tried for the crime in furtherance of which the communication was made Vide *illustrations* (*a*) and (*b*) So the privilege mentioned in this section is subject to the limitation that no Court can be called upon t ... s part of criminal or unlaw ... (1901) A C 196 So ... with the attorney was for ... v *Avery*, 8 C. & P 596 ... ite, *R* v *Farbey*, 2 C & K 313, *R* ... n Cr 166 So a solicitor is not ... *Reynell* v *Sprye*, 10 Beav 51, 56 ... , *Lord Cranworth* V. C ... tempt to dispose of property in eva... *Coombs*, 32 L J Ch N S 281, it w... o the fraud, in order that the priv... Cox 486, *Williams* v *Quebrada* *Ry*, ... R 11 Q B D 153, 164, *Postale* *the* ... 24 Communications made with a v ... *O'Rourke* v *Darbishire*, (1920) A C 581.

Proviso (2) T
W *Page Wood V C*,
one which lies on
may be formed contrary to the laws of society, to destroy the public welfare For this reason, I apprehend that, if a secret which is contrary to the public good—such as a design to commit treason, murder or perjury—comes to the knowledge of an attorney, even in a cause where he is concerned, the obligation to the public must dispense with the private obligation to the client" Vide

which may be formed contrary to the laws of the society, to destroy the public welfare For this reason, I apprehend that if a secret which is contrary to the public good—such as a design to commit treason murder, or perjury—comes to

where he is concerned the obliga
ate obligation to the client'
boundaries of this limitation It

has not always been kept in mind that the privilege, in its very fundamentals presupposes what Bentham so drastically censured—the furnishing of legal advice to the culpable client, as well as to the worthy one i e to a client who if the law were duly enforced would lose in the litigation How, then can the privilege continue to exist at all, if any exception is to be made by which the confidences of the guilty are to be disclo ... take merely the practical point of view, and to ... t at least cease to be a cloak for criminal ... and to contrive an arbitrary limit for this excep ... ry thus to do violence to the theory of the privilege Looking at the reasons of policy upon which it rests, they appear by their natural limits to end with the same conclusion They predicate the need of confidence on the part not only of injured persons, but also of those who being already wrong doers in part or all of their cause are seeking legal advice suitable for their plight. The confidences of such persons may legitimately be protected, wrong doers though they may have been, because the elemen ... ted from an element of right, because ... y properly be employed to obtain the ... g redress, and because the legal adviser must not habitually be ... e position of an informer But these reasons all cease to operate at a certain point namely, where the desired advice refers not to prior wrong doing *but to future wrong doing* From that point onwards, no protection is called for by any of these considerations Upon this much there has been a fair consensus among all who have declared themselves upon the subject But certain minor points of detail still remain, if a practical rule for disclosure is to be settled upon (1) Must not the advice be sought for a *knowingly* unlawful end? (2) Must not that unlawfulness be either a crime or civil wrong involving a moral turpitude? (3) Must not the attorney have so far abandoned his professional attitude as to have become, by assent to the design a partaker in the client's intended wrong? *Wigmore* § 2298 The law on the subject is thus laid down by *Bronson J* in *Coveney* v *Tannahill*, 1 Hill, N Y 33, 35, 41 'It is the ... to speak ... should not ... was done ... the transac ... torney and client, either in the commission of a crime, or the doing of a wrong by force or ... can only ... consulted ... s of com ... , and they ... was done ... as done in his presence towards the perpetration of the fraud One who is charged with having done an injury to another, either in his person, his fame or his property may freely communicate with his counsel, without the danger of having his confidence betrayed through any legal agency But when he is not disclosing what has already happened, but is actually engaged in committing the wrong he can have no privileged witness In *Annesley* v *Earl of Anglesea* 17 How St Tr 1229 *Mounteney B* said A man (without any natural call to it) ... desirous and ... to carry on ... re ment one ... nderstanding ... too honest a ... but he must never discover this declaration, because he was retained as attorney This prosecutor applies in the same manner to a second, a third, and so on, who st...

and the document came into the hands of the plaintiff, it was held that there was no rule relating to privileged communications preventing its production in evidence *Paicheappa* v *Mt U*, L B R (1872—1892), 412 There is no protection approved by the Evidence Act to a doctor as such When a doctor is called to give evidence he is in '
exempted by the Act, and he is no
case *Edna May Olivia* v *Harold I*
A L J 14

S.
S.

127. The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

Section 126 to apply to interpreters, etc

Principle It has never been questioned that the privilege protects communications to the attorney's
Taylor v *Foster*, 2 C &
Kennedy L R 27 Ch D 1 (
pensible to his work, and
sarily committed to them by
must include all the persons

Scope of the ... the
capacity ... v
Gorham, ... e a
communic ... the
... sed
xtends to such a communication,
a communication to a pleader
3-2 C W N 649 The evidence
Maung Mya U v *Sun Singh*, U.
v *Queen Empress*, 25 C 736, it
is also privileged But the
in the attorney's office, nor the
was an attorney *Barnes* v.

128 If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such barrister, pleader,* attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney, or vakil on matters which, but for such question, he would not be at liberty to disclose.

Privilege not waived by volunteering evidence

Privilege The privilege mentioned in section 126 is designed to secure the client's confidence in
is not violated by receiv
permits to be made S
niz d that a waiver may l
360, 480 *Merle* v *Moore*
a waiver by implication ?
In deciding it, regard mu
in every waiver i e not
element of fairness and consistency A privileg d person would seldom be found to waive, if his intention not to abandon could alone control the situation

* This word in s 128 was inserted by the Indian Evidence Act Amendment Act (18 of 1872), s 10

as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point, his election must remain final *Wigmore* § 2327.

Scope of the section Under s 24 of Act II of 1855, a party who gave evidence ... s privilege, and to ... ny relevant matter, ... be bound to disclose *Cun Ev* 361 Under the present Act the client's offer of his own testimony in the cause at large is not a waiver, for the purpose either of cross ... of calling the attorney to prove ... would be exercised only at the ... on the stand The client's offer of ... hich he has happened to communicate with the attorney is not a waiver *Wigmore* § 2327; *Doolar Jha* v *Ranjit* 15 W R 340 The client's offer of the attorney's testimony in the cause at large is not a waiver so far as the attorney's knowledge has been acquired casually as an ordinary witness But the client's offer of his attorney's testimony as to specific communication to the attorney is a waiver as to all other communications to the attorney on the same matter; for the privilege of secret consultation is intended only as an incidental means of defence, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former So also a client's offer of his own or his attorney's testimony as to a part of any communication to the attorney is a waiver as to the whole of ... of the principle of completeness *Wigm* ... so *Mc'donnell* v *Conry*, 1843, Ir Cir Rep 807 ... he waiver cannot be recalled The evidence is made incompetent at the option of the client only, and if he elects at any time to remove the seal from the lips of the witness, the evidence may be received The b... nt, and the information having ... t further thereto is gone The cli... l and a shield, to waive when ... loes not. After its publication no ... hts and interests, which the law was intended to protect, and there is no further reason for its enforcement The nature of the information is of such a character that when it is once divulged in legal proceedings it cannot be again hidden or concealed It is then open to the consideration of entire public, and the privilege of forbidding its repitition is not conferred by law The consent, having been once gi... d the client can never be restored ... s of public policy, has sought to protec... iple or authority for holding, after ... has been properly g... he privileged person can again r... een voluntarily defeated by the I... be no reason for its continued ... versa lex ... to us ... word 'waived' as used in the statute, and as supporting the conclusion that when, once waived, and made effectual by publication, it is waived for all time *McKinney* v *Grand Street etc.*, 104 N Y 352 (Am) Waiver in one trial is a waiver in subsequent ones *Burr Jones* § 756.

Confidential communication with legal advisers

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such

communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others

S. 1

Principle The privilege being for the protection of the client in his sul ect ve froo l
unly be defeated if the disclosure
was still obtainable
it has nev r been
uuuteu that the client s own *Wigmore* § 2324

Scope of the section Under the old law (i e Act II of 1855 section 22) a party to a suit who offerel himself as witness was bound to produce any confidential writing or correspondence that had passed between h mself and his legal adviser The reason for this rule is not very clear and the present section abrogates it so far that such correspondence need be produced only if it is neces ary to explain the witness's evidence The English law at present is iden
C
m
if
is
ev
B
to protect professional communications and to leave them unprotected at the examination of th
which the la
to di close
no man wo ild do with a view to his defence
or to the *Greenl Ev* § § 236—240
The rule iven or opinions stated
but exten ther oral or documentary
properly relating to the business in hand and to all documents books papers
or instruments which may be properly
information of his attorney *Crosby* v
same principle the privilege exte ds
the purpose of obtaining the advice of counsel and to the opinion of counsel based upon such statements *Burr Jones* § 750

In *Munchershaw Bexonji* v *The New Dhur nsay S & W Co* 4 B 576 which was a sui
fication by reason
plaintiff while in
payments made by
the permission o
ha l had a letter fr
the or ginal docum
w th a case for opinion upon matters connected with it He now produced a translation of the document *Mr Inverarity* for the defendant called for the production of the case submitted to counsel *West J* in disallowing the production said In drawing up the Indian Evi lence Act chiefly from Taylor on Evidence, *Sir James Stephen* plainly intended to adopt in section 129 the principle
but v k he was condensing
a witr that if a party becomes
disclo every thing necessary to the true comprehension of his testimony equires it be made to
The argument th ch that the Court can
properly order os te party may demand
a perusal of it, If a communication is
protected by it in an especial degree
as against an adversary in l t gation Here the document which the plaintiff is asked to produce is in its nature a confidential communication The plaintiff wanted advice for his personal gui lance in fulfilling a contract of service The statement which he laid before counsel with this view is his own property in substance as well as form it not being suggested that the consultation was in furtherance of any fraud I do not find it necessary to

0. compel a disclosure of it, in order to explain the evidence given by the pla ntiff and in the absence of such necessity it would be wrong to put pres ure on the plaintiff It is obviously desirable that communications with profe ional advisers should be unembarrassed by any such fears as a contrary deci on would give rise to which would make frank communicatic l at a disa lvant by their candour med and di torted statements, and useless litigation would thus be promoted in numberless cases in which an exact knowledge of facts would have enabled a coun el or solic or to nip it in the bud by timely warning or sugge tion Lastly, a compul ory disclosure of confidential communic tions is so opposed to the popular con- cience on that point, that it would lead to frequent falsehoods as to what had ... should e lge to e and

di closures made under section ... should not be enforced in any ... except when they are plainly necessary Letters written by one of the defendant's servants for the purpo e of obtaining information with a view to po sible ... they might un ler the circum ... endant s solicitor *Brijpro Das* v ... ion compelled cannot mean ' sub pœnaed and it uses the words compelled to disclose ' with reference to the case when a man has offered himself as a witness and must refer to some force put upon the witness after he is in the witne s box *Moher Sheik* v *Queen Empress*, 21 C 392 Statements of witne ses recorde l for the special purpose of being shown to a legal adviser with a view to ascertaining whether there is a good cause to go to the Court are privileged under this section *Di ibai* v *Framroz* 43 Ind Cas 71 The documents for which privilege could be claimed woul ... tween the lay clier ... de by the defendan ... latter of the suit ... e can attach to them *Central India Spinning* v *G I P Railway* 29 Bom ... R 414 = 102 Ind Cas 425 = A I R 1927 Bom 367

130. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property or any document in virtue of which he holds any property as pledgee or mortgagee or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims

Production of title deeds of witness not a party

Principle The title deeds to land in England were always a secret of ... at the time of the common ... ngly dominant in polices ... se interests was a paramount ... compulsory public reg tra tion the secrecy of the title instruments comes to be a vital (if selfish) con ... tion for the occupants of the land Their possession may be unquestione l but the instruments under which they claim are constantly defective in some import ant feature A boundary may vary a release be mi sing a recital be in correct,—a score of defects of one sort or another might be discoverable in the chain of title But the possession and the title are as yet unquestione l and thus the security of title depends practically on preserving these defects from ascertainment by persons opposed in claim who might be only too gla l to take advantage of them It comes therefore to be a fundamental maxim of the ... locuments of ... ndy It is the real ty

S. 1.

Wig ore § 9211 Th ... need for such protec
recorded, not by what
otive for demanding a
help them Where a
person holds a document, not his own, but subject to a lien which would be lost by his surrender of possession or owns and holds a document, such as a bill of exchange, whose continued possession is necessary for the enforcement of his rights under it he may fairly claim not to be compelled to surrender it for evidential purposes in litigation between other parties *Wigmore* § 2211

Protection of title deeds by persons not party to a suit No witness who is not a party to a suit can be compelled to produce his title deeds to any property *Pickering* v *Noyes* 1 B & C 263, *Adams* v *Lloyd*, 3 H & N 351, *Doe* v *Date*, 3 Q B 609, *Egremont* v *Egremont*, 14 Ch D 158 Where an attorney is called upon, whether by *subpoena duces tecum* or otherwise, to produce deeds or papers belonging to his client, who is not a party to the suit, the Court will inspect the documents, and pronounce upon their admissibility according as their production may appear to be prejudicial or not to the client, in like manner as where a witness objects as to the production of his own title deeds *Copeland* v *Watts*, 1 Stark 95, *Amy* v *Long*, 9 East 473, *Reynolds* v *Rowley* 3 Rob La 201, *Travis* v *January*, 3 Rob La 227 ...
l for are in the hands of the agent or
in the hands of the owner himself, their
in the judgment of the Court it may
3 C & P 591, *Pickering* v *Noyes*, 1 B
, *Doe* v *Thomas* 9 B & C 288, *Bull* v
12 Q B 711, *Doe* v *Hertford*, 13 Jur
Kemp v *King* 2 Mo & Rob 437, *R* v
Woodby ... 5 C & P 591 The extension
of the ... a
tion of ... ils
from a ... es
where not being themselves parties the whole merits cannot be tried *Greenl Ev* § 469 (n) A Will as well as the title deeds of an estate in mortgage to the party whose privilege is invoked, and the mortgage deed itself would be within the protection The object is to protect property by excluding the means of picking holes in the document under which it is held Indeed it is not necessary that the deeds should be even those establishing the title They would be within the protection of the rule, though called for to show the title's defeasance Thus in a case in which the witness an attorney was required to produce a deed of assignment with a view of showing a departure with the intere ...
d that it was the deed of his
Cresswell J observing —"The
it which the law authorised
to produce it or to answer any
as not a title deed It was
however, called for as such and it was intended to show that the title was no longer in the defendants It need not be even strictly a deed —any document or paper having relation to the title would be within the protection The docum ...
ion of which title might be capable
of ... f ejectment where the titl of the les or
of th ... of a gentleman who had been in treaty
wit ... but which treaty had gone off was
allo ... title that had
been deli ... contents of
the d ed ... had refused
after not ... *Goodeve Ev*
pp 150 151

The protection against the production of the deeds would extend to all discovery of their contents It was observed by *Baron Alderson* It would be perfectly illusory for the law to say that a party is justified in not producing a deed, but that he is compellable to give parol evidence of its content, that would give him or rather his client through him, merely an illusory protection if he happens to know the contents of the deeds, and would be only a round

about way of getting from every man an opportunity of knowing the defects there may be in the deeds and titles of his estate I am clearly of opinio therefore, that when a party refuses to produce a deed, and is justified in so doing, he ought not to be compelled to give parol evidence of its contents *Davies* v *Waless*, 9 M & W 606

There have been cases in England in which the Court has taken on itself the inspection of the document
production would be prejudicial t
sidered as objectionable, and would
now upheld, and for the cogent
Soyer, 13 Com B 236 'Suppose'
to examine the document and, u
title deed,—his decision might be made the subject of an argument in open Court by bill of exception, and thus the contents of the deed might be communicated to all the world But *Professor Wigmore* says, "This principle, then, that the disclosure of title deeds in litigation between other parties was not compellable, appears to have been always accepted in English Courts coming down as an unquestionable tradition and it was occasionally extended to documents other than those affecting land, though it seems ever to have been regarded as limited by trial Court's discretion' *Wigmore* § 2211, see also *Miles* v *Dawson*, 1 Esp 405, *Copeland* v *Watts*, 1 Stark 95, *Reed* v *James* 1 Stark 132, *Corson* v *Dubois* Holt 239, *Roberts* v, *Simpson*, 2 Stark 203, *Harris* v *Hill* 3 Stark 140, *R* v *Hunter* 3 C & P 591, 592, *Mills* v *Oddy* 6 C & P 728, *Doe* v *Langdon*, 12 Q B 711 The rule appears to be the same in India Vide Order XVI, r 6 of the Civil Procedure Code and s 16? of the Indian Evidence Act

Although a witness cannot be asked to testify to the contents of such a
ion *Doe* v
named ca e
trument for
he contents
1 & R 726,
3 356 367,

Imrit v *Sidhari*, 15 C L J 9

Any document in virtue of which he holds the property as pledgee or mortgagee Mortgagees or pledgees when not parties to a suit are not
hold any property
Vide *Doe* v *Ross*
Lidelell 24 L J
Costa Rica Republic

Document the production of which might tend to criminate him Upon principles of reason and equity, a Judge will refuse to compel either a witness or a pa
cument the production of which may tend to c
od 2 Taunt 115, *Roe* v *New York Press* 75 L
Hotel Co (1897) 2 Q. B 124 But a book of account cannot be withheld on the ground that it tends to incriminate him "It is a novel if not a somewhat startling proposition that an officer of a corporation can refuse to produce its books, when he is asked to account for property which has been committed to his charge, upon the ground that the production of the books may tend to incriminate him If such rule were to prevail, it is not difficult to see ho
possession for
of the books of a public or priva
d d
property which had come into h
even
tix claiming that the production o
his
though the production was solely
But

of the document may relu the
within the protection of the rule
also the privilege does not extend to
public documents in the official custody of the witness *Bradshaw* v *Murphy* 7 C & P 612

Unless he agreed in writing etc It amounts to waiver on his part.

S. 1
S. 1

Production of documents which another person having possession could refuse to produce

131. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

Principle This section is intended for the protection of persons whose title deeds and other documents happen to be in the hands of their attorneys, stewards, etc, *Falmonth* v. *Moss*, 4 Price, 455 In such a case the owner's consent is a necessary condition precedent to the production of the documents *Nort Ev 315*

Scope of the section Examples of persons having documents in their possession are agents, attorneys, trustees, mortgagees, etc, *Whitely Stokes*, Vol II p 922 Is ..
in his possession
clo ure of the attorn
the document nor is he asked to testify about them The answer depends upon the other privileges of the client irrespective of the privilege under s 126 *infra* The attorney is but the agent of the client to hold the deed, if the client is compellable to give up possession, then the attorney is, if the client is not, then the attorney is not It is merely a question of possession and the attorney in this respect is like any other agent The extent of the client's obligation to produce must therefore be taken as determining the present question. It follows, then, that when the client himself would be privileged from production of th
cl
of
n
cl
pe ...ure to produce th
client is privileged as
Cas 99 101, see also
140; *Nixon* v *Mayoh*,
Doe v *Ross*, 7 M & W
2 A & E 171, 181, *B*
produce his client's
C & P 728, 731 In *Newton* v *Chaplain* 10 C B 356, *Maule J* said. "The privilege of W
as if he
would
discover
custody
Esp procedure *Pearson* v *Fletcher*, 5
Temp *orsen* v *Dubois*, Holt 239, *Copen* v
Ry 1 Price 455, *Nauling* v *Howard*,
719, 288, *Doe* v *Langdon*, 12 Q B 711,

Witness not excused from answering on ground that answer will criminate

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Proviso

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Principle According to the English Law it is settled rule that a witness

1453, *May* v *Hawkins* 11 Ex 210 *R* v *Garbet* 1 Den C C 236, *Earl of Worcester* 6 M & S 194 *Paxhurst* v *Lewton* 1 Mer 401, *Pye* v *Butterfield* 34 L J Q B 17, *Chester* v *Wortley* 18 C B 239 *R* v *Lord George Gordon* 21 How St Tr 535, *Ex parte Reynolds* L R 29 Ch D 293, *R* v *Boyes* 1 B & S 330 Upon a principle says *Mr Starkie* of humanity as well as of policy every witness is protected from answering questions by doing which he would criminate himself Of policy because it would place the witness under the strongest temptation to commit the crime of perjury, and of humanity because it would be to extort a confession of the truth by a kind of duress every species and degree of which the law abhors It is pleasing to contrast the humanity and delicacy of the law of England in this respect with the cruel provisions of the Roman Law which allowed criminals and even witnesses in some instances to be put to the torture for the purpose of extorting a confession *Starkie on ... of Ideal*

the views of many active lawyers and Judges on this question the majority of those consulted have expressed the opinion that no innocent person would *suffer* and that *more guilty ones would be detected and convicted* if the provision would be repealed Commenting on the English rule *Prof Wigmore* says 'In preserving the privilege however we must resolve not to give it more than its due significance We are to respect it rationally for its merits not worship it blindly as a fetish We are not merely to emphasize its benefits but also to concede its short comings and guard against its abuses Indirectly or ultimately it wo ... e community at l ... otection of the guilt ... judicial habit is to ... file cant ...

... perusal of our precedents ... ourts' doting tenderness ... ting up his fuel ... wn offences The ... nd fostering respect every appeal to this privilege and of amiably feigning each guilty invocator to be an unsullied victim hounded by the prosecutions of a tyrant is a work of ... tional sentimentality It invokes a confusion between the abstract privilege— ... al entitled to it—who may ... l lemselves to ...

But in India the ... witness was not excused from answering any question relevant to the matter at issue in any civil or criminal proceeding upon the ground that the answer to such question would criminate or

might tend directly or indirectly to criminate him or that it would expose, or tend directly or indirectly to expose him to a penalty or forfeiture It contained, how-

that no answer the witness might thus be com-
he purposes of punishment for false evidence
ition, or be used as evidence against him in any
criminal proceeding This section re enacts the provision of section 32 of Act II of 1855 The reason for the change in thus stated by *Turner C J* in *Queen* v *Gopal Das*, 3 M 271, 279, Under the English law a witness was not bound to criminate him elf, but if he thought fit to do so his admission on oath was equally admissible in evidence against him as any other admission This state of the law in some cases tended to bring about a fracture of justice, for the allowance of the excuse when the matter to which the question related was in the knowledge solely of the witness, deprived the Court of the information which was essential to its arriving at a right decision To avoid this inconvenience, and to obtain evidence which a witness refused to give it was suggested that, 'when the question was material to the issue, it should be left to the discretion of the J ... ard to the
genera ... should be
expres ... from any
punishment etc with respect to the ... to which the answer relat d, or at
lea t su ... minal
proceed ... gisla
ture di ... Judge
no optic ... The
end desired, the production of evidence from unwilling witnesses, was sought by depriving them of the privilege they had theretofore enjoyed of claiming excuse, but ...
remove any ...
not be used ...
of the law w ...
and it was n ...
an infraction of the criminal law, had exposed themselves to penalties In the same case *Muttusami Ayyar J* said "The necessity under which the witness lay of explaining how the answer might criminate him, amounted in some cases—as observed by *Baron Pollock* in *Adams* v *Lloyd*, 3 H & N 362 and *Maule J* in *Fisher* v *Ronalds*, 12 C B 762, since overruled by *R.* v *Boyes*, 1 B & S 311—to a virtual denial of the privilege and to an evasion of the rule that no on ... ing the above
extract ... suggested is
when a ... iture criminal
proceed ... man shall be
compel ... to an answer
contained in the sworn examination of the accused in a criminal case It seems to me that the legislature in India adopted this principle repealed the law of privilege and thereby obviated the necessity for an enquiry as to how the answer t ...
indemnit ...
and thu ...
of the rul ...
when a criminal proceeding is ...
of absolute privilege does not ap ...
proviso to this section *McGill* ...
Cr L J 25

Scope of the section This section abolishes the law of privileges and creates an obligation in a witness to answer every question material to the issue, whether the answer criminate him or not, and gives him a right, as correlated to that duty, to claim that that answer shall not be admitted in evidence against him in criminal prosecution Under this section it is not in the power of the Judge to excuse a witness from answering if the question is relevant to the issue *Queen* v *Gopal Das*, 3 M 171 Section 32 of Act II of 1855 is reproduced almost *totidem verbis* in this section *Per Innes J* in *ibid* Where an accused person has made a statement on oath voluntarily and without compulsion on the part of the Court to which the statement is made, such

must be overruled *Ibid* Where a person he is alleged to have incriminated himself act that he was the person who gave the *Ramayyangar*, 2 Wier 794 A statement another, made by a witness in a judicial this section of the Act, for which inst criminally If the statement were false he might be prosecuted for giving false evidence *Maladin* v *Queen Empress* 3 O C 80

Taking a thumb impression of a witness by the Court is not equivalent to asking a question and receiving an answer within the purview of the proviso of this section and therefore, such a thumb impression may be proved against the persons giving it in a criminal trial *Tunno Miah* v *King Emperor*, 16 C W N 503=15 C L J 399—13 Ind Cas 925=39 C 348 Where an incriminating question is put to a witness, the Magistrate should explain to him his position, and should advise him of his right, as otherwise, he may be induced through ignorance of the state of the law, to deny the truth for fear of penal consequences *In re Jaddonath Dutt* 2 C L R 181, but see 1 Weir 153=3 M H (App) 29 When a co accused is cited as a witness his position is sufficiently protected by this section *Raja Ram* v *Emperor*, 5 Lah L J 499=73 Ind Cas 521=24 Cr L J 633

Proviso This section makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and has given him a protection in the latter of those cases only The words ' be compelled to ' clearly ... afforded to answers which a witness has objected excused from giving, and which then he give *Queen Empress* v *Ganu Sauba*, per *Birwood J* in *ibid*, see also *per* term shall be compelled ' in section 132 appears to be the correlative of the term ' shall be excused and they presuppose the rule that every person giving evidence on any subject before any Court or person authorized to administer oaths and affirmations shall be bound to state the truth, and an authority competent at the time to excuse or compel compliance with this rule They also suggest that the witness has objected to the question and has sought and been refused excuse, and even constrained to answer The terms of this section when read with the rest of the Act afford protection only to answers to which a ... *Queen* v ... A L J ... him to ... answer or ... shall be compelled to give " in this section are not a mere surplusage, but apply to when he asks to be excused such a statement without ... used against him in his ... *Empress* 21 C 392, *Hauder* ... L J 409=9 C W N 911 ... *Bhikaji* Rat Un Cr C 660 ... witness objected to answe... 3=15 C L J 39 ... *Motilal Nath* 6 Ind ... *Queen Empress* v Sa... witnesses in a mu... ing the deal bo ly ... ly evidence being ... as they had omitted to object, perhaps owing to the want of legal advice to answer the question, on the ground that the answers would criminate them *In re Nilla*

Ramuddu, 2 Weir 792 When incriminating questions are put from the Bench to a witness, who has become already entangled by self contradictions, such questions should be put with the object of furthering the ends of justice in the judicial proceeding, in [illegible] the truth, and not with a view [illegible] pos sibly be taken against the wit [illegible] ich a witness under this section should as a rule, be explained by the Court, before any incriminating question is put in the above circumstances *Mi Me Ma* v *Queen Empress*, L B R (1893 1900) 91 Where the accused had made in a previous enquiry under ss 162, 163 of Act VI of 1882, depositions on oath, without [illegible] the Evic [illegible] against [illegible] accused [illegible] exam [illegible] as suing for [illegible] defendant [illegible] to answer [illegible] dence Act [illegible] *inga Sahai* [illegible] L J 186

A witness must claim the benefit of the protection afforded by this section before [illegible] a question is subsequently raised [illegible] 206 = 43 Ind Cas 823 = 19 Cr L J [illegible] 22 Cr L J 68 59 Ind Cas 325

It [illegible] on a [illegible] answ[illegible] either [illegible] tion [illegible] r not the witness has object [illegible] 43 A 92 = 18 A L J [illegible] L J 825 "Compulsion" [illegible] in a crimin[illegible] made certain [illegible] the Court of the innocence of the accused and subsequently a prosecution was launched against the witness for such statements which proved to be false *held* that the statements were not excluded by this section of the Evidence Act *Emperor* v *Banarsi*, 46 A 254 = 77 Ind Cas 829 = 22 A L J 144 25 Cr L J 477

A statement made on oath by a person before a Coroner at an inquest held by him cannot be used against him in a trial for a charge based on such evidence as a statement tending to prove his guilt *Emperor* v *Kazi Dawood* 50 B 56 = 93 Ind Cas 225 = 27 Cr L J 433 = 28 Bom L R 49 = A I R 1926 Bom 144

A person who answers questions put to him by counsel without seeking the protection of s 132 of the Evidence [illegible] charge of defamation and all that he is [illegible] under s 499 I P Code *Peddabba Pea*[illegible] L W 210 = 116 Ind Cas 337 = 30 Cr L [illegible] I R 1929 Mad 286 = 56 M L J 570, *Bai Shanta* v *Umrao*, A I R 1926 Bom 141 = 50 B 162 = 28 Bom L R 1 (F B), *Ramchandra Rao* v *Mahomed* 10 Mys L J 421

133. An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice

Accomplice

S ar[illegible] pitu[illegible]

conviction for the crime This argument is only broadly related to the maxim *nemo turpitudinem suam allegans audiendus est* The notion underlying the maxim is that a person who comes upon the stand to testify that he has at a former time spoken falsely or acted corruptly is by his very confession, a liar and a villain, and therefore untrustworthy as a witness The argument, however was judicially repudiated from the very beginning—partly on the ground of necessity, partly on the ground that turpitude, though self confessed, was no hindrance unless there had been a conviction of crime *Wigmore* § 5.., 526 In *Tongs Case*, Kelyng, 18, the Court observed "It was resolved that some of these persons who were equally culpable with the rest may be made use of as witnesses against their fellows, . . . and the law alloweth every one to be a witness who is not convicte . . . and if it were not so, all treasons would . . . one who conspires with never so many . . . ose See also *Charmod's Trial*, 12 How . . . *Trial*, 33 How St Tr 681 921 *Abbott C J* said . . . are seldom fully . . . them, and can . . . of untainted wi . . . caution, it is . . . considered H . . . purpose does by that very acknowledgment depreciate his own personal . . . and credit If, . . . rule in the administration of . . . as incredible, the . . . it must not only happen that many heinous crimes must pass unpunished, but great encouragement will be given to bad men by withdrawing from their minds the fear of detection and punishment through the instrumentality of their partners in guilt, and thereby universal confidence will be substituted for that distrust of each other which naturally possesses men engaged in wicked projects and which often operates as a restraint against the perpetration of offences to which the co operation of a multitude is required" *Wigmore* § 526 At common law, when two or more persons were tried upon the same charge, each and all were naturally disqualified Only by ceasing to be a party in the cause could one then become a witness, for or against his co defendants *Wigmore* § 4..0

Accomplice meaning of . . . concurred . . . Cr 7.. . . . *tiles* v . . . one who . . . Cr L . . . ins such a relation to the criminal act that he would be jointly indicted with the defendant he is an accomplice *White* v *Common Wealth* Century Digest Vol 14 Col 1780, cited *Ramasami* v *Emperor*, . . . to give to . . . k out from . . . omplice, he . . . they do not . . . 56, *Queen Empress* v *Javecharan*, 19 B 363, *R* v *Daspard* 28 How St Tr 489 If . . . of convicting the guilty, he . . . 509 (515), *Bickley's Case* 2 Cr . . . witness is not concerned in the . . . is charged, he can not b . . . *mperor*, 27 M 271 = 14 M L . . . of accomplices, who . . . urpose of . . . e pub . . . supplying marked money for the detection of a crime cannot be treated as that of an accomplice *Ibid*

An accomplice confesses himself a criminal No man ought to be treated as an accomplice on mere suspicion, unless he confesses that he had a conscious hand in the crime or makes admission of facts showing that he had

such a hand If the evidence of a witness ... S.
an accomplice, and his testimony must be ...
ordinary witnesses *Emperor v Percy Hen...*
268=10 Cr L J 530 A person offering ...
accomplice No distinction can be drawn
to assist in the receipt of illegal gratifications and those who assert under compulsion *Queen Empress v Magenlal*, 14 B 115, *Queen Empress v Chagan Dayaram* 14 B 331, *King Emperor v Malhar*, 26 B 193=3 Bom L R 691, *Emperor v Edward William Smither*, 26 M 1=2 Weir 521

So an accomplice is a person who is in some way concerned in the commission of a crime for which the accused is on trial This includes principals and accessories whether before or after the fact A person against whom, there is sufficient evidence to indict for the crime upon which the accused is standing trial is his accomplice Mere knowledge or belief that a crime is to be committed ...
render
of the
constitute an accomplice, the mere concealment of knowledge that a crime has been committed does not make the person concealing his knowledge an accomplice This is the general rule and is sustained by the majority of cases *Folk v State* 36 Ark 117 (Am), *Gatlin v State* 40 Tex Cr App 116 However this may be in the case of an accessory after the fact it is well settled that all accessories before the fact if they actually participate at all in the preparation for the crime are accomplices within the rule, but if their participation is limited to the knowledge that a cr...
Watson v State, 9 Tex App ...
Gounden v Emperor, 27 M 2...
was committed assisted in the removal of the dead body from the place of murder to the pit in which it was buried, was not an accomplice

A voluntary participation in the commission of the crime is required to constitute an accomplice One who either by threats or coercion inciting in him a fear that he is in danger of losing his life or liberty under and by reason of such coercion and fear participates in a crime is not an accomplice Whether a person is not an accomplice depends upon the facts in each particular case considered in connection with the nature of the crime This is usually determined by the Court as a question of law Parties to be accomplices must participate in the commission of the same crime Thus a person who receives stolen goods knowing them to be stolen is not an accomplice of the thief where the receiver did not participate in the commission of the larceny The receiving and the larceny are distinct crimes In perjury all persons who with knowledge of the falsity of the statement aid in the commission of the crime have been held as accomplices *Underhill Cr Ev* § 69 A person from whom a
Police ... charge of
murde... 809 P B
A per... a bribe
must ... who was
a wit... not giv...
information about it till the 21st June must be treated in the same way as that of an accomplice *Aga Po That v Queen Empress* 1 L B R 29

The mere fact that a person is cognisant of an offence and omitted to disclose it for ... him an accomplice when
it does not ... mission of the offence *Ishan*
Chandra v (... ...Government are justified in
cm...
ins...
Q...
associates with criminals solely for the purpose of discovering or making known their crimes and who acts throughout with this purpose and without any criminal intent is not an accomplice and it is immaterial that he encouraged or aided the commission of the crime *Emperor v Chaturbhuj* 8 Ind Cas ... 15 C W N 171=11 Cr L J 560

But where from the facts of the case, it appeared that certain ... took an active part in carrying away the person whose death the a... been charged with having caused, after he had been grievously ...

left him in the field where he was subsequently found dead, those witnesses are no better than accomplices *Ahmud Din* v *Queen Empress* 23 C 361 A bribe giver is an accomplice *Harsukh Rai* v *Emperor*, 3 P W R Cr 1919 To constitute an accomplice there need only be the intention of assisting in the commission of a crime but he need not know exactly what crime was being committed An indication of the meaning of the word 'accomplice may be found in section 337 of the Cr Pro Code *Surjya Kant* v *Emperor*, 24 C W N 119 Where a witness is found, from his own testimony, to be privy to the crime alleged to be committed by accused, his evidence is no better than that of an accomplice *Nur Mahomed* v *Emperor*, 6 Lah L J 529 = A I R 19?? Lah 2?3 A person who has knowledge of the commission of an offence but keeps quiet for some days is no better that an accomplice *Umed Sheikh* v *Emperor* 2 Cr L J 1011 = 96 Ind Cas 867 = 30 C W N 816, see also *Hayatu* v *Emperor* A I R 1929 Lah 540 A person convicted and sentenced continues to be an accomplice *Allisab* v *Emperor*, A I R 1933 Bom 24 = 34 Bom L R 14?3

Who are not accomplices Witnesses to payment of bribes are not accomplices, unless they co operate in the payment of the bribes, or are instrumental in the negotiation for *Emperor* 33 C 649 – 10 C W N *Deodor Singh* ?7 C 144 *Emperor* v *E* v *Emperor*, 50 Ind Cas 18 But persons who accompany another, who is entrusted with and carries the money i they know that the money is to , although they do not actually *an Mullick* 2 C W N 672

Where mon money lender for obtaining the rel oney not being voluntarily given not procee ing against the ng him to leg punishment, *held* that such payment was not an illegal gratification but money extorted and that the money lender advancing the money could not be regarded as an accomplice of the Police officer *Akhoy Kumar Chuckerbutty* v *Jagat Kumar Chuckerbutty* 27 C 925 = 4 C W N 755, see also *Deputy Legal Remembrancer* v *Upendra* 12 C W N 140 = 6 Cr L J 534 A person charged with an offence by the police, but discharged by the Magistrate after examination of the witnesses for the prosecution, because he found that no case has been made out which, if unrebutted wc cannot be said to be an accomplice *Nga Maung* v *Qu* 467 *Queen* v *Behary* 7 W R Cr 44, *Nabi B*

A policeman or other person procurin to obtain a conviction is not an accomplice R (1893 1900) 365 overr 1892) 146, see also *Queen* v Corrobora tion is not necessary in who have entered into communicatio lo ed the conspiracy to the police authorities, under whose direction they continue to act till the matter can be so far matured as to ensure a conviction To such persons the rule as to corroboration does not apply The early disclosure is considered as binding the party to his duty and though a great degree of disfavour may attach to l yet his case is not treated as that of In Cr C 423 One who de of the body of the deceased aft ce *Jehana* v *Emperor*, 73 Ind

Accomplices in particular crimes In dealing with intoxicating liquor the buyer is ar usually the woman—may c the nature of the crime, a dultery, the other partner as in incest 's case ler age C & P

604, *Wigmore* § 2060 But the word "accomplice includes a person who consents to the commission of an unnatural offence with him or her *R* v. *Jellyman*, 8 C & P 604, *R.* v *Tate*, (1908) 2 K B 680

S.

Distinction between accomplice and informer In criminal cases the distinction between an informer and an accomplice assumes at times considerable importance, and in order to determine whether a witness who first associated with the wrong doers and subsequently gave information to the police belongs to the first category or is an accomplice whose evidence cannot be accepted without corroboration, it has to be seen whether the witness had entered into the conspiracy for the sole purpose of defeating and betraying it or whether he is a person who concurred fully in the criminal designs of his co conspirators for a time and joined in the execution of those till either out of fear or for some other reasons he turned on his former associates and gave information to the police If at the time when he joined the conspiracy he had no intention of bringing his associates to book but his sole object was to partake in the commission of the crime, he cannot be called an informer but is an accomplice, and his position is not modified simply because later on he turns round and carries information to the police *Maungat Rai* v *Emperor* 10 Lah L J 262=110 Ind Cas 676-29 Cr L J 740=A I R 1928 Lah 647, see also *Karim Buksh* v *Emperor*, 9 Lah 550=109 Ind Cas 593-29 Cr L J 577=A I R 1928 Lah 193

Scope of the section (1) An accused person can be legally convicted upon the [illegible]

[illegible] credit unless it is corroborated in some material particulars tending to show that the accused committed the offence with which he is charged, (4) It is for the Court to [illegible]
matter [illegible]
may or may [illegible]
Act) is wor[illegible]
against the a[illegible]
corroborated by the evidence of another approver, or by the confession of a person who is being tried jointly with the accused for the same offence implicating both himself and the accused, (6) It is the duty of the Court to scrutinize with care such corroboration as that mentioned in (5) but whether it is to be treated as evidence against the accused or not is to be determined by the Court having regard to the circumstances of the case *Aung Hla* v *Emperor* 9 Rang 404=1931 Cr C 875-A I R 1931 Rang 235 In case of retracted confession of a co a[illegible] from
evidence [illegible] also
Nazir v [illegible] not
illegal s[illegible] f an
accompli[illegible] the
practice of the Courts to require corroboration of such evidence *Queen Empress* v *Kallu*, 7 A 160=A W N 1881 314 It is only under very exceptional circumstances that a conviction based only on the uncorroborated evidence of an accomplice could be sustained *Nazir Khan* v *Emperor*, 57 P L R 1902=5 P R [illegible]
convic[illegible]
on wh[illegible]
v *Ti[illegible]*
three [illegible]
shuf[illegible]
crir[illegible]
of [illegible]
in [illegible]
tho [illegible]
the [illegible]
dar [illegible]
truth the accomplices will make out a stronger case against th[illegible]
more favourable to themselves than the real truth will warrant [illegible]
give their evidence under an absolute certainty of impunity [illegible]

some of them hope, not only to avoid prosecution, but to retain their appointments in the government service *Ibid* ' This section was not necessary" says *Mr Justice Markby* "as s 118 makes all persons competent to testify, except

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phatic statement in th s
desired to encourage
mplice This, however
cannot have been the case, because in s 114 we find given, as one of the presumptions based on the common course of human conduct, the presumption "that an accomplice is unworthy of credit, unless he is corroborated in material particulars" Moreover, no conviction based on the uncorroborated evidence

t of appeal, except under
lge in his charge to the jury
g on such uncorroborated
uncorroborated evidence—
vould however have been

n the Letters Patent
35 M 397, namely —
material particulars
before it can be acted upon, is it open to the Court to convict upon the uncorro
the Court is satisfied that the evidence
Evidence Act (I of 1872), section 133, real
intend to lay down that a conviction
upon the uncorroborated testimony of an accomplice is not illegal where the
idence of an accomplice
and Miller JJ answered,
in material particulars

before it can be acted
uncorroborated testimony
evidence is true In the
of the Indian Code law is
1872, which in
witness against
it proceeds upo
opinion there
or renders nugatory
or which requires
and in all circumstan
borated in material
to the Court to act on
perfectly true The
to guard against such
(not 'the Court sha

convict on the uncorroborated testimony of
ases (See *Best on Evidence*, page 182, *Ch' J*
danger of relying on such evidence is so
great that in England Judges always advise the juries not to convict, or tell them
they ought not to convict, unless the story of the accomplice is corroborated.'

S.

Queen v *Chatterdharee*, 5 W . . . *aikh*, 10 W R 63 Cr ; *R* v *Stubbs*, 25 L J M . . . V R 80 Cr ; *R.* v *Nawal Jan*, 8 W R 19 : . . . W R 17 Cr ; *R* v *Mohima Chunder Doss*, 15 . . . 18 W R Cr 45, 1 Hale P C 303, 301 . . . r 1377; *Rex* v. *Rudd*, Cowp 331; *Rex* v *Atwood*, 2 Leach, C L 538; *Durham's Case*, 2 Leach C L 538

The subject of the credibility of the testimony of an accomplice and the necessity for the corroboration in order to sustain a conviction are involved in some confusion The proposition that an accused person may be convicted on the evidence of an accomplice alone, and that the testimony of an accomplice must be corroborated, are both sound, though this involves a seeming inconsistency. The proposition that an accomplice must be corroborated does not mean that there must be cumulative or independent testimony to the same fa . . . evidence in a murder case that a co t be-

. . . law which prevents a convi . . .
103. "There are decisions in which it has been held that the testimony of one accomplice cannot safely be relied on as material corroboration of that of another accomplice for the purpose of these provisions; and that the material corroboration required means corroboration as against individual accused. It has been pointed ou . . .
that s 133, . . .
that a con . . .
'testimony . . .
facts of e . . .
picion which an accomplice's testimony incites has been rebutted Indeed s 114, Evidence Act itself indicates that it is for the Court to consider whether the maxims given in the illustration do or do not apply to the particular case before it In *King Emperor* v *Malhar*, 26 B 193=3 Bom L R 694, after referring to the . . . Sup 459) the . . . to the general . . . unless corroborated in material particulars But along with this principle must be borne in mind the qualifications, taken apparently from *Peacock C J's* judgment, contained in the further illustrations which the Court is directed to consider when determ . . .
The . . .
cann . . .
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cannot do so The decisions however show the principle on which the Judges have acted . . . f their successors to consider . . . y are applicable to the circum . . . d in *Deo Nandon* v *Emperor*, . . . in considering whether the rule . . . accused on the evidence of accomplice unless corroborated) applies to any particular case, it must be remembered that all persons coming technically within the category of accomplices cannot be treated as precisely on the same footing and that no general rule on the subject can be laid down In *Elahee Buksh's* case above referred to an observation was cited of *Buller J* that the testimony of the approver 'must be received and left with the jury under such directions and observations from the Court . . . to say whether they think . . .

might be acted on with as much safety as that of any other witness That, we think, is still the law and it would be misdirection either to omit to give the jury a suitable warning or to tell the jury that an approver's evidence against a particular accused has received independent corroboration when this is not in fact the case" *Raghunath* v *Emperor* A I R 1933 Pat 96=13 P L T 80?

Under sections 118 and 133 Evidence Act an accomplice is a competent witness *Nga Po Yin* v *King Emperor*, U B R 1906 Evidence 3=5 Cr L J 300, *Karomal* v *Emperor*, 81 Ind Cas 881=25 Cr L J 1057. Although it would generally be most unsafe to convict an accused, on the uncorroborated evidence of an accompl[illegible] the evidence thinks that it is [illegible] it is his duty to convict [illegible] 156, *Queen Empress* v *Maganlal* 11 B 143, *Queen* v *Godai* 5 W R Cr [illegible] *Empress* v *Shaku* 5 C P L R 1 Cr, *Crown* v *Hossainee*, 27 P R 1869 The evidence of an accomplice may be admitted without corroboration, if the witness is not open to the same charge as the accused *In the matter of Rojoni Kant* 13 W R Cr 24 The evidence of an approver has to be most carefully analysed and considered It must be so far above suspicion that a Court has no alternative but to accept and act upon it When the Court believes in the approver's evidence in part, and disbelieves in p[illegible] the evidence altogether *Balkaran* v *Empe*[illegible] The well known rule of criminal law 't[illegible] unless he is corroborated in material particulars" which is formulated in section 114, illustration (b) of the Ev[illegible] namely that the [illegible] friend of his own, who actually [illegible] the rule rests, and it is a very sound rule The rule is not an old [illegible] evident from section 114 (illustration b) and section 133 of the Evidence Act, but it is only in exceptional cases that the corroboration can be dispensed with A witness who does not carry very much weight is not sufficient corroboration of an accomplice *Narain Singh* v *Emperor* 12 O L J 499=89 Ind Cas 261=26 Cr L J 1317=A I R 1925 Oudh 715, *Emperor* v *Bhim Rao*, 27 Bom L R 190=86 Ind Cas 72 Though illustration (b) of section 114 is [illegible] he corroboration of an [illegible] v *Emperor* A I R [illegible], see also *Emperor* v [illegible]ian v *Emperor*, 86 Ind. Cas 401=6 Lah L J 608=26 Cr L J 769=A I R 1925 Lah 268, *Sheroo* v *Emperor*, A I R. 1925 Nag 78, *Mannalal* v *Emperor*, A I R 1925 Oudh 1 An accomplice is a competent witness and may be examined on oath *Joseph* v *Emperor*, 3 Rang 11=26 Cr L J 492=85 Ind Cas 236=3 Bur L J 265 *Abdul* v *Emperor*, 47 A 39, *Balchand* v *Emperor*, L R 197 (Cr) Where first statement requires corroboration from independent sources such corroboration cannot be sought in accomplice's evidence recorded in Sessions Court *Ramani Mohan* v *Emperor*, A I R 1933 Cal 146

Accomplice evidence and corroboration In *R* v *Rudd*, 1 Cowp 331 336, *Lord Mansfield*, after referring to the competency of accomplices as approvers said 'Though under this practice they are clearly competent witness, this single testimony, alone is seldom of sufficient weight to convict the offenders' 'As to tl[illegible] at all it cannot be clearly [illegible] *Lord Holt*, that is upt[illegible] in 1775) that the p[illegible] *Accomplices*, 2 In *R*[illegible] in 1784, corroboratic[illegible] unable [illegible] let the [illegible] to the [illegible]d 1 Leach Cr L 4th I[illegible]ctice was not foundec[illegible]ecognized con stantly [illegible]xercise of his commor[illegible] evidence, and

100, *Kashemali* v *Emperor*, 36 C W N 874, *Sher Singh* v *Emperor*, 36 Cr L J 916=140 Ind Cas 19=A I R 1932 Lah 621, *Ghena* v *Emperor*, 137 Ind Cas 95=32 P L R 16=A I R 1932 Lah 180, *Surendra* v *Emperor* A I R 1932 Cal 377, *Emperor* v *Ahsab*, 34 Bom L R 1453, *Musaheb* v *Emperor*, A I R 1932 Oudh 321, *Kashemali* v *Emperor*, 36 C W N 874

Although in criminal trials it is the settled practice to require other evidence in corroboration of that of an accomplice, yet the manner and extent of the corroboration required are not so clearly defined Some Judges have deemed it sufficient, if the witness be confirmed in any material part of the case, others have been satisfied with confirmatory evidence as to the *corpus delicti* only, but others, with more reason, have thought it essential that corroborative proof should be given of the prisoner having actually participated in the offence, and, when several prisoners are tried, that confirmation should be required as to all of them, before all can be safely convicted *R* v *Stubbs*, 25 L J M C 16 This last is undoubtedly now the prevailing opinion, the confirmation of the w

no confirmation at a

circumstances of the

on the contrary every

when he shall afterwards endeavour to fix the crime upon the prisoner *R* v *Farler*, 8 C & P 106, *R* v *Wilkes*, 7 C & P 272, *R* v *Moores*, 2 C & P 270, *R* v *Addis*, 6 C & P 388, *R* v *Wells*, M & M 326, *R* v *Sheenan* Jebb C C 54, *R* v *Carey*, Jebb C C 263, *Taylor Ev* § 969, *Greenl Ev* § 381 "It is a practice" said *Lord Abinger* in *R* v *Farler* 8 C & P 107, 108 "which deserves all the reverence of the law, that Judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material circumstances Now, in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the ... ry, without identifying the persons ... in were to break open a house and ... boration

to show th ... The danger is, that when a man is f ... detected, he will purchase impunity

Criticising on the above statement of law, *Chief Baron Joy* in his *Evidence of Accomplices* said "There are different opinions entertained upon the subject —First some hold that the corroboration required must go to the criminality or identification of every prisoner on trial, accused by the accomplice— lastly, others are of opinion that the points of corroboration are not necessarily confined to the criminality or identification of any of the prisoners, but that it is enough if the testimony of the accomplice is confirmed in such and so many material parts of it as may reasonably induce the jury to credit him as to the entire narrative, and among other parts as to the guilt of the prisoners The first opinion appears plausible, and the arguments in support of it are specious and are apt to captivate those who do no attentively consider the subject ... re of the defects ... idence is not in its ... ly to the prisoners ... What therefore is required is to throw something, no matter of what nature, into the opposite scale ... witness's credit ... prove the ... omething ... y that the ... o try the ... be many ... onal confidence in the testi... ration as to that part of the ... orrect and accurate manner ... of the transaction show that

he was cool and collected, that he po
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brought into contact with his they fit into one another and correspond exactly, it is good ground for presuming that his entire narrative is correct The accomplice, who must be supposed to know the whole details is expected to relate them, and is thus exposed to detection in a variety of ways There is, therefore, less necessity for breaking the general uniformity and destroying the harmony of the rules of law, in this case, than in the other Similarly in *Tidd's Trial*, 33 How St Tr 1483, in charging the jury *Garrow B* said 'It may not be unfit to observe to you here that the confirmation to be desired to an accomplice is not a repetition by others of the whole story of the accomplice and confirmation of every part of it, that would be either impossible or unnecessary and absurd and therefore you are to look to the circumstances to see whether there are such a number of important facts confirmed as to give you reason to be persuaded that the main body of the story is correct. You are each of you, to ask yourself this question Now that I have heard the accomplice and have heard other circumstances which are said to confirm the story he has told does he appear to me to be so confirmed by unimpeachable evidence as to some of the persons affected by his story or with respect to some of the facts stated by him, as to afford me good ground

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Latafat Hossain v *Emperor*, 33 C W N
Emperor, 48 C L J 481; *Narain* v
Emperor, 107 Ind Cas 97=29 Cr L J 209

Corroboration as regards the identity of the prisoner In England originally there was no necessity of specific corroboration as regards the accused's identity *R* v ... *Birkett and Brady*, R & R 252 ... *Pitus* ... both of and finally prevailed ... the circumstances of th... *Cr E*... 152, see also *R* v *Sheehan*, Jebb 54, *R* v *Addis*, 6 C & P 388, *R* v *Webb* 5 C & P 595, *R* v *Wilkes*, 7 C. & P 272, 273, *R* v *Farler*, 8 C & P 106; *R* v *Kelsey*, 3 Lew Cr C 45, *R* v *Dyle* 8 C & P 261, *R.* v. *Birkett*, 8 C & P 722, *R* v *Stubbs*, 7 Cox Cr 48, 48, *M'Clory* v *Wright*, 10 Ir C L 514, 521, *Everest's Case*, 2 Cr App 130, *Warren's Case*, 2 Cr App 194 In *Everest's Case* supra, it was held that corroboration must be as regards 'some particular which goes to implicate the accused" But in *Wilson's Case*, 6 Cr App 125 the Court said 'It must not be supposed that corroboration is required amounting to independent evidence implicating the accused' In *Blatherwick's Case*, 6 Cr App 281, the Court said "*Everest's Case*, goes too far *Wilson's Case* is the correct statement of the law" See also *Watson's Case*, 8 Cr App 249 In *Cohen's Case*, 10 Cr App 91, 101 *Reading L C J* said "It is sufficient to say that *Everest's Case* and *Wilson's Case* seem to us to lay down the right principle" Again in *Thrielfall's Case*, 10 Cr App 112, 117, the ... to decide whether *Everest's* ...

of opinion has arisen in the main in reference to the question whether the co... borative evidence must connect the accused with the crime The rule of practice ... g a person ... What is ... ory of the ... only in... ime which does not connect the accused with it, or if the only independent evidence relates to the identity of the ... it corro borative evidence? ... imply that it may be ...

... argued ... Judge who ... conviction ... dends is ... worthy ... Leach ... where it ... the jury ... C 183, per ... After ex... o the con... in *Rex* v ... that the ... stances of ... tron does ... he crime, ... is confir... ty of the ... mation as to a material circum... sult of ... accused in relation to the crime ... is been ... twenty five years practice, it was ...

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Les (1836) (7 Car & P 272) *Baron* s advice juries to require, is a con- goes to fix the of guilt on the particular person charged You may legally convict on the evidence of an accomplice only if you can safely rely on his testimony, but I advise juries never

reverence of law, that Judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance Now in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused A man who has been guilty of a crime himself will always be able to relate the facts of the case and if the confirmation be only on the truth of that history, without identifying the persons that is really no corroboration at all It would not at all tend to show that the party accused participated in it' In *R v Dyke* (8 Car & P 261) *Baron Gurney* said Although in some instances, it has been held you will find that in the majority of recent cases it is laid down that the confirmation should be as to some matter which goes to connect the prisoner with the transaction In *R v Birkett* (8 Car & P 732) the prisoner was indicted for receiving stolen sheep The evidence consisted of the statement of an accomplice and to confirm it it was proved that a quantity of mutton corresponding in size with the sheep stolen was found in the prisoner's house *Mr Justice Patteson* said If the confirmation had merely gone to the extent of confirming the accomplice as to matters connected with himself only it would not have been sufficient but here we have a great deal more, we have a quantity of mutton found in the house in which the prisoner resides, and that I think is such a confirmation of the accomplice's evidence as I must leave to the jury'

' These cases led to the view expressed later by *Baron Parke* in *Reg* v *Stubbs*, 25 L J M C 16 = Dears C C 555 and shew that in his time, although there had been doubt in the past the law as formulated by him was accepted as the correct ... to be the law to the time of passing of the ... judgment to the present day

... corroboration must be independent testimony ... ects the accused by connecting or tending to connect him with the crime In other wo... which confirms in so... has been committed ... to determine the n... whether the case falls within the rule of practice at common law or within that class of offence for which corroboration is required by statute The language of the statute 'implicates the accused' compendiously incorporates the test applicable ...

of evidence which would be regarded as corroboration except to say that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed but that it was committed by the accused

The corroborati... the crime it is suff... tion with the crime ... in *Reg* v *Birkett* (... which are ... ncest, offences ...

' Th... required call for some explanation, and it is because they do not always appear to be to the same effect that this Court was especially constituted in order that we might lay down rules for future guidance

' In *Rex* v *Everest*, 2 Cr App R 130, the Court said 'The rule has long been established that the Judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused' We think 'tell the jury to acquit' should read 'warn the jury of the danger of

rated as regards every single statement *Sureshchandra* v. *Emperor*, 47 C L J 471 = A I R 1928 Cal 309, see also *Latafat Hossain* v *Emperor*, 33 C W N 58 = A I R 1928 Cal 745, *Kailash* v *Emperor*, 48 C L J. 481; *Narain* v *Emperor*, 107 Ind Cas 97 = 29 Cr L J 209

Corroboration as regards the identity of the prisoner In England originally there was no necessity of specific corroboration as regards the accused's identity *R* v *Despard*, 28 How St Tr 346 · 487; *R* v *Birkett and Brady*, R & R 252 ... Nisi Prius and finally prevailed ... both of the circumstances of th... *Cr Ev* 152, see also *R* v *Sl*... v *Webb* 5 C & P 595, *R* v *Wilkes*, 7 C. & P 272, 273, *R* v *Farler*, 8 C & P 106, *R* v *Kelsey* 3 Lew Cr C 45, *R* v *Dyle* 8 C & P 261, *R.* v, *Bulett*, 8 C & P 722, *R* v *Stubbs*, 7 Cox Cr 48, 48, *M' Cloy* v *Wright*, 10 Ir C L 514, 521, *Everest's Case* 2 Cr App 130, *Warren's Case*, 2 Cr App 194 In *Everest's Case* supra, it was held that corroboration must be as regards "some particular which goes to implicate the accused" But in *Wilson's Case*, 6 Cr App 125 the Court said 'It n... required amounting to independent ... ther ...*rick's Case*, 6 Cr App 281, ... far *Wilson's Case* is the correct statement of the law" See also *Watson's Case*, 8 Cr App 249 In *Cohen's Case*, 10 Cr App 91, 101 *Reading L C J* said "It is sufficient to say that *Everest's Case* and *Wilson's Case* seem to us to lay down the right principle" Again in *Threlfall's Case*, 10 Cr App 112, 117, the same learned Judge said 'Without attempting to decide whether *Everest's Case* or *Wilson's Cas*... But in *R* v *Willis* (19... no intention (in *R* v *C*... and *R* v *Blatherwick*" ... B 28, the same learned Judge however reviewing the law said, "The difference of opinion has arisen in the main in reference to the question whether the corroborative evidence must connect the accused with the crime The rule of practice ... ng a person ... What is ... ory of the ... only in... ime which ... lence relates ... it corro... s which ... were of ... e person he ... case is very ... not argued by ... Judge who ... a conviction ... *decl lends* is ... rthy ... e ... re it ... ury ... per ... ext ... con ... ed in *Fey* ... ly that the ... rcumstances of ... Baron does ... the crime, ... ere is confir... mation as to a material circum... of the accused in relation to the crime ... sult of twenty five years practice, it was ... is been

Nature and extent of corroboration "A confirmation does not mean that there should be independent
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plice and therefore one accomplice's evidence is not corroborative of the testimony of another accomplice *Rex* v *Noakes* 5 Car & P 326" *Per Lord Reading J* in *Rex* v *Baskerville* 86 L J K B 28 (33) So long established a rule of pra
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merely because it proceeds upon the
uniony of an accomplice The Courts should give proper effect to the provisions of section 114, illustration (*b*) The rule in section 114, illustration (*b*) and that in section 133 are part of one subject and both are found in most of the great judgments, and neither section is to be ignored in the exercise of judicial discretion The illustration (*b*) to section 114 is the rule, and when it is departed from, the Court should show, or it should appear that, the circumstances justify the exceptional treatment of the case *Queen Empress* v *Chagan Dayaram* 14 B 331 Although a conviction is not illegal merely because it proceeds ce, the evidence of an ted in material partic deal of caution and scr ration, and when a per sense his evidence does not require the same amount of corroboration as that of a person, who is an actual perpetrator with the principal offender In dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice the Court must exercise careful discrimination and look at all the surrounding circumstances in order to arrive at a conclusion whether the facts deposed to by the person alleged to be an accomplice are borne out by those circumstances, or whether the circumstances are of such a nature that the evidence purporting to be given by the alleged accomplice should be supported in essential and material particulars by evidence *aliunde*, as to the facts deposed to by that accomplice *Kamala Prasad* v *Sital Prasad*, 28 C 339=5 C W N 517 The evidence of a pardoned accomplice taken with the statements of unpardoned co prisoners is not sufficient by itself to warrant the conviction of those who never confessed *Queen Empress* v *Phagya* Rat Un Cr C 750 Where material discrepancies occur between the statements of th the Police and their depositions in the e is no corroboration and conse quently *Crown*, 36 P W R 1910 Cr = 8 Ind C id down in illustration (*b*) to section to all persons, who technically come wi
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3. as distinguished from that derived from the earlier statements of the ap[proving] accomplice or the statements of other accomplices *Ibid per Chandravarkar J* There must be corroborative evid[ence] [illegible]
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convict[e] [illegible] who are no better than accompl[ices] [illegible] if this evidence is not corroborated in material respects by other independent evidence in the case *Jogendra Nath* v *Sangap Garo* 2 C W N 55

The rule of evidence contained in s 133 and in s 114 (b) of the Evidence Act amounts to nothing more than a direction to all Judges and Magistrates that a fact cannot reasonably be held proved within the meaning of section 3 if there be no other evidence of it than the statement of an unreliable witne[ss] *Crown* v *Ramchand*, 6 S L R 195 = 11 Cr L J 262 19 Ind Cas 531 Section 114 of the Evidence Act enacts a rule of presumption, and read with s 4 of the Act it indicates that this is not a hard and fast presumption incapable of rebuttal a *presumptio juris et de jure* *Emperor* v *Shrinivas* 7 Bom L R 969 3 Cr L J, 33

Prior to the Evidence Act, the rule not of law but of practice was that a conviction could not be founded on the unsupported evidence of an accomplice that the accused person's statement was no evidence against a fellow prisoner or one tried jointly with the person making the statement and that such statement was only admissible in evidence when made in the witness box *Crown* v *Nihal Singh*, 31 P R 1866 Cr, *Queen* v *Jumeendla* 124 P R 1866 Cr, *Queen* v *Boora* 125 P R 1866 Cr, *Dewa* v *Crown*, 27 P R 1867 Cr *Crown* v *Jairam* 28 P R 1867 Cr, *Crown* v *Ruhceemee*, 35 P R 1867 Cr *Queen* v *Godai* 5 W R Cr 11, *Crown* v *Hooraince* 27 P R 1869, *Empress* v *Shakir* 5 C P L R 1 Cr But where a Magistrate treated a mere witness as an accomplice and granted him conditional pardon his evidence does not require corroboration *Reg* v *Fatehchand*, 5 B H C Cr 85 In ordinary cases the uncorroborated testimony of an approver is not sufficient to convict a person charged with an offence *Queen* v *Tulsi* 3 B L R A Cr 66, *Queen* v *Jaffer* 3 W R Cr 8 *Queen* v *Nawab Jan* 8 W R Cr 19, *Queen* v *Imsagar* 8 W R Cr 57, *Queen* v *Chirag* 12 W R Cr 5, *Queen Empress* v *Shiddappa* Rat Un Cr C 844, *Reg* v *Chatur* I B 476 N, *Jamiruddin* v *Emperor*, 1 C L J 782, *Queen Empress* v *Bepin*, 20 C 970, *Narigadu* v *Emperor*, 12 Cr L J 240 = 10 Ind Cas 589, *Hubla* v *King Emperor*, 4 Ind Cas 851 = 12 O C 118 = 11 Cr L J 71, *Queen* v *Kalla Chand*, 11 W R Cr 21 It is not safe to convict upon the uncorroborated evidence of an approver and the testimony of his wife who is obviously interested in supporting his story which had procured pardon cannot be regarded as independent corroboration of the approver's evidence *Sultan* v *Emperor*, 33 P L R 13 Evidence in corroboration need not be direct It may be circumstantial evidence *Kunwar* v *Emperor*, A I R 1932 Oudh 86 = 9 O W N 1136

Although s 114 illustration (b) provides that a Court may presume that the evidence of an accomplice is unworthy of credit, unless corroborated, may is not 'must' and no decision of Court can make it 'must' Therefore in spite of all that has been said to the contrary in law, the evidence of an accomplice stands on the same footing as any other evidence The Court is not obliged to hold that he is unworthy to consider after taking into consideration all the circumstances—one of which being that he is an accomplice—whether it does or does not rely on the evidence To entirely rule out the uncorroborated evidence of an accomplice might in many cases lead to miscarriage of justice *Emperor* v *Mathews*, A I R 1929 Cal 322

Judge's duty in charging the jury In *Rex* v *Baskerville* (1916) 2 K B 658 = 86 L J K B 28 *Lord Reading* in delivering the judgment of the Court said "There is no doubt that the uncorroborated evidence of an accomplice is admissible in law—see *Rex* v *Atwood*, 1 Leach C C 464 But it has long been a rule of practice at common law for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and in the discretion of the Judge to advise them not to convict upon such evidence, but the Judge should point out to jury that it is within their legal province to convict upon such unconfirmed evidence—*Reg* v *St[ubbs]*

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.. L J M C 16 and *Meunier, In re* 63 L J M C 198=(1891) 2 Q B 115 *This rule of practice* has become virtually equivalent to a rule of law; and since the Court of Criminal Appeal Act, 1907, 17 Edw 7 C (23)], came into operation this Court has held that in the absence of such a warning by the Judge the conviction must be quashed—*Rex* v *Tate* 77 L J K B 1043=(1908) 2 K B 680 If after the proper caution by the Judge the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated It can but rarely happen that the jury would convict in such circumstances In considering whether or not the conviction should stand this Court will review all the facts of the case and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony As the rule of practice at common law was founded originally upon the exercise of the discretion of the Judge at the trial and moreover as it is anomalous in its nature, inasmuch as it requires confirmation of the testimony of a competent witness, it is not surprising that this rule should have led to the differences of opinion as to the nature and extent of the corroboration required, although there are propositions of law applicable to corroboration which are beyond controversy" The Legislature intended to lay down in section 114 of the Evidence Act, the rule that the testimony of an accomplice is unworthy of credit so far as it implicates an accused person unless it is corroborated in material particulars in respect of that person, and it is the duty of a Court which has to deal with an accomplice's testimony to consider whether ... te un ... cr not, and in a case tried by jury, ... to the principles relating to the reception of ... v *Sallu ... an'al*, 21 W R Cr 69 The ... assessors (1) that there is no rule of law prohibiting the conviction of an offender upon the uncorroborated evidence of an accomplice, (2) that, as a general rule of practice, it is considered unsafe to convict upon such evidence, and (3) to point out any circumstances in the particular case which, in the opinion of the Judge afford a sufficient reason for relying upon the evidence 2 Weir 798=4 M H C ... uld not be left to a jury without suc... as the circumstances of the case ... Cr 80=B L R Sup Vol 459 Where the evidence of an accomplice is uncorroborated, the correct practice requires Sessions Judges not merely to tell the jury that it is unusual to convict on such evidence but also to tell them that it is unsafe, and contrary both to prudence and practice to do so But his omission to state the above particulars does not amount to an error in law *Reg* v *Gaun Bin* 6 B H C Cr 57, see also *In re Palaiasam* 2 Weir 796 If the jury found a prisoner guilty on the uncorroborated evidence of an approver after the Judge in his summing up had pointed out to them the desirability under the circumstances of such corroboration the High Court on appeal would refuse to set aside the conviction *Queen* v *Mahima* 6 B L R App 108 15 W R Cr 37 But where a Session Judge has failed to warn a jury that it is unsafe to convict merely upon the testimony of the approver, and where the Judge has not properly explained to the jury the law and practice regarding such cases there is a misdirection of a very seri... sustained *Mal bul* v *Emperor* 12 ... in his charge to the jury shoul... approver was given on condition al... It will be an error in summing ... acting upon the uncorroborated ... was corroborated by a fact jury that the evidence of the accomplice which did not amount to any corroboration at all *Jamiruddi* v *Emperor*, 29 C 782=6 C W N 553 The evidence of an approver should not be believed without material corroboration and in order to see whether there is such a corroboration it is the duty of the Court to scrutinize and marshall out very carefully the proof relating thereto Where this duty has not been properly performed by the lower Court the High Court will interfere on the revision side and set ... Courts below *Muna* v *Emperor*, 9 Inc... 1911, *Queen* v *Elahee* *Bux*, 5 W ... 07 Ind Cas 876=29 Cr L J 311=A...

as distinguished from that derived from the earlier statements of th accomplice or the statements of other accomplices *Ibid* per *Chandravarkar* J There must be corroborative evidence not only as to the identity of the person spoken of as the accused but also as to the *corpus delicti* *Reg* v *Chatur*, Rat Un Cr C 102; *Reg* v *Nanku bhau*, Rat Un Cr C 102 A person cannot be convicted upon the evidence of witnesses who are no better than accomplices if this evidence is not corroborated in material respects by other independent evidence in the case *Jogendra Nath* v *Sangap Garo*, 2 C W N 55

— s 133 and in s 114 (b) of the Evidence a direction to all Judges and Magistrates proved within the meaning of section than the statement of an unreliable witness *Crown* v *Ramchand*, 6 S L R 195 = 14 Cr L J 263 = 19 Ind Cas 531 Section 114 of the Evidence Act enacts a rule of presumption, and read with s 4 of the Act it indicates that this is not a hard and fast presumption incapable of rebuttal, a *presumptio juris et de jure* *Emperor* v *Shrinivas*, 7 Bom L R 3 Cr L J, 33

Prior to the Evidence Act, the rule not of law, but of practice was that a conviction could not be founded on the unsupported evidence of an accomplice that the accused person's statement was no evidence against a fellow prisoner or one tried jointly with the person making the statement and that such statement was only admissible in evidence when made in the witness box *Crown* v *Nihal Singh*, 31 P R 1866 Cr, *Queen* v *Jumeeruta* 121 P R 1866 Cr *Queen* v *Boora*, 125 P R 1866 Cr, *Dewa* v *Crown*, 27 P R 1867 Cr *Crown* v *Jairam*, 28 P R 1867 Cr, *Crown* v *Ruheemee*, 38 P R 1867 Cr, *Queen* v *Godai* 5 W R Cr 11, *Crown* v *Hooramee*, 27 P R 1869, *Empress* v *Shibar* 5 C P L R 1 Cr But where a Magistrate treated a mere witness as an accomplice and granted him conditional pardon his evidence does not require corroboration *Reg* v *Fatehchand* 5 B H C Cr 85 In ordinary cases the uncorroborated testimony of an approver is not sufficient to convict a person charged with an offence *Queen* v *Tulsi*, 3 B L R A Cr 66, *Queen* v 3 W R Cr 8 *Queen* v *Nawab Jan* 8 W R Cr 19, *Queen* v *Ramsagar*, 8 W R Cr 57, *Queen* v *Chirag* 12 W R Cr 5, *Queen Empress* v Rat Un Cr C 814, *Reg* v *Chatur* I B 476 N; *Jamiruddin* v *Emperor*, 782; *Queen Empress* v *Bipin*, 20 C 970, *Nayagadu* v *Emperor*, 13 Cr L J 240 = 10 Ind Cas 891 = 12 O C 118 = 11 Cr L J 71, Q It is not safe to convict upon the and the testimony of his wife who is obviously interested in supporting his story which had procured pardon cannot be regarded as independent corroboration of the approver's evidence *Sultan* v *Emperor*, 33 P L R 13 Evidence in corroboration need not be direct It may be circumstantial evidence *Kunwar* v *Emperor*, A I R 1932 Oudh 86 = 9 O W N 1136

Although s 114, illustration (b) provides that a Court may presume that the evidence of an accomplice is unworthy is not 'must' and no decision of Court can of all that has been said to the contrary stands on the same footing as any other evid hold that he is unworthy to consider after taking into consideration —whether it does or corroborated evidence justice *Emperor* v

(1916) 2 K B

been a rule of practice at common law for the judge to danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and in the discretion of the Judge to advise them not to convict upon such evidence; but the Judge should point out to jury that it is within their legal province to convict upon such unconfirmed evidence—*Reg* v *Stubbs*

in England as far back as the 10th December 1662, after conference with all the Judges" Then quoting extracts from *Sir Mathew Hale's* Pleas of the Crown, *King* v *Atwood*, 1 Leach Cr C 4 4, *King* v. *Jones*, 2 Camp Rep 131 and from *King* v. *Durham*, 1 Leach Cr C 478, he continued · " The law as above laid down that a conviction is legal, though supported by uncorroborated evidence of an accomplice has been admitted by *Lord Denham* in *Rex* v *Hastings and another*, 7 C & P 112, by *Baron Alderson* in *Rex* v *Wilkes*, 7 C & P 272; and by many other
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law of England, therefore, upon this
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Amount of corroboration A conviction based on the totally uncorroborated story of an accomplice is bad in law *Queen Empress* v *Shidlingappa*, Rat. Un Cr C 841, *Crown* v *Hira Mthar*, 71 P R 1866 Cr, *Crown* v *Motum*, 11 P R 1867 Cr, *Aloe* v *Queen Empress* U B R, (1892—1899) Vol 1, 103 An approver's evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence *Lad Khan* v *Crown*, 19 P W R 1912 Cr = 13 Ind Cas 938 = 13 Cr L J 182 = 47 P L R 1912, *Queen Empress* v *Krishna Bhat*, 10 B 319, *P S Narayan* v *Emperor*, (1914) M W N 363 = 15 Cr L J 117 = 24 Ind Cas 153 Not only as to the persons spoken of by an accomplice must there be
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direction *Reg* v *Chalu*, Rat Un C
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persons whom accomplices charge and with respect to the facts they state, and their testimony ought to be confirmed by other evidence against each person they name *Gunda Singh* v *Crown* 21 P R 1869 Cr, *Esur Singh* v *Crown*, 1 P R 1868 Cr The testimony of an accomplice is not alone sufficient for a conviction The corroboration must be on matters directly connecting the prisoner with the offence of which he is accused *Queen* v *Dwarka*, 5 W R Cr 18 = 1 Ind Jur N S 100, *Queen Empress* v *Dhondi*, Rat Un Cr C 810, *Queen Empress* v *Kunjan Menan*, 1 M L J 397, *Queen Empress* v *Shidlingappa*, Rat Un Cr C 841 The evidence of two or more accomplices requires corroboration equally with the testimony of one *Queen* v *Dwarka*, 5 W R Cr 18 = 1 Ind Jur N S 100, *Queen Empress* v *Shidlingappa*, Rat Un Cr C 841, *Nga Paw* v *Q E*, L B R (1872 1892) 51 An accomplice is a competent witness and there is no absolute rule of law which enacts that the conviction on the evidence of an accomplice is bad, but there is an established practice, founded on the judicial experience of generations, which requires corroboration by some untainted nting not
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more persons having been concerned
should be confirmed, not only as to the
stances of the case, but also as to the identity of the prisoners, and any prisoner as to whom his testimony is not supported should be acquitted *Rex* v *Imam Valad*, 3 B H C Cr 57 In dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice, the Court must exercise careful discrimination and look at all the surrounding circumstances in order to arrive at a conclusion, whether the facts deposed to

by the person alleged to be an accomplice are borne out by those circumstances or whether the circumstances are of such a nature that the evidence purporting to be given by the alleged accomplice should be supported in essential and material particulars by evidence *aliunde* as to the facts deposed to by that accomplice The amount of criminality is a matter for consideration, and when a person is only an accomplice by implication or in a secondary sense his evidence does not require the same amount of corroboration as that of a person who is an actual perpetrator with the principal offender Although a conviction is not illegal, merely, because it proceeds upon the uncorroborated testimony of an accomplice, the evidence of an accomplice, ordinarily speaking, should be corroborated in material particulars, and such evidence should be accepted with a great deal of caution and scrutiny *Kamala Prasad* v *Sital Prosad*, 5 C W N 517=28 C 339 The corroboration of the [illegible] required, should be such corroboration [illegible] a prudent man, on the consideration of [illegible] that the evidence is true, not only as to the [illegible] but also so far as it affects each person [illegible] *Srinivas Krishna*, 7 Bom L R 969=3 Cr [illegible] [illegible]ror, 10 C W N 962=4 Cr L J 115=33 C [illegible] Previous statements made by the accomplice himself, though consistent with [illegible] the trial, are insufficient for the corroboration of th[illegible] The evidence requisite for the corroboration of the [illegible] must proceed from an independent and reliable source *Reg* v *Malapa Bin*, 11 B H C A C 196 The confession of one of the [illegible] of an accomplice against the [illegible] *Sheikh Sheru* v *Emperor*, 81 [illegible] is not [illegible] better by being corroborated by other tainted evidence *Queen* v *Bijoy* [illegible] W R Cr 43, *Hakam Singh* v *Emperor*, A I R 1929 Lah 850=1929 Cr C 626, *Queen* v *Ramsaran*, 8 A 306=A W N 1885, 311, *Queen* v *Dowlut*, 5 W R Cr 18, *Mahomed Usuf* v *Emperor*, 114 Ind Cas 457=A I R 1929 Nag 215

The rule laid down in s 111, illustration (b) corresponds with the rule observed in England *Reg* v *Ramasami*, 1 M 394=2 Weir 799 It is unsafe to convict a person on the uncorroborated testimony of an accomplice *Queen Empress* v *Imdad*, 8 A 120=A W N 1886, 7, *Maung Lay* v *Emperor*, 77 Ind Cas 429 The initial presumption is that the evidence of accomplices is [illegible] ly where there are any special circum[illegible] and leave no reasonable doubt that the belief *Nga Wa* v *King Emperor*, 1 U

The law as expressed in ss 114(b) and 133 of the Evidence Act is in no respect different from the law of England, but simply reproduces a rule of practice *viz*, that a conviction based on the uncorroborated testimony of an accomplice is not illegal, that is, it is not unlawful But experience teaches that it is not safe to rely upon the evidence of an accomplice, unless it is corroborated, and hence, it is the practice of the Judges, both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated and, when trying a case with a jury, to warn them that such a course is unsafe Not only it is necessary that the evidence should be corroborated in material particulars but the corroboration should extend to the identity of the accused person There must be [illegible] corroboration independent of the accomplice or of the accomplice and the confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him It is of no value and makes no difference if there are two accomplices A second accomplice does not improve the position of the first, nor does the fact that there are two make it unnecessary that both should be corroborated The accomplice must be corroborated not only as to one, but as to all of the persons affected by the evidence; corroboration of his evidence as to one prisoner would not justify his evidence against another being accepted without corroboration *Queen Empress* v *Ram Saran* 8 A 306=A W N 1885, 31; *Emperor* v *Jamaldi*, [illegible] C W N 536 If some part of his evidence is satisfactorily corroborated, the

is good ground for believing him in other parts in which there is no corroboration *Queen Empress* v *Kunjan Menon*, 1 M L J 397 (F. B)

The ... a great deal of
cautio... to swear falsely
in ord... hardly applies
to the ... y his
own tes... reby
fastens ... it he
shows a ... Cr.
L J. 33

Where ...
testifies an
sidered as
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unless cor
worthy of belief, applies to persons to whom a pardon has been tendered on condition of their making a full disclosure of all the circumstances of the crime in which they profess themselves to have been participators and subject to the penalty of being themselves placed upon their trial, if, in the opinion of the Court, they have spoken falsely or kept back anything important It does not apply to a cr...
upon the evide...
and have unc...
share in it T...
made by them at the time of their trial, is good corroborative evidence under s. 157 of the *Evidence Act* *Empress* v *Tantia Bhil*, 4 C P. L R 1

As regard ... a person on
the testimony
circumstances
Facts, which
the offence ...
the w
portio
an ... , but
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V N
Cas
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... *Reg* v *Badhu*, 1 B 475.
Whe... must be corroboration
agai... with the offence alleged
agai... , Ind Cas 636 Section
133 of the Evidence Act contains the rule of law, section 114, illustration (b) being merely a sort of guidance to assist the Courts It is impossible to lay down any ... accomplice must
be corrobo... is to be viewed
with suspic... has a motive to
shift guilt ... likely to commit
perjury on occasion, (iii) because he hopes for pardon, or has secured it and so favours the prosecution *Barkat Ali* v *Crown*, 2 P R 1917 Cr = 36 Ind Cas. 86, *Nand Singh* v *Crown*, 9 P W R. 1917 Cr

No hard and fast rule
approver's evidence be rejected
on that point it happens to b...
of all other facts and consider...
aside as worthless unless it
worthy character *Bichuta* v *T*...
833; see also *Balmokund* v *Cro*...
show that the co accused or some of them
approver at or in the vicinity of the places ...
comm...
v *The*...
co-accu...

more reliable witness than the accomplice who is examined under conditional pardon, although proper corroboration is necessary in cases of both *Sudam Chandra* v *Emperor*, A I R 1933 Cal 148

A conviction based on the uncorroborated testimony of an approver is illegal. *Gurdit Singh* v *Crown*, 52 P L R 1918=44 Ind Cas 967=19 Cr L J 439, *Pan Gang* v *Emperor*, 42 Ind Cas 1002=19 Cr L J 47

The retracted confession of an accused person may be sufficient corroboration of the approver's story as against himself but not against a co accused *Palha* v *Emperor* 12 P W R Cr 1949=49 Ind Cas 604=20 Cr L J 188, *In re Damur Veerabadra*, 12 L W 385=61 Ind Cas 528

The approver s evidence is ... it may be of belief for variou ...

... d unless the Judge is satisfied ... rroborated in some material and ... L T 757 Where the corroboration was the recovery of certain articles alleged to be some of the articles stolen and subsequently produced from the house of the accused, his house was ... ng the ... into ... were ... ances ... peror

The approver referred to a ... along with appellants to join in the dacoity ... prover ... prover ... three ... nd bearing consecutive number was strong corroboration of the approver s story as to the appellants having accompanied him to the scene of the occurrence *Hakim* v *Emperor*, 1923 Lah 153

The production of stolen property by an accused person even from a place which is not in his own possession may be accepted as material corroboration of the evidence of an accomplice who has deposed that the accused joined him in committing the burglary or theft *Mahomed* v *Emperor*, 111 Ind Cas 417=29 Cr L J 863

... lly scrutinized with a ... *Fred Latimer* 29 L ... ell known rule of cr ... ess he is corro ... onal cases ... ration of ... e accused ... mstantial evidence of their connection with the crime ... In l Cas 423=30 Cr L J 922=A I R 1929 Oudh 321 The mere presence of a person in the house is not a corroboration *Abot* v *Emperor* 1929 M W N 698 An approver is unworthy of credit unless corroborated in material particulars Where the only witness who corroborated him was his son aged 7 years who parrot like repeated what he had been tutored to say, it is unsafe to convict the accused on such evidence. *Meher Singh* v *Crown*, 11 Lah L J 223=30 P L R 422=A I R 1929 Lah 287

Corroboration need not necessarily consist of ... lence that the accused ... evidence ... *Hakam* ... R 421, ... oborat on ... ich case ... of su- ... 929 Lah.

In deciding a criminal case with reference to the evidence of an accomplice Court must take into consideration the maxim that it is unsafe to convict a son upon the evidence of an accomplice unless he is corroborated in material ticulars both as to the circumstances of the offence and the identity of the son whom he implicates *Lady Mohar* v *Emperor*, 114 Ind Cas 623 = A. I. 1929 Nag 222 = 30 Cr L J 331 see also *Mahomed* v *Emperor*, 114 Ind 457 = 30 Cr L J 311 = A I R 1929 Nag 215, *Sundaram* v *Emperor*, 9 M W N 791, *Mahomed Usaf* v *Emperor*, 114 Ind Cas 457 = 30 Cr L 311 = A I R 1929 Nag 215; *Musa* v *Emperor* 114 Ind Cas 609 = A I R 9 Nag 233 = 30 Cr L J 333, *Hakam Singh* v *Emperor* A I R 1929 Lah , *Monohor* v *Emperor*, A I R 1930 Cal 430, *Sheo Baksh* v *Emperor*, A. R. 1930 Pat 161

It is the main duty of the prosecution to bring the accomplice character of evidence to the notice of the Court and then invite it to believe it by erence to the corroborative evidence on record *Mahomed Usuf* v *Emperor*, Ind Cas 457 = 30 Cr L J 311 = A I R 1929 Nag 215 The foremost ential condition for accepting the approver's statement is that it must be trustthy statement. *Lodya* v *Emperor*, 114 Ind Cas 623 = 30 Cr L J 331 = A 1929 Nag 222

Rejection of Accomplice evidence If the evidence of an approver is arded, it must be discarded as a whole and the defence cannot have argument, t any more than the prosecution *Sheo Bash* v *Emperor*, 11 Pat L T = A I. R 1930 Pat 164

134 No particular number of witnesses shall in any case be required for the proof of any fact.

imber of witnesses

Principle "And after all, what is it worth?' said *Jeremy Bentham* in his *ionale of Judicial Evidence* B IX, pt VI C 1 § 1, 'In the multitude of nsellers says the proverb, there is safety, in the multitude of witnesses e may be some sort of safety but nothing more; it is by weight, full as h as by tale, that witnesses are to be judged *Pundere non numero* From nbers ...
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their agreement with other matters of fact too notorious to stand in need of imony — single witness (especially if situation and character be taken into unt) will be enough
r instances, a crowd of
nd wanting in the ba
he bar whose experience
witnesses opposed to e
se testimony has been of
egard to mendacity) f
I do not ... (... be ... to insinuate) that the
sition of ... against perjury No
ot but that, ... require, the greater
security a ... t that security, (be it
ter or less), is not so necessary as that you should pay so great a price for
s you do pay, and must pay by the license you thereby grant to commit the
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more reliable witness than the accomplice who is examined under conditions pardon, although proper corroboration is necessary in cases of both *Sudai Chandra* v *Emperor*, A I R 1933 Cal 148

A conviction based on the uncorroborated testimony of an approver i illegal *Gurdit Singh* v *Crown*, 52 P L R 1918=44 Ind Cas 967=19 Cr L J 439, *Pan Gang* v *Emperor*, 42 Ind Cas 1002=19 Cr L J 47

The retracted confession of an accused person may be sufficient corrobora tion of the approver's story as against himself but not against a co accused *Pallia* v *Emperor*, 12 P W R Cr 1949=49 Ind Cas 601=20 Cr L J 188 *In re Damur Veerabadra*, 12 L W 385=61 Ind Cas 528

The approver's evidence is in [illegible] some case it may be of belief for various re[illegible] approver taken at the end of the tria[illegible] v *Emperor*, 56 Ind Cas 667=21 Cr L J 507, see also *Palla* v *Empe*[illegible] Lah L J 296 An accused cannot be convicted unless the Judge is satisfie that the evidence of the accomplice was corroborated in some material an satisfactory manner *Dhanu* v *Emperor*, 2 Pat L T 757 Where the corro boration was the recovery of certain articles, alleged to be some of the article stolen and subsequently produced from the house of the accused, his house wa [illegible] into [illegible] were [illegible] ances [illegible] peror

The approver referred to a story by one A who invited him along with [illegible] the story told by the approver [illegible] its were seen with the approver [illegible] The possession of the three [illegible] was strong [illegible] ed corroboration of the approver's story as to t[illegible] him to the scene of the occurrence *Hakim* [illegible]

The production of stolen property by an accused person even from a place which is not in his own possession may be accepted as material corroboration of the evidence of an accomplice who has deposed that the accused joined him in committing the burglary or theft *Mahomed* v *Emperor*, 111 Ind Cas 447=29 Cr L J 863

The testimony of a proferred accomplice requires to be carefully scrutinized with anxious search for possible corroboration *Macdonald* v *Fred Latimer* 29 L W 155=112 Ind Cas 875=A I R 1929 P C 15 The well known rule [illegible] is corro- [illegible] ses [illegible] of [illegible] sed [illegible] tial [illegible] as evidence of their connection with the crime *Lalu* v *E*[illegible] 423=30 Cr L J 922=A I R 1929 Oudh 321 The mere presence of a person [illegible] 1929 M W N 698 An [illegible] in material particulars [illegible] his son aged 7 years who [illegible] is unsafe to convict the [illegible] Lah L J 223=30 P L [illegible] that the accused [illegible] ntial evidence [illegible] 658, *Hakim* [illegible] 1 K B 421, [illegible] corroboration [illegible] of each case including the character and antecedents of the approver and the degree of suspicion attached to his evidence *Hakim Singh* v *Emperor*, A I R 1929 Lah 860.

he may safely violate any engagement, however solemn, contracted under similar circumstances 2 Artificial rules of this kind hold out a temptation to the subornation of perjury, in order to obtain the means of complying with them 3 They produce a mischievous effect on the tribunal by their natural tendency to react on the human mind, and they thus create a system of mechanical decision dependent on the number of proofs.
wh
do
ag
cor
proceed on intelligence and credit, and not on the number of the witnesses examined or documents produced in evidence—is a just one, there are cases where, from motives of public policy, it has been wisely ordained otherwise" *Best Ev* §§ 597 601 ; *Wigmore* § 2033

"What we must conclude, then, is that our whole presumption should be against any specific rule requiring a number of witnesses, or corroboration of a single witness ; that such arbitrary measurements are likely to be of little real efficacy and to introduce disadvantages greater than those which they purport to avoid , and that therefore any such rule, when advanced for a specific issue—for example, treason or perjury—or for a specific witness—for example, an accomplice or a raped complainant—must justify itself by experience as overwhelmingly useful and efficacious" *Wigmore* § 2033

Scope of the section Section 28 of Act II of 1855 enacted "Except in cases of treason, the direct evidence of one witness, who is entitled to full credit shall be sufficient for proof of any fact in any such Court or before any such person But this provision shall not affect any rule or practice of any Court that
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tion either for treason or misprison for treason, the offence is required to be established on the testimony of not less than two witnesses This is a statutory provision of the reign of William III, and requires the oath of either two witnesses to the same overt act, or one to one, and the other to another overt act of the

being part of the act or treason even though part of the general proof ; as for instance, in an indictment for adherence to the Queen's enemies, proof that the accused was a subject of the Crown In the case of an indictment for
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sup
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Now has been removed Now a conviction up *Khulam* v *Bhowani-prosad*, 22 particular number of witnesses of any fact *Ibid* ; see also *Raja Prosonno* v. *Romonee* 10 W R 236 , *Govindo* v *Narain*, 21 W. R. Cr 18 ; *Arjun* v *Emperor*, 53 A 598 = A. I. R. 1931 All 362.

In *Queen Empress* v. *Ghulet*, 7 A 44 at p 60 *Duthoit, J* said "*R.* v. *Harris*, 5 B & A 926, has been followed in *Mary Jackson's Case*, 1 Lew Cr 270, in *R.* v. *Wheatland*, 8 C & P. 238, in *R* v *Hook*, 15 D & R. and in cases As regards all these cases I remark generally that the England as to the necessity of calling witnesses to assignment of perjury, and of showing th taken was m question of defending, is not law in India"

CHAPTER X.

OF THE EXAMINATION OF WITNESSES.

Order of production and examination of witnesses

135. The order in which witnesses are produced and e[illegible] amined shall be regulated by the law ar[illegible] practice for the time being relating to ci[illegible] and criminal procedure respectively, and, [illegible] the absence of any such law, by the discretion of the Court.

Attendance of witnesses This chapter deals with the examination of [illegible] [illegible] by incorporating the rules of English law on the subject The o[illegible] [illegible] questions It freque[illegible] the facts nec[illegible] ask the parties rules as rega[illegible] produce any documents This chapter does not lay [illegible] the production of witnesses or documents before the Court The Civil and Cri[illegible] Provisions have be[illegible] na [illegible] [illegible] rules on these subjects [illegible] Co[illegible] m [illegible] owled[illegible] hich [illegible] A[illegible] as [illegible] been recognized and enforced by the common law from [illegible] is enforced is the *subpoe[illegible]* v *Long*, 9 East 473 The process by which this writ is enforced is the commands the witness *ad testificandum*, commonly called *subpoena*, which commands the witness [illegible] a writ or order directed to a [illegible] the trial to give his testimony It is a writ or order directed to [illegible] place to testify as [illegible] books, documents or produce in evidence [illegible] cident to the jurisdic[illegible] The right to comp[illegible] [illegible] tion of the Common Law Courts; and statutes generally exist extending this [illegible] the like" *Burr Jones* power [illegible] f Court to secure the § 797 [illegible] ial proceeding By an attend [illegible] reasonable costs and early [illegible] generally regulated by [illegible] r each [illegible] lue ad-[illegible] com-[illegible] finitely [illegible] wer to to hear and determine any suit, has by [illegible] end, to call for all adequate proofs of the facts in controversy, and, to that end, to [illegible] the attendance of witnesses before it" *Greenl Ev* 60 [illegible] obedience to [illegible] time So also [illegible] oduction of a [illegible] the mode of [illegible] is by [illegible] idrews [illegible] these [illegible] selves [illegible] n dis-[illegible] lore, in [illegible] mediate [illegible] tablish-[illegible] ribunal [illegible] our law [illegible] ments, and must be an [illegible] Accordingly, we find it [illegible] extend"

Exclusion of witnesses from Court room Before discussing the general [illegible] witnesses, it is proper to call attention [illegible] the exercise of its discretion, direct the [illegible] while the testimony of other witness-es is being given. *Burr Jones* [illegible] *Ev* §§ 1400-1402. When excluded

they must not be ... ngs of the case; and those ... ers have testified *Best* § ... his is called putting or ... ctice which has prevailed ... and Scotland from an ... The object of such an order is obviously to elicit the truth by securing testimony not influenced by the statements of other witnesses or the suggestions of counsel as well as to prevent collusion and covert of testimony among witnesses While this order will generally be made by the Court on the application of counsel, before the examination of the witnesses, it is generally held to be a matter of discretion, rather than of strict right; yet in some States it may be claimed as a right *Burr Jones* § 807. Parties to the litigation except for some impropriety will not generally be excluded, since their presence is usually necessary to a proper management of their case. Nor will an attorney for one of the parties be excluded, but see *Everett* v *Lowdham*, 5 C & P 91; *Pomeroy* v. *Baddely*, Ry. & M 130 The same is true of one who is party in interest, though not a party to the record ... ice of such agent is ... with the facts that ... action or defence The mere fact of the necessity for the presence of such an agent will not out- ... its discretion Expert witnesses ... nce be given upon the question or ... if there is any reason to apprehend that the expert witnesses are liable to be influenced by the testimony of other witnesses ... order ef ... are bein ...

Burr Jones § 807, *Selfe* v *Isaacson*, 1 F & F 194; *Charnock* v *Dewings*, 3 C & K 378; *Pussel* v. *Pilson*, 28 R L Jo 810, *Ramsden* v. *Jacobs*, (1922) 1 K B 640; *Contra, Outram* v *Outram*, (1877) W N. 75; *Usher* v *Henwood*, 20 S J 598; *Tay* § 1400

... Judge ... Moo & ... rt room ... witness but it would not render him incompet ... hear his evidence and pass upon ... *States*, 1 Okl Cr 291, *Burr Jones* § ... *Cobbet* v *Hedson*, 1 E & B 11, Phip ...

Proc ... tion ... Proc ... tion ... befo ... few ... witn ... circu ... the r ... *Gree* ... in re ... and ... intro ... parti ... coun ... has discretion, the Court has also power under this section to direct the order in which witnesses cited by a party shall be examined *In the goods of Gopesar Dutta*, 16 C W N 265=39 C 215 In *Kedar Nath Ghosh* v *Bhupendra Nath Bose*, 5 C W N. xv, at the close of the examination-in-chief

who was the first witness called, *Mr Jackson* referring
cross-examination of the
of the plaintiff by his
es cross examination In
e Court is very slow to
in which witnesses should
be examined I think that in the present case the ordinary practice should
regulate the order of exami ... should be cross examined
at the conclusion of the ... defence wants to
cross examine the prosecuti ... by being allowed
to postpone the cross-examination of the complainant on the ground that the
cross-examination of the complainant before some other witnesses will embarrass
and prejudice the defence case the mere fact that the complainant, is a sickly
man, is present in Court and may not come on some other day due to his bad
health, is not sufficier ... the
of the defence, but the ... It
defence *Moosa Haji* ... the
is not the duty of th ... ab

L R 136
he discretionary control of the trial Judge
to
rom
rom

And where permission has been given to recall a witness ...
omitted to ... that
of the Co ... evi-
question ...
dence to be introduced, out of its order, in the examination-in-chief, though
... of the case to be presented by the other side On
witness is needlessly protracted,
arrest it, and the Judge may
own motion *Burr Jones* § 814
... evidence at the
on behalf
Cr P Code
as not thereby vitiated *Nayan*
N 170=A I R 1930 Cal 134

Right to begin In the regular order of procedure, the party having the
... evidence necessary to support the subs-
firmative allegations should
is received *Burr. Jones*
he rules of evidence. As a
sts should begin. *Sections*
subject of burden of proof
of lies on that party who
le Ordinarily the plaintiff
facts alleged by
dditional facts
of the relief
begin *Civil*
C L R. 274,

r day to which
hall state his
he is bound to
evidence (if
prove The other party shall then ...

any) and may then address the Court generally on the whole case The party beginning may then reply generally on the whole case *Civil Procedure Code*, Order XVIII, rule 2 If there be some defendants who support the plaintiff's case, in that case, they should address the Court and call their evidence before the other defendants *Haji Bibi* v. *Sultan Mahomed*, 32 B 599 Where there are several issues the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and in the latter case, the party beginning may produce evidence on those issues af[illegible]
party may then r[illegible]
beginning; but the [illegible]
the whole case C[illegible]

As regards order of production of witnesses in criminal cases, *vide* Chapters XVIII XX, XXI, XXII, XXIII, of the Criminal Procedure Code

136 When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant, and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise.

Judge to decide as to admissibility of evidence

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations

(*a*) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 32

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement

(*b*) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced

(*c*) A is accused of receiving stolen property knowing it to have been stolen

It is proposed to prove that he denied the possession of the property

The relevancy of the denial depends on the identity of the property The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of possession to be proved before the property is identified

(*d*) I[illegible] the cause or effe[illegible] C and D) which r[illegible] the cause or effe[illegible] be proved before [illegible] C and D is proved, or may require proof of B, C and D before permitting proof of A.

Para 1 'The reception of clearly incompetent evidence is a practice which leads ... incompetent eviden... expense of money ... which may follow ... v Mc Dermont, 1 ... y shall offer his evidence is for the counsel to determine, unless it is made to appear to the Court that some undue advantage of the opposite party is thereby attempted When evidence is offered which proves or tends to prove any relevant fact, it is to be presumed that this will be followed by such other proof as is necessary to establish the proper connection Hence, it is of no consequence in what order the evidence is introduced, so far as its ultimate legitimacy is concerned, provided in its relation to the other evidence in the case, it is at the end pertinent to the issue A case consists frequently of various parts neither one of which makes it out and to hold that a party is not entitled to introduce any part until he establishes the whole ... is that the particular ... involved in the issu...

... ded by other ... he case The ... testimony is ... unsel must be allowed to begin somewhere upon the expectation that other links are to be afterwards supplied, and for this the Courts rely upon the statement of counsel professional honour being a guarantee against abuse For example, the Court may permit a sheriff s deed to be given in evidence before the judgment and execution on which it is founded are introduced and where one relies on his right as assignee of a bond he may introduce the bond in evidence before he shows ... *Burr Jones* § 812 So it is clear that relevant ... may be given in evidence as of right and ... not depend upon itself but rests upon some ... reception is a matter of privilege In other ... the absence of that testimony without which it ... been declared that the relevancy of testimony need not always appear at the time when it is offered, since it is the usual course to receive at any proper and convenient stage of the trial, in the discretion of the Judge any evidence which the counsel shows will be rendered material by other evidence which he undertakes to produce If it is not subsequently thus connected with the issue it is to be laid out of the case *Greenl Ev* § 51(a) But if the testimony is apparently irrelevant before counsel can ... nce otherwise ... or in some ... nt But on cross examination much more latitude is necessarily allowed to counsel In the absence of such assurance the evidence should not be received If it is plain ... and there ... es not ... rought ... vidence ... re not ... elevant

Para 2 Vide Section 104 illustration and Notes It often happens that an agent for instance to carry a message and bring back an answer or do some other act, is put into the box before his agency or authority is proved There upon an objection is taken by the opposing counsel that the evidence is not receivable, because the agency, etc, is not proved An undertaking, is usually then given that evidence to prove the agency will be forthcoming at a later period, whereupon the case proceeds If the proof of agency should break down, the whole of the alleged agent s evidence is expunged from the Judge s notes It would often be highly inconvenient to interrupt the witness in his story, and call another witness in the middle of his examination, to prove the

agency It is to meet such a state of things that the clause is provided *Noil Fi p 319*

Para 3 Vide notes under para (1) It is doubtful whether s 136 gives the Court any discretion to allow evidence to corroborate a witness to be given " *Ujin v King Emperor* re a Judge suggests to a evidence on a parti ere l for cross examina is satisfied with the

evidence so far as it has
that have been called has not
such a suggestion and it l
have a just cause of complaint if the Judge afterwards turns round and says I decide against you on that point. *Hasaji Mijachand v Dhondiram* 6 Bom L R 636

Examination in chief

137. The examination of a witness by the party who calls him shall be called his examination-in-chief

Cross examination

The examination of a witness by the adverse party shall be called his cross-examination

Re examination

The examination of a witness subsequent to the cross examination by the party who called him, shall be called his re-examination

Order of examinations

138 Witnesses shall be first examined in-chief, then (if the adverse party so desires) cross examined, then (if the party calling him so desires) re examined

The examination and cross-examination must relate to relavant facts but the cross examination need not be confined to the facts to which the witness testified on his examination in chief

Direction of re examination

The re-examination shall be directed to the explanation of matters referred to in cross-examination and if new matter is by permission of the Court introduced in re examination, the adverse party may further cross examine upon that matter

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Every party to a suit is entitled to have all the witnesses, whom he desires to call, and is ready at the trial to produce, heard by the Court, whatever opinion the Court may form by anticipation as to the probable value of the evidence when it shall be given. *Looloo* v. *Rajender*, 8 W R 364, see also *Bungshee* v. *Chowdhry*, 1 W R 263; *Morno* v *Bheem*, 6 W R 231, *Chowdhury* v. *Shib*, [illegible] *Jeswant* v *Jaisingjee*, 2 M I [illegible] ry [illegible] ich of taking upon [illegible] witness should be [illegible] L J 156=27 Ind Cas 220

Witness to testify orally When testimony is to be given in Court at a trial, it is to be given verbally, in the presence of the Court and jury, where the behaviour, expression, and gesture of a witness may be seen One cannot write out his testimony, and read it to the jury himself, or have it read One of the strongest indications of the truthfulness of a witness is his manner under the particular circumstances which surround the giving of his testimony This is of course, lost to the jury unless the witness testify orally before it Whenever [illegible] compels testimony to be taken [illegible] orally such facts [illegible] tify from his own [illegible] ice is brought out between the ideas and language of various witnesses in reference to their own knowledge of the facts about which they are questioned One witness will know a thing [illegible] another will only go to the extent of givi[illegible] ime [illegible] or With certain [illegible] made by sign [illegible] ing

Referrin[illegible] the truth of a part transaction will probably ever be devised by human ingenuity [illegible] conducted as it [illegible] e parties, [illegible] f observ- [illegible] witnesses [illegible] ts cannot [illegible] erty and [illegible] o, he has [illegible] fence, of [illegible] greatest

Examination in chief The first rul[illegible] on in chief is this —Counsel can ask a witness whom [illegible] only as are strictly relevant to the issue [illegible] matter immediately in issue No quest[illegible] direct examination, the probable answer to which cannot have a tend[illegible] to prove the offence or defence, or other matter put in issue by the pleadings [illegible] allow a greater [illegible] h as are [illegible] sume the [illegible] ing that [illegible] images is relevant; everything else will be rigorously excluded And relevant facts must be proved in the legitimate way, a fact may be most material, still that is no reason for admitting hearsay evidence Again, counsel must confine his questions to matters of fact; [illegible] ask him what he inferred from [illegible] nion of a witness on any mat[illegible] killed or scientific witness[illegible] er special training or special [illegible] form a competent judgment on any matter in issue. *Powell Ev* 526 Generally it is not the province of the Court to examine witnesses and as a rule Courts should leave the witnesses to the pleaders to be dealt with as is provided in section 13 *Janki* v *Sheo Narain*, 82 Ind Cas. 154=25 Cr L J 1226 The necessity for expediting trials frequently precludes the Court from permitting the repetition

of questions especially in direct examination. To repeat a question once excluded for any other purpose than to seek, in good faith, its introduction after a change of condition in the proof, is opposed to the canon under consideration *Chamberlayne's Ev* § 551.

Importance of examination in chief Cross-examination is far easier than examination-in chief. In cross examination one cannot avoid getting answers which are not desired, but in chief a great deal depends upon the way in which witnesses are examined *Lord Alverstone's Recollections of the Bench and the Bar* The examination of a witness in chief or the direct examination of witnesses as it is some times called, is very much underrated in its significance and its importance *Parry's Seven Lamps of Advocacy*, 82 85 If a direct examination is properly and skilfully conducted, the impression thus made by an honest witness is more lasting than any argument of counsel The vivid story of a single witness told in a winning way will leave a first impression upon a juror's mind that no eloquence can efface It is no easy matter for an advocate to get his own evidence properly before a Court and jury It is an important fact for him to remember that cases are often won or lost by the straight forward statements of the part...

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neither to the right hand nor to the left, and, when you have come to the end of the statement on the paper, to resume your seat and leave him to be dealt with by your adversary in cross examination But your task is far from being so easy" *Cox Advocate cited in Wrottesley* 51-54 No lawyer can be successful in the highest sense of the term unless he is a master of the difficult art of examining witnesses It requires greater combination of qualities than almost any other branch of advocacy, the most important of which are patience, coolness and tact"

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exercise your sagacity at the moment, it must depend upon the particular facts of the case" *Ibid p* 37

Duty of counsel It is the duty of counsel to bring out clearly, and in proper chronological order every relevant fact in support of his client's case to which the witness can depose This task is more difficult than may at first sight appear The timid witness must be encouraged, the talkative witness repressed, the witness who is too strong a partisan must be kept in check And yet counsel must not suggest to the witness what he is to say An honest witness, however, should be left to tell his tale in his own way with as little interruption from counsel as possible In criminal cases, the duty of counsel

for the prosecution is wider It is the practice, and probably the duty, of a prosecuting counsel to ask a witness questions favourable to the prisoner, for he must lay all the material evidence before the Court, whether it tells in favour of the prisoner or not, and not unduly press for a conviction. *Powell Ev* 526, *Ramranjan* v *Emperor*, 42 C 422

The Rambling witness Testimony in itself intelligible is often rendered difficult of comprehension by the incompleteness, or the want of continuity, with which it is presented These evils are due either to the defective mental constitution of the witness, or to his moral weakness, or to his personal hostility, or to the in ... ntal constitution manifests itse ... many indivi duals there ... a single object and persisten ... individual it is useless to expect any exhaustive and coherent statement of the facts within his knowledge Any idea which suddenly arises in his mind, during the course of his narration, diverts his thought into another channel; he loses sight of many details which he shou ... ithout consciousness of the omission ... lea his effort to explain it leads him ... when he returns ... at which it was abandoned, while ... to the comprehension of the whole ... a witness of this defective mental ... *obinson's Forensic Oratory, Wigmore* Jud Proof § 160

The dull and stupid witness The same obstacles are encountered in eliciting the evidence of a dull and stupid witness His perceptions are cloudy and indefinite His processes of recollection and reflections are slow and ... examination must be ... his story in order to ... effort of his memory, to construct questions which contain some word or phrase suggestive of the missing thought, to contrive methods of explanation or illustration which enables ... ties ... or ... of

Timid and self ... timony of a witness whose moral ... id self consciousness is subject ...

... disclosure o ... work through ... he omits or ... ideas uttered, however, than he becomes conscious of their error If he now attempts an explanation, it usually results in his entire discomfiture If he persists in the misre ... arises in the fear ... hoods and suppres ... knowing matters of importance ...

... *Robinson's Forensic Oratory* p 126, *Wigmore's* ... *Judicial Proof* § 160

The Bold and Zealous witness—his treatment The moral weakness of a ...

delivered, and avails himself of every opportunity to assert his own opinions

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Incompleteness or obscurity in the . difficulties of an entirely different the examination of the rambling, the self conscious or the stupid witness arise from intellectual or emotional defects, and can be overcome by enlightening the mind of the witness, or by assisting him to bring his impulses under control The obstacle encountered in an

. . . impulses he is determined to withhold the knowledge he possesses, or if compelled to yield it, to communicate it in language which makes it as valueless as possible Where such a witness is the sole repository of ideas which are . . . course than to produce him, . . . he should avoid him altogether . . . *Principles of Judicial Proof*

§ 100

Paul Brown's Golden Rules—Examination-in chief "No better general rules" says *Mr Wrottesley* "for the examination of witness in chief, that we know of . . . *Brown*, who was one of the gr . . . tood the test of experience and ha . . . the United States, and nearly . . . rowed largely from them We fe . . . e concluded to give the rules in full" *Wrottesley* on examination of witnesses p 40 The following are *David Paul Brown's Golden Rules* for the examination-in chief of witnesses —

"1 If they *are bold, and may injure your cause by pertness or forwardness*, observe a gravity and ceremony of manner towards them which may be calculated to repress their assurance

"2 If they are alarmed or diffident, and their thoughts are evidently scattered, commence your examination with matters of familiar character, remotely connected with the subject of their alarm, or the matter in issue, as for instance,—Where do you live? Do you know the parties? How long have you known them? etc And when you have restored them to their composure, and the r . . . of the ca . . . u may agai . . .

"3 If the evidence of your witness be unfavourable to you (which should always be carefully guarded against), exhibit no want of composure; for there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may appear to produce upon the counsel

"4 If . . . the witness is imbued with preju dices . . . unless there be some . . . ich that witness alone . . . on as possible If the . . . it to . . . least . . . him . . . direc . . . you, a . . . mind . . . still be . . . own ca . . .

"5 Never call a witness whom your adversary will be compelled to call This will afford you the privilege of cross examination—take from your opponent the same privilege it thus gives you—and, in addition thereto, not only render everything unfavourable said by the witness doubly operative against deprive that party of the power of counter acting

without an object, nor without being able to connect that object with the case, if objected to as irrelevant

7 Be careful not to put your question in such a shape that if opposed for informality, you cannot sustain it or at all events produce strong reason in its support Frequent failures in the discussion of points of evidence enfeeble your strength in the estimation of the jury, and greatly impair your hopes in the final result

'8 Never object to a question from your adversary without being able and disposed to enforce the objection Nothing is so monstrous as to be constantly making and withdrawing objections it either indicates a want of correct perception in making them, or a deficiency of real or of moral courage in not making them good

"9 Speak to your witness clearly and distinctly, as if you were awake and engaged in a matter of interest, and make him also speak distinctly and to your question How can it be supposed that the Court and the jury will be inclined to listen when the only struggle seems to be whether the counsel or the witness shall first go to sleep?

10 Modulate your voice as circumstances may direct— Inspire the fearful and repress the bold'

'11 Never begin before you are ready, and always finish when you have done In other words do not question for question's sake, but for an answer

[illegible] own way 'The advocate may either allow [illegible] is own way, or he may bring out his testimony [illegible] witness is intelligent and honest the best [illegible] stories but if he is stupid and inclined to speak of irrelevant matters, it is [illegible] it *Wrottesley* p 38 But strictly [illegible] ly must depend upon your discernm[illegible] recall facts by recalling all the associated circumstances, however irrelevant they must repeat the whole of a long dialogue and describe the most trivial occurrences of the time, in order to arrive at any particular part of the transaction With such you have no help for it but to let them have their own way [illegible] deavours to disturb the r[illegible] confusion in the ideas of [illegible] ng at your object *But* [illegible] s, happily more rare who [illegible] ve no order of events [illegible] on, your only chance of [illegible] questing that they will [illegible] e with their own mental [illegible] hion, with disconnected facts, which you will afterwards connect together in your reply, or which may dove-tail with the rest of the evidence, so as to form a complete story' *Wrottesley* p 62 citing *Cox's Advocate*

Continuous narration without question May not the witness narrate his knowledge in continuous speech and without the interruption of questions? It is obvious that this method, on the one hand has often the advantage of preserving continuity and clearness of thought for the witness himself and saving time for all parties concerned *Wigmore* § 767 'One of the important branches of advocacy' said *Mr Harris* 'is the examination of a witness in chief One fact should be remembered to start with, and it is this, the witness whom he has to examine has probably a plain straightforward story to tell, and that upon the telling it depends the belief or disbelief of the jury and their consequent verdict If it were to be told amid social circle of friends it would be narrated with more or less circumlocution and considerable exactness But all the facts would come out, and that is the first thing to

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His first feeling is that he must not tell it in his own way. He is going to be examined upon it, he is to have it dragged out of him piecemeal, disjointedly, by a series of questions—in fact, he is to be interrupted at every point in a worse manner than if everyl . . .
him about what he was going
is not unlike a *post mortem*
to the painful operation . Now the best thing the advocate can do under these circumstances is to remember, that the witness has something to tell, and that but for him, the advocate, would probably tell it very well, in his own way The fewer interruptions, ther . . .
the less questions will be needed
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matter" *Harris on Hints on Advocacy* ; . . .

Objection to questions by other party The general principle governing the time of the objection is that it must be made as soon as the applicability of . . . 8; *Kissen Kamini* v *Ram Chandra*, W R 244 For evidence contained . . . ordinarily be made as soon as the question is stated, and before the an . . . due, not to subject of the question, but to some feature of the answer. *Wigmore* § 13, vide p. 73 *supra* If objection be not made in proper time it is generally considered as being waived But the rule of waiver is not applicable in case of inadmissible evidence *Miller* v *Madho Das* 23 I A, 106 (116)=19A 76, *Sri Pal* . . .
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Cross Examination When a witness has been examined in chief, the other party has a right to cross examine him The powers of cross examination has been justly said to be one of the principal, as it certainly is one of the most efficacious tests, which the law has devised for the discovery of truth By means of it the situation of the witness with respect to the parties, and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of ob . . .
he . . . knowledge of the facts to which
of . . . he has used those means, his powers
tain . . . all fully investigated and ascertained . . . of the jury, before whom he has testified, and who have thus had an opportunity of observing his demeanour, and of determining the just weight and value of his testimony It is not easy for a witness who is subjected to this test, to impose on a Court or jury, for however artful the fabrication of falsehood may be it cannot embrace all the circumstances to which a cross examination may be extended *Greenl Ev* § 446; *Starkie Ev* Vol I, 160 On th . . . cross examination or examination *ex adverso* . . .
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may be led into such a strait that what he will not say, he cannot deny For as in an oration we generally collect scattered proofs, which singly do not appear to press on the accused yet by being put together, prove the charge so a witness of this sort should be asked many things as to what went before—what came after—as to place, time, and persons, and other things so that he must fall upon some answer after which he must necessarily either confess what is desired, or contradict his former statements If this does not happen, it may become apparent that he will not speak, or he may be drawn out and detected in some falsehood foreign to the cause or by being led on to say more than the matter requires in favour of the accused, the Judge may be led to suspect him, which will damage his cause not less than if he had spoken the truth against the accused ... any
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witnesses are usually asked many questions which may be useful as to the lives of other witnesses as to their own character and position any crimes they have committed their friendship or enmity to the parties—in the answers to which they may either make some useful admission, or be detected either in a falsehood or the desire of injuring the opposite party

It is certainly implied by s 138 of the Evidence Act that a party must have had an opportunity to cross examine and does not mean that merely a right to cross examine a witness without an opportunity being offered for cross examination is sufficient compliance with the requirements of the law *Moti Singh* v *Dhanuk Dhari* 73 Ind Cas 339 = 24 Cr L J 595 = (1923) P 53

Cross examination as a distinctive and vital feature of English Law For centuries past the policy of Anglo Saxon system of Evidence has been to ... feature of law
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efficacious test" *Starkie Evidence* Vol I, pp 96, 129 In *State* v *Campbell,* 1 Rich L 126, *Richardson J* said· Experience has proved that it is, of all others, the most effective, the most satisfactory, and the most indispensible test of the evidence narrated on the witness' stand . I know of no disagreement, among the expounders of evidence, upon the importance of cross-examination."

Cross examination—Theory of The fundamental feature is that a witness, on his direct examination, discloses but a part of the necessary facts That which remains suppressed or undeveloped may be of two sorts, (*a*) the remaining and qualifying circumstances of the subject of testimony, as known to the witness, and (*b*) the facts which diminish and impeach the personal trustworthiness of the witness (*a*) The remaining and qualifying circumstances of the subject of testimony will probably remain suppressed or undisclosed, not merely because his testimony is commonly given only by way of answers to specific interrogatories, and the counsel producing him will usually ask for nothing but the facts favourable to his
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interested namely, the opponent Cross examination, then, *i e* further examination by the opponent, has for its first utility the extraction of the remaining and
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extent, again, cross examination is vital, *i e*, it does what must be done and what nothing else can do *Wigmore* § 1368 So the objects of cross-examination are to impeach the accuracy, credibility, and general value of the evidence given in chief, to shift the facts already stated by the witness, to detect and expose discrepancies, or pressed facts which will support the case
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It is certainly implied by s 138 of the Evidence Act that a party must have had an opportunity to cross examine and does not mean that merely a right to cross examine a witness without an opportunity being offered for cross examination is sufficient compliance with the requirements of the law *Moti Singh* v *Dhanuk Dhari*, 73 Ind Cas 339 = 24 Cr L J 595 = (1923) P 53

Cross examination as a distinctive and vital feature of English Law For centuries past the policy of Anglo Saxon system of Evidence has been to regard the necessity of testing by cross examination as a vital feature of law The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience Not even the abuses the mishandlings and the puerilities which are so often found associated with cross examination have availed to nullify its

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observed what a very different shape their story appears to take in each of these stages, will at once see how extremely dangerous it is to act on the ex parte statement of any witness and still more of a witness brought forward under the influence of a party interested' However artful' says *Mr Starkie*, the fabrication of the falsehood may be, it cannot embrace all the circumstances to which the cross examination may be extended, the fraud is therefore open to detection for want of consistency between that which has been fabricated and ... for want of ... invent on ... ipal tests ... ly a mo t

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former, which is to be regretted, as the point still appears to be left open' *Powell Ev* 220 ... separately represented may ... evidence which he has given ... 1 M H C R 456

When a witness has been examined in chief the other party has a right to cross-examine him *R* v *Burdit*, 6 Cox 458; *Lord* v *Colvin* 3 Drew 222, 225 But the question often arises, whether the witness has been so examined ... he witness is called merely ... be proved by another witness, ... v *Gibson*, 1 Ad & El 48, ... 1 Stark 132, *Rush* v *Smith*, 1 C M & R 94; *Summers* v *Mosely*, 2 C & M 477, *Bracegirdle* v *Bailey*, 1 F & F 536 In England, when a competent witness is called and sworn, the other party will ordinarily, in strictness, be entitled to cross examine him, though the party calling him does ... *Brook* 2 Stark 472; *Phillips* v. *Eamer* ... 67, *R* v *Murphy*, 1 A M & O 201, ... Ch D 642) Unless he was sworn by ... 16; *Rush* v. *Smith*, 1 C M & R 91, *Wood* v *Mackinson*, 2 M & R 273) or, unless an immaterial question having been put to him, his further cross examination has been stopped by the Judge (*Creevy* v *Carr*, 7 C & P 64) Greenl Ev § 445 And even where a plaintiff was under the necessity of calling the defendant in interest as a witness, for the sake of formal proof only ... ld that he was the ... xamined to the whol ... The right of cross ... is adverse to that o ... R 1932 Lab 105—135 Ind Cas 209

A witness summoned and examined by Court cannot, as of right, be cross examined either by the prosecutor or by the accused The Court as a general rule, should however, allow the parties to cross examine the witness if they desire to do so *Chuvai* v *Queen*, S C 275 Oudh Such a witness is a witness of the Co ... him with ... whether ... said in a ... the part ... counsel ... cross exa ... v *Disbo* ... *Gurudas* ... *Girish*, 5 C 614, *Sharfara* v *Dhunno*, 16 W R 257

It is the duty of the Magistrate to insist on the trials proceeding from day to day and rigidly to check prolix examination and cross examination of witnesses in exercise of the powers inherent in all Magistrates to prevent abuse of process *F. W Sole* v *Crown*, 11 S L R 27

Death of witness after examination in chief Where a witness dies after examination ... admissible but the ... stances o ... there is ... may even ... R 1925 A ... 127, *R* ... witness's ... examination but for the voluntary act of the witness himself or the party offering him—as by a postponement or other interruption brought about immedia ... must be ... where th ... the witn ... death or illness prevents cross examination under such circumstances that no

responsibility of any sort can be attributed to either the witness or his party it seems harsh measure to strike out all that has been obtained on the direct examination Nevertheless, the principle requires in strictness nothing less The true solution would be to avoid any inflexible rule and to leave it to the trial Judge to admit the direct examination so far as the loss of cross examination can be shown to him not in that instance a material loss *Wigmore* § 1390) In *R* v *Mitchell*, 17 Cox Cr 503, a dying woman was examined in chief, and after her cross examination had continued for about 10 minutes, the Magistrate stopped on account of her condition She died a few minutes after Her evidence was held inadmissible But in *Fuller* v *Rice*, 4 Gray 343 *Shaw C J* said 'No general rule can be laid down in respect to unfinished testimony If substantially complete it ought not to be rejected '

Cross examination by Court In *Nur Bux Kazi* v *Empress* 6 C 279 *Garth C J* said We think it right to point out to the Sessions Judge, that the course which he adopted in the examination of the witnesses for the prosecution was irregular, opposed to the provisions of section 138 of the Evidence Act and not fair to the prisoners We find that on the examination in chief being finished, the Judge questioned almost all the witnesses at considerable length upon the very points to which he must have known that the cross

on either side have omitted to put some material question or questions, and the Court should, as a general rule leave the witnesses to the pleaders to be dealt with *as laid down in section 138 of the Act The Judges' power to put questions* under s 165 is certainly not intended to be used in the manner which we have had occasion to notice in the present case " Generally it is not the province of the Court to examine witnesses and as a rule the Court should leave the witnesses to the pleaders to be dealt with as provided for in section 138 *Janaki* v *Sheo Narain*, 82 Ind Cas 154

' Although we do not regard it always safe
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So where the examination of a witness is needlessly protracted it is within the discretion of the Court to arrest it *Burr Jones* § 814, *Banke* v *Kanhaiya* A I R 1922 Oudh 124 This discretion the Court can use even where a witness
dard L J Co 30 C
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a witness or the repetition of interrogatives, until full answers are obtained *Burr Jones* § 814

Cross examination, whether should be confined to relevant facts In England great latitu
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irrelevant to the matter in issue, the answer to which may tend to affect his credit, but he will not always be obliged to answer the question and if he does answer it he cannot as a rule be contradicted He may be asked questions which affect his veracity, such as, whether he has been convicted of a crime,

whether he is a relation, or intimate friend, or under any special obligation, to the party who calls him, whether he is not identified or connected with him in interest ... the adverse party;
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Th ... Powell Ev 533
... up the whole of the cross examiner's case *Berwick* v *Murray*, 19 L J Ch 281, 286, *Morgan* v. *Brydges*, 2 Stark, R 314; *R.* v. *Murphy*, 1 Arm M & O 206 So also under section 138 of the Evidence Act an accused has the right to cross examine prosecution witnesses at the conclusion of their examination in chief and such cross examinations may be on all points and by means of all questions not disallowed by the Evidence Act. Cross examination need not be confined to matters raised elsewhere in the evidence *Mihomed Ali* v *Emperor*, 12 Cr L J 277=10 Ind Cas 917, *R* v *Ishan*, 6 B L R App 88=15 W. R Cr 341; *Mayor* v *Murray* 19 L J Ch 281, *Subramanyam* v. *Government of Mysore*, 6 6 Mys L J. 551 (F B)

But ... questions will be disallowed, if ... of the examination in chief, nor ... oss-examiner may not as a rule ask questions of the witness as to his transactions with a third person *Powell Ev* 533 see al ...
B N. S 388
separately trie ...
subject matter ...
23 T L R 460

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witness
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Manufac ...
M L J
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(4) his ...
deems obligatory, or by such affirmation or declaration as may by law be substituted for an oath Proportioned to these is the degree of credit his testimony deserves from the Court and jury *Archb Cr P* (27th ed) 483, Best §§ 22 6, 189 195, Phip Ev 461 It is unprofessional on the part of counsel to cross-examine a witness as to facts within his personal knowledge *Donald Watson* v *Peary Mohan*, 40 C 898=18 C W N 18 Where counsel acting under instruct ... substan-
counsel
opinion
litigation
and the parties to the suit, the imputation complained of ought to have been withdrawn *In re Messrs Crompton & Co* v *Secretary of State*, 26 M L J 549

Knowledge, ... matters affect-
ing the weight of ...
opportunities of ...
power of memory and perception, and any special circumstances affecting his
con ... which may be inquired into
... cross examination to impeach,

Although a witness is perfectly disinterested, although he is a man of integr ... moral obligation of the oath
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his
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acc
a t ... other circumstances, which, ...
torily answered and accounted for by the other party, so as to convince the witness himself that he laboured under a mistake (*See Munsterberg*, Psychology and

S. Crime) Where there is a doubt, therefore, whether the evidence given by a witness is not founded on some misconception, it is the duty of the counsel who cross-examines him to question him as to the sources of his knowledge, his reasons for believing the fact to be as he has stated, his reason for recollecting it the circumstances attending its occurrence, whether it was light or dark, and whether he was near or distant at the time, it occurred, and the like, so that the tribunal may be able to judge of the degree of confidence it should place in the witness's testimony If a witness refuses to answer such questions, or does not answer them
his credit in
questions m
omissions,
testimony.

Disinterestedness A witness to be perfectly credible, must not be in the slightest degree biassed or partial to one party or the other Therefore, if it appears that the witness is prejudiced against the party against whom he appears or has before expressed sentiments indicative of such prejudice, or it appears
him for the same or a similar offence
acts charged in the indictment against
ances which detract proportionately from

stated that for the
by the Court to the
different situation
is presented Asking a witness at this stage, to repeat the evidence given on direct examination may well serve to test the truth of the original statements, and be, therefore, entirely within the legitimate rights of the party Ability to repeat a story not only involves memory and accuracy; it throws valuable light on the questions as to whether a narrative concerns actual facts, in which case the reality of the events or circumstances narrated will enable the witness to repeat them as often as asked, with substantial accuracy, or, the story is a fabricated one, in which event, attempts at repetition may well break down, unless the story is a short one, or learned with remarkable thoroughness and retentiveness of memory *Chamberlayne's Ev* § 552 Where perjury is claimed, by reputable counsel, directly or by implication from conduct, the Court in exercise of its administrative function for the furtherance of justice, may permit repitition on cross examination, not alone of the same questions asked on direct examination but of questions asked on cross-examination, to which the examiner cannot get an answer or only one with which he is not satisfied as being in accordance with the facts He will, if permitted, ask the same question until he gets either an answer, or one which he thinks is true With many perhaps most, witnesses the test is one of the most effective that can be employed Where the mind of the witness is interposing a barrier of falsehood or equivocation between the examiner and the true state of his own mind the effect of repeating the question, psychologically, is not unlike that of an ancient battering ram Each blow, delivered at the same point adds its quota of disintegrating force until the barrier is broken down The auto-suggestion of the witness that he remains steadfast to the pre-arranged story is steadily undermined by the counter suggestion of the insistent questions, until it
master hand,
the canon
ect perjury
no such
gain is promised, a trial judge may exclude questions on cross examination which are chiefly argumentative or combative in their nature *Chamberlayne's Ev* § 553.

Judge may restrict number of counsel in the examination of a witness The Court may expedite trials by declining to permit more than one counsel to intervene in the examination of any given witness He may properly require that a counsel who has started the examination or cross examination of a witness
sel on the same side,
, 1 M & Rob 400,
g elaboration, conflict
one of administration

and circumstances may arise which will justify or require a trial judge to permit more than one counsel to interrogate a witness The practice and certain obvious considerations affecting it are thus stated by *Lord Ellenborough* in *Doe* v *Roe*, 2 Camp 280 "Convenience certainly requires that the examination of a witness should be carri
clearly cannot
another, in th
right, in his di
hands Very
If a gentleman
embarrassed
in the power of the oppos
relief And other
that the gentleman
questions to a wit
applied where several defendants rely on separate defences tried in the same action" "The witnesses are to be examined by the counsel successively, in the same
d not separate" (*Chippendale*
v
Should the examining counsel
fa
from the customary practice or
right of the Court to permit
undoubted When such a deviation
the interests of expediting business,
intervene or prescribe general conditions to avoid useless repetition, or other waste of Court's time *Chamberlayne's Ev* § 555, *Wigmore* § 783

What facts are not relevant in cross examination In cross examination too the facts inquired into must be relevant A witness may not be cross-examined as to
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Spenceley v *De Willott*, 7 East 108 There the Court was all decidedly
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facts that will actually be extracted will be favourable or unfavourable to the cross examiner's purposes It is here that the art (that is, the technical skill) of cross examination enters On this hangs all the lesser rules of the art Hence it is that it must call to its aid so many other elements than mere knowledge of law Experience of human nature judgment of chances knowledge of the case, tact of manner,—all these things, and more, have to do with the art Yet the theory of the process underlies and influences at every point To cross examine or not to cross examine,—that is the fundamental question, which springs from the essential nature of the process and arises anew for every part of every witness's testimony The greatest cross examiners have always stated this as the ultimate problem *Wigmore* § 1368

David Paul Brown's Golden Rules for cross examination '1 Except in indifferent matters, never take your eye from that of the witness This is a channel of communication from mind to mind, the loss of which nothing can compensate —

'Truth, falsehood, hatred, anger, scorn, despair,

And all the passions,—all the soul is there

"2 Be not regardless either of the voice of the witness Next to the eye this is perhaps the best interpreter, of his mind The very design to screen conscience from crime—the mental reservation of the witness—is often manifested in the tone or accent or emphasis of the voice For instance it becoming important to know that the witness was at the corner of Sixth and Chestnut Streets at a certain time the question is asked were you at the corner of Sixth and Chestnut Streets at six o clock ? A frank witness would answer, perhaps I was near *there* But a witness who had been there, desirous to conceal the fact, and to defeat your object, speaking to the letter rather than the spirit of the enquiry, answers, "No' although he may have been within a stone's throw of the place or at the very place, within ten minutes of the time The common answer of such a witness would be, I was not at the *corner*, at *six o clock* Emphasis upon both words plainly implies a mental evasion or equivocation and gives rise with a skilful examiner to the question At what hour were you at the corner, or at what place were you at six o clock ? And in nine instances out of ten it will appear that the witness was at the place, about the time, or at the time about the place There is no scope for futher illustrations, but be watchful I say, of the voice, and the principle may be easily applied

'3 " afty, confiding with the honest; rough to the ruffian and a thuder e unmindful of your own dignity Bring to bear all the powers of your mind not that you may shine but that virtue may triumph and your cause may prosper

4 In a criminal especially in a capital case so long as your cause stands well ask but a few questions, and be certain never to ask any the answer to which, if against you may destroy your client, unless you know the witness perfectly well, and know that his answer will be favourable equally well, or unless you be prepared with testimony to destroy him if he play traitor to the truth and your expectations

"5 An equivocal question is almost as much to be avoided and condemned as an equivocal answer, and it always leads to or excuses an equivocal answer Singleness of purpose clearly expressed is the best trait in the examination of witnesses, whether they be honest or the reverse Falsehood is not detected by cunning but by the light of the truth, or if by cunning it is the cunning of the witness and not of the counsel

6 If the witness determine to be witty or refractory with you you had with the that le t you do assured

pon the ees may

"8 Never undervalue your adversary, but stand steadily upon your guard, a random blow may be just as fatal as though it were directed by the ... me often cures, and sometimes

... jury, kind to your colleague, civil to your antagonist, but never sacrifice the slightest principle of duty to an overweening deference towards either."

Cross examination of the perjured witness "It seldom happens that a witness's entire testimony is false from beginning to end Perhaps the greater part of it is true, and only the crucial part—the point, however, on which the whole case may turn—is wilfully false If at the end of this direct testimony, we conclude that the witness we have to cross examine, comes under this class, what means are we to employ to expose him to the jury? Let us first be certain we are right in our estimate of him—that he intends perjury Embarrassment is one of the emblems of perjury, but by no means always so The novelty and difficulty of the situation—being called upon to testify before a room full of people, with lawyers on all sides ready to ridicule or abuse—often occasions

...

his own accustomed language

"If, however, the manner of the witness and the wording of his testimony bear all the earmarks of fabrication, it is often useful, as your first question, to ask him to repeat his story Usually he will repeat it in almost identically the same w... possible, th... Try him b... quickly to t... rather than ... has no facts ... it to mind as a whole, and not ... facts entirely dissociated with th... entirely unprepared for these new ... for answers Distract his thoughts and then suddenly, when his m... considerations to which you had ... same question a second time E... and very likely will give a differen... in the net He cannot invent answers as fast as you can invent questions, and at the same ... he will not keep his ans... ne confused and from th... you have made it appe... *the Art of Cross examination* pp 50-53

But ... Nothing ... whose in... methods ... manner to be displayed towards such a witness It all depends upon the individual character you have to unmask In a large majority of cases the chance of success will be greatly increased by not allowing the witness to see

that you suspect him, before you can lead him to commit himself as to various
matters with which yo
Wellman, the Art of Cros
"You must sometimes tr
or repugnancy to know
feigned. The following
this sort of cross-examination: 'Open gently, mildly, do not appear to doubt
him (the witness)
are not afraid
and collateral
from the main
between the tale he had told and the questions you are about to put to him Then
by slow approaches bring him back to the main circumstances by the investigation of which it is that you propose to show the falsity of the story.

"If however you adopt the other course (i. e.) to show that you suspect him at the first, and instead of surprising the witness into the betrayal of his falsehood you resolve to bring out of him the truth by a bold and open attack—to awe him, as it were, into honesty,—aspect and voice must express your consciousness of his perjury an ... determined fixing of your eye up ... will certainly help you to assure ... njust. It may be stated as a general rule, that a ... boldly and fully in the face with a steady ... is cast down or wanders restlessly ... is speaking the truth or what he beli ...
however timidly, will look at you when he answers your questions, and will

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culars ... upon
which h ... refore
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... ur purpose

upon which you surprised him into invention on the moment. It is more probable that after such a diversion of his thoughts he will have forgotten what his answers were, what were the fictions with which he had filled up the ... him for
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... ideas,
... your
... ien to
cross examination at the middle of his narrative, then jump to one end,

previous question S. 1
e he speaks from
perplexed and will
acts by association,

"When you are satisfied that the witness is drawing upon his invention, there is no more certain process of detection than a rapid fire of questions Give him no pause between them, no breathing pause, no time to rally Few minds are sufficiently self possessed to maintain a consistent story under such a catechising If there be a pause or a hesitation in the answer, you thereby lay bear a
the ans
and he
him to time and place, and names 'You heard him say so?' 'Where?' 'Who were present?' 'Name them' 'Name one of them' Such a string of questions following one upon the other as fast as the answer is given, will frequently confound the most audacious Fit names and times and places are not readily invented or if invented not readily remembered" *Reed's Conduct of law suits,* 307-308

Truthful witness "The truthful witness has been said to be the most difficult of all to cross examine I cannot help differing so much from that opinion as to ... When I say truthful ... true If it were so, it ... truth-ful witness is ... is the eas ... ning,

Flippant witness When a witness comes into the box with what is ... with a determined pose of the head, as ... counselor I am your man, tackle me," ... masterful being to deal with He has come determined to answer concisely and sharply, means to say "no" and "yes", and no more, always to be accompanied with a lateral nod, as much as to say, "take that" ... the masculine pronoun, this witness is ver... her self off before her friends, she to... feels quite equal to "any counselor as ev... should carefully abstai... witness down" His ... encourage that fine frenzied exuberance, which, bye and bye will most surely damage the case she has come to serve *Harris Hints on Advocacy pp 65, 107, Wigmore Principles of Judicial Proof* § 160

The Dogged witness The Dogged witness is the exact opposite of the one I have just been dealing with He will shake his head rather than say no As much to say "You don't catch me You see him, gentlemen and you see me I am up to him" He seems always to have fear of perjury before his eyes, and to know that if he keeps to a nod or shake of the head, he is safe He is under the impression that damage the case he must, whatever he says

He will answer ... appeal to his memory, or if your question magnifies his indep... dazzling luster that 'uprightness and ... virtue he believes himself to have ever ... not the actual dis-coverer *Ibid*

The Hesitatin... cautious and truthful witness, ... you begin to cross-examine ... what effect the answer will have upon the case and not what the proper answer is By no

3. means hurry this individual Let him consider well the weight of his intended answer, and the scale into which it should go, and in all probability he will put it into the wrong one after all If he should, leave it there by all means Hesitation, however, may result from a desire to be scrupulously accurate in which case you must be careful that the mere strictness of language does not convey a false impression The latter sometimes, even in advocacy, kills where the spirit would make alive *Ibid*

The Nervous witness A nervous witness is one of the most difficult to deal with The answers either do not come at all or they tumble out two or three at a time, and then they often come with opposites in close companionship, a 'Yes" and a 'No' together, while "I don't know" comes close behind 'I believe so' or 'I don't think so' is a frequent answer with this witness as it is with the lying and the truthful witness They are all partial to this expression, but all from different and opposite motives

You must deal gently with this curious specimen of human nature He is to be encouraged It is no use to bray him in a mortar You should deal as gently with a weakness of this kind as you would with a shying horse Great allowance is always made for a nervous witness, who invariably receives the sympathy of the jury You have to guard, therefore, against offending that sympathy, as you undoubtedly would by a severe tone or manner *Ibid*

must be dealt with cunningly
rd question out of character
at only, straightforwardness
may not be out of place with the jury Whatever of honesty, whether of apperance, manner tone, or language contrasts with the vulgar, self asserting and mendacious acting of this witness will tend to destroy him It will be the antidote to his craftiness It is strange, but, true, that no man can be what is usually understood as a "cunning person and conceal the fact He is not really a shrewd man but only thinks he is tries to be, and above all wishes to be thought so He always pretends that he has some deep and hidden meaning in what he says and does, which no amount of skill or perception on your part can penetrate He would be an impostor to the world if he could but the only person he really imposes upon is himself Every one can see that he tries to appear what he is not and that he pretends to know a great deal more than he does. This is the man to show to the jury in his real character and they will enjoy your good humoured exposure of the cheat *Ibid*

The canting Hypocrite The canting hypocrite is not the least pleasing object of creation when in the witness box, nor is he the most difficult to cross examine He invariably speaks from the very best and purest of motives His desire is only to speak the truth, no not merely that but without so much as an apparent tinge of partiality He has no interest in the case—no feeling It is such a pity it could not have been settled out of Court as he proposed himself to be arbitrator

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e be
a gap somewhere hard by or a somewhat lower fence that he may scramble over and so not do violence to himself in the event of a mishap . His evidence which may and will be always on the confines of truth, must be closely
He is too excellent
quantities at a time
with it the shadow
ly cost *Ibid*

The Positive witness There is another class of witness which may be mentioned, and that is the positive witness (generally a female or of female tendencies) It is usually very difficult to make the witness unsay anything she has said, however mistaken she may be, but you may sometimes lead her by

S. 13

... n ... may ... leal ... or ... say ... has said Her ... ndacity, but ... uineness like ... sworn that ... She always ... to convince her that she must be wrong Such questions as 'How can that be?' will only draw the answer, 'I dont know how it can be, but I know it is' *Ibid*

Spy as a witne ... from previous information or suspicion, ... otting of some offence, whether aga ... of the medit ... remains to le ... fixed design ... in puni hing ... morally, and his evidence against them, the mere character of spy ought not to prejudice, or stain the credit of the witness To this man no guilt of the plotted offence attaches. Another description of spy may be a man, who has undesignedly been present at ... example of others been tempted to join it, or a ... t, and either of th ... n further than h ... n repentence or o ... w

opp ... Anc ... lear ... with ... and ... con ... con ... stor ... exa ...

... ral, and often the inevitable, ... the witness by a skilful adverse ... favourable to the witness in as ... character he bears of a spy; ... argue a want of self respect ... imputation of dishonour ... ts, 171-179

3. " and in all probability go out and meet you
n he answered the question you have just put
14; *Willman's Day in Court* 182; *Iyer's Cross*
He knows what you will ask him if you are no
Quarter Sessions cross-examiners But try him
with something just a little out of the common line, by way of experiment
You see he looks at annot
quite see what you are s eyes
if you desire to make a ns, the
chances are against your getting the answers you want, or in the form in which
you would like them He thinks it
get an answer you don't want, it will p
young and inexperienced as you are
Aiyar's Advocacy Series Vol II p 2

not permit him to trace the connection between one question and another when
you desire that he should not do so If you ask him whether it was very dark
night, and the darkness has nothing whatever to do with the issue, he will
commence a process of reasoning as to your motive, and what might possibly be
the effect of his answer While I

may have the best, but police men have such a high standard that no man in the
dock can ever come up to it Further more, it is dangerous to put "fishing"
questions to this class of witness You are almost sure to catch the wrong

Expert witness "Attention is also called to the distinction between
mere matters of scientific fact and mere matters of opinion For example
certain medical experts may be
are not mere matters of opinion C
but in the province of mere opi
much among themselves that but lit
as such As a general thing, it is unwise for the cross examiner to attempt
cope with a specialist in his own field of inquiry Lengthening cross-examinations
along the lines of the expert's theory are usually disastrous and should rarely
be attempted Many lawyers, for example, undertake to cope with a medical
or hand-writing expert on his own ground,—surgery, correct diagonisis, or the
intricacies of penmanship In some rare instances; (more especially with newly
educated physicians) this method of cross-questioning is productive of result
More frequently, however, it affords an opportunity for the doctor to enlarge
upon the testimony he has already given, and to explain what might otherwise
Experience
d on his
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stify the
experiment, and then only when the lawyer's research of the medical authorities,
which he should have with him in Court, convinces him that he can expose
the doctor's erroneous conclusions, not only to himself, but to a jury who will
which even the
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scientific facts from the knowledge of the expert as will help his case, and thus tend to d... ...ert given against him ... mind is that no question ... as to give the expert an oppor... and thus afford him an oppor- ...way, for his opinions, which ...otherwise have fully brought ...his examination. *Wellman's The Art of Cross examination*, pp. 74-75

"A successful method of ... and gradually ... defended If th... now and then ... witness is to be taken over is a very different one from that which the examiner has resolved he shall travel The examiner must not, however, for an instant, lose his temper, nor suffer his attention to be drawn from the time he means to take When the ... ex... de... ex... so... m... to... sw... en... 264 265

Woman witness "Women, I have usually found are much better witness of what they have seen than men Men reflect on and draw inferences from what they have seen, and are apt to mix in their evidence what they surmise must have happened with what they actually saw happening. women usually tell what they saw Their evidence, however, is reliable only so long as their passions are ... ...usband or children, or hatred ... word they utter can be trusted ... *Bar* p 69 "Now and then ... grossest perjury, but when she is called as a witness she far surpasses man in the perspicuity of her narrative and in the honesty of her replies No counsel who has any pretence to tact ever tries to get the better of a plain country woman giving evidence at the assizes T... you treat her with pr... but even these artifi... ...de up her mind in th... *Aiyar's Cross exam*...

Re examination When the cross examination of the witness is concluded, the party who called him has the right to re-examine him on all matters arising out of the cross examination for the purpose of reconciling any discrepancies that may exist between the evidence on the examination in chief and that which has been given in cross examination; or for the purpose of removing or diminishing any suspicion that the cross examination may have cast on the evidence in-chief, or to enable the witness to state the whole truth as to matters which have only been partially dealt with in cross examination If there has been no cross-ex... And it is, as a rule, unnecessary, ... already put in chief Only such ... with and arise out of the cross-ex... ever, may in his discretion ... D 50... *Queen*... that c... be pro... ...sions used by the witness on cross examination, if they be in themselves doubtful, as also of the motive by which the witness was induced to use those expressions, but I think he has no right to go further, and to introduce matter

S. new in itself, and not wanted for the purpose of explaining either the expressions or the motives of the witness '

"So far as the evidence of the opponent is to be explained away,' says *Prof Greenleaf* "contradicted, or otherwise reputed, by any process which consists merely in diminishing or negating its force, the original party has the right to do this, either by a re examination following immediately upon the cross-examination of his witness, or by new witnesses called in rebuttal after the opponent's own evidence has been put in But anything beyond this cannot belong to him as of strict right the reason being that, all questions that we asked are to be asked at the proper time,' otherwise, the trial will be in perpetual confusion (per L C *Hardwicke* in *Lord Lovat's Trial* 18 How St Tr 658), and the proper time for all matters not rendered material by the course of the opponent's cross examinations of his own witnesses' testimony is the original party s direct examination of his witnesses Nevertheless 'to obviate the effects of inadvertence,' it will often be fair to allow a party to do at a later stage what he might and should have done at an earlier one The pro[illegible]
circumstan[illegible]

[illegible] y explanatory of and rendered necessary by the opponent's and evidence which might have been introduced at an earlier stage is often difficult to draw, but the principle is apparent A variety of situations for the exercise of the discretion of the trial Court may present themselves (1) In the re examination, of a witness immediately after his cross examination, or in the stage of rebuttal after the opponent's own evidence has all been put in it may be desired to add testimony of new facts *i e* matter which was omitted in the direct examination as a whole or in that of the particular witness but might have been there put in This may be done in the tr[illegible]
or [illegible] he re examination of a particular witness
det[illegible] be desired to repeat or emphasize or
dor[illegible] testified to in chief This also may be
shc[illegible] a re examination to make corrections
and dismissed, it may become desirable to recall him to the stand for further [illegible] After a witness has been cross examined
[illegible] refused in the trial Court's discretion
[illegible] red to re examine the witness a second
[illegible] examination or after the witness has left the stand, this may be granted or refused in discretion (5) After the evidence has been put in by each party and the case declared closed, and even after argument or charge begun it may become important to supply om ss ons, and here also th[illegible]
R[illegible]) In
afte[illegible] idence
who[illegible] itness
exar[illegible] re-
[illegible] ts of the conversation not connected with the portion to which the cross examination referred *Prince* v *Samo* 7 A & E 627 If such questions are asked and answered, the witness may be again cross examined but such further cross examination will be confined to the matter so improperly introduced *Powell Ev* 540

Where [illegible]
names [illegible]

the [illegible] in [illegible] may of course relate not only to statements made in cross-examination as to the relevant facts but also as to those affecting the witness s credit as for instance to show what provocation he had received for making use of a vindictive expression which he has admitted having uttered *R* v *St George* 9 C & P 183 (489) In re exam[illegible] on no question as to the

witness's evidence in chief is not directly or indirectly challenged in cross examination, there is of course no occasion nor any right to re examine thereon *Wills Ev 2nd Ed* 328

S.
S.

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness

Cross examination of person called to produce a document

Scope of the section Where a witness is summoned by *subpoena duces tecum* merely to produce documents, he need not be sworn *Perry* v *Gibson*, 1 A & E 48; *Summer* v *Moseley* 2 C & M 477 But if he has to speak to the proper or safe custody of the document the course of business in his office with respect to documents, filing, noting, docketting, and the like or to do more than merely produce, he must be sworn *Nort Ev* 323 When a witness is not swor[illegible] son 1 A & E 48, *Summer* [illegible] x 355 But if he is called [illegible] is entitled to cross examine [illegible] This is so although he is not examined but is merely called to produce a document But a party is not entitled to cross examine a witness called by mistake, if the mistake be discovered before any question is put to him *Wood* v *Mackinson*, 2 M & R 273 In the above case *Coleridge J* said "Upon the whole it appears to me that the more satisfactory principle to lay down is this, that if there really be a mistake, whether on the part of counsel or officer, and that mistake be discovered before the examination in chief has begun the adverse party ought not to have the right to take advantage of his mistake by cross examining the witness Here the learned counsel explains that there has been a m[illegible]

[illegible] ness had [illegible] called to prove, b[illegible] ction, knew other[illegible] ted to withdraw h[illegible] here no right to [illegible]

140. Witnesses to character may be cross-examined and re-examined.

Witnesses to character

Scope Where witnesses are called simply to speak to the character of a prisoner, it is not usual to cross examine them expect under special circumstances *R* v *Hodgkiss*, 7 C & P 298, but no rule of law expressly forbids this *Taylor* § 1429, see also *R.* v *Wood* 5 Jur 225 But where a witness for the prisoner having proved that he had known him for some years, and given him a good [illegible] anythin[illegible] taken [illegible] 'Did y[illegible] objecte[illegible] prisone[illegible] of that [illegible] The m[illegible] his be[illegible] *Wood*, 5 Jurist 225

141. Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

Leading questions

Leading questions—meaning of A leading question is one which suggests to the witness the answer which it is desired he should give If the questions

2. are asked to which the answer "Yes" or "No" would be ...

... the desired answer; i e, one which is put in such a way as to suggest to the witness the answer which is expected or wanted There is no particular form which will make a question leading, or will save it from being such The fact that a question is put so as to require a categorical answer does not necessarily make it leading, though it may do so, nor does the fact that a ... so as to avoid a categorical ... *Willis v Quimby*, 31 N H 485 ... one, when it indicates to the ... miner expects and desires to have confirmed by the answer. Is not your name so and so? Do you reside in such a place? Are you not in the service of such and ... th him? It is ... conveyed to the ... desired answers ... pretends igno- ... receiving it." ... *of Judicial Evidence* It is very clear that a question is leading which suggests to the witness ... is to make, or which puts into his mou... *Turney v. State*, 16 Miss 104 But ... sting an answer or a ... Mis 620 It has often ... ding, which embodies a ... or negative *Greenl* ... "no" ... the an... leadin... "yes" ... orm 'whether or not" that is in the ... but it may be so, when proposed in that ... witness the answer desired And t... hich assumes a fact to be proved which is not proved. More properly, such questions may be called misleading, and are objectionable both as likely to mislead a fair witness *Burr Jones* § 816.

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

When they must not be asked

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved

Principle "The assigned reason ... usually has a strong feelin... is disposed to swear anythin... leading question in effect ... to give and ... unworthy ... perjury; b... witnesses, ... assent to th... of the counsel and answer as he may suggest, instead of reflecting and answering after an exertion of their own memory." *Joseph Chitty's Practice of Law*, Vol III, 892. But *Chief Justice Appleton* in his Evidence said: "The end proposed in extracting testimony is the obtaining the actual recollection of the witness, not the allegations of another person suggested to and adopted by the witness ... The real danger is that of ... interrogating and the ...

the expectation on his part and with an understanding on the part of the witness that he will assent to the truth of the false facts thus suggested ' *Appelton Ev* 227

S. 1

Scope of the section The witness must not be examined in chief by means of l

... party an opportunity for unfairly shaping the testimony if he were allowed to frame his questions to the witness in such form as to suggest what answer he desires to receive *Wills Ev* 2nd Ed p 315 Such evidence would obviously b ... of the party ... *Phip* ... v 166 Courts ... iple of of all ... Courts exclud ... terms ... Regulation Law under Reg IV of 1797, s 6, Madras Reg VII of 1827, s 36) The oldest of the Regulation Presidency of Bengal) and which may be taken in principle as a sample of the others, provides —'In the examination of witnesses leading questions suggesting an answer, or having a tendency to such suggestion, are to be carefully avoided, and the interrogatories to them are to be proposed in such general terms as may bring forth all the information they possess and lead to a discovery of the truth" Up to the point of dispute, however,—that is while the examination is introductory only to what is material,—the witness may be led Were it otherwise a very unnecessary consumption might be had of the time of the Court, and a great infliction practised on its patience *Goodeve Ev* p 215

'It is often a convenient way of examining' says *Mr Alison* to ask a witness whether such a thing was said or done, because the thing mentioned aids his recollection and brings him to that stage of the proceeding to which it is desired he should dilate But this is not always fair, and when any subject is approached, on which his evidence is expected to be really important, the proper course is to ask him what was done or what was said, or tell his own story In this way also, if the witness is at all intelligent a more consistent and intelligible statement will generally be got there by putting separate questions' *Alison s Practice*, 546

But the determination of what is, and what is not leading is in itself frequently one of difficulty, whenever the test has to be applied to any particular question And the particular difficulty on the one hand is to secure that all the essential portion of the narrative be given in its entirety and on the other to prevent a needless prolixity of statement It is not a very easy thing says *Mr Starkie*, to lay down any precise general rule as to leading questions On the one hand, it is clear that the mind of the witness must be brought into contact with the subject of enquiry, and on the other hand that he ought not to be prompted to give a particular answer ... leading any question to which the answer 'yes' or 'no' would be conclusive ... to particularize in framing the question ... each individual case *Starkie on Evidence* p 161

The "Yes or No" test suggested by *Mr Starkie* is not however it is submitted a very accurate and at all events must not be taken as an universal one There are many instances in which it would be the natural response, without the question which evoked it being leading Thus, suppose it was required ... might be ... natural ... requisite ... present? ... the quest ... words, t ... other hand all such question as— Did one say so and so ... or Did he do so and so, —while obviously capable of being answered by the curt—"Yes

or No,"—would by suggesting what it was required of the witness to state, naturally provoke the reply. An illustration may be supplied from the daily practice of all Courts, where the question is one of personal identification If there be no ground of suspicion, the individual is pointed out to the witness, as he is asked directly,—"Is that the party ?" and the answer is the simple—'Yes or No" Let the witness, however, be suspected, the question would not be allowed to be put in that form, and the witness would be told to look round the Court, and point out the individual in question The invitation to the answer—"Yes or No"—would, in truth be leading or not, according to the circumstances *Goodeve Ev* 217

One great test as to whether a question were to be regarded as leading would be its tendency to elicit an answer conveying rather in itself the result of facts, than a statement of the facts themselves, from which the Court was to draw the result Thus, if it were a question of some given arrangement come to at a ... he result whic ... and such was ... e, leaving ... is necessary, ... d one, where ... le the mind ... iquiry, when ... hecks upon ... ight require

... *Ev* p 161, *Goodeve Ev* 218

Mere suggestions in the way of stimulants to the memory accordingly would not fall within the category of leading questions, and may be made wherever the incapacity to answer sufficiently appears to arise either from a want of recollection, or absence of some connecting link with the subject of examination Thus the names of persons, or places, or dates, may be suggested, and sometimes particular transactions, or connecting circumstances Though a touch stone only to memory, they might awaken the whole association in the mind, ... all the entire tune In a ... firm, the names might ... e them on repetition, but could not rehearse them from memory So he might be asked as to his knowledge or recollection of a particular date or circumstance, and he might be led from them to more detailed allusions as to occurrences in connection with them ... have made a given statement which another ... to the latter, ...

particular conversation, ... offers, statements, or other matters sworn to have been made in the course of a conversation In such cases, therefore, this form of enquiry is absolutely necessary for obtaining complete information on the subject. So where a witness is called to prove affirmatively what a witness on the other side has denied, as for instance, to prove that on some former occasion, that witness gave a ... may frequently arise in proving ... e such other statement, without a ... *ugh, C J* said · "I have always ... the meaning of a leading question ... was an advocate who produces a ...

Leading questions such as can properly be put in cross examination of a hostile witness cannot be put by the Public Prosecutor in examination-in chief *Dhannu Beldar* v *Emperor*, 2 Pat L T 757. The refusal to allow a question to be put in cross-examination merely because it was in form a leading question

would be improper If it is so disallowed the counsel should ask both the question and the order to be recorded *Deya v. King Emperor*, 9 L B R 88= 9 Bur L T. 133=17 Cr L J. 500=36 Ind Cas 468

S. 1

If objected to, etc If the objection is not taken at the time, the answer will be taken down in the Judge's notes. Sometimes the Judge himself will interfere to prevent a leading question or series of leading questions being put; but it is the duty of the opposing counsel to take the objection, and it is only

At the same time, it is
of leading questions
much weakened, for
it scarcely escapes the notice of the Judge It is advisable, therefore, for a counsel, examining in chief or on re-examination, not to put leading questions except of course as to those points on which they are expressly permitted by the Act *Nort Ev* 325

The Court shall p
examination from being
open to review, (*Lauder v*
D 681, *Exp Bottomly*
it necessary in the interes
cases (*Phipson Ev* 453):—

(1) Introductory matters,—Leading questions may always be asked on merely introductory matters, such as name or occupation of a witness *Cockle's Cas* 266 So also leading questions are proper where they are merely introductory and designed to lead the witness more quickly to matters which are material to the issue For example, in cases of conversations, admissions or agreements, the attention of the witness may be drawn to the subject, occasion, time place
ther such person said
anything on
and if so, what he
said Questi
s and experience of a
witness are largely within the discretion of the Court, and, unless it manifestly appear that such questions are put for an improper purpose, such discretion is not receivable as error *Burr Jones* § 817

"The good sense of the rule" says *Mr W D Evans* in his *Notes to Pothier* II, 226, 'is perfectly manifest with respect to all cases where the question propounded involves an answer immediately bearing upon the merits of the cause and indicating to the witness a representation which will best accord with the interests of the party But where the questions are merely introductory, where the mere answer of "yes' or "no" will leave the point of the case precisely as it found it
nquiry
to be
etulant
position to interrupt the course of examination '

2 On other matters not in dispute A question is not objectionable as leading when it relates to matters as to which there is no dispute In most cases it is necessary to prove a certain number of uncontested facts, in order that Judge ar
surround
the pern
put in th

3 Assisting memory Even upon points which are keenly contested between the parties t
who calls him to
sought to be inquire
indication of the poi
be unintelligible.
that "A was a bankr
appear in the next Gazette,' a
pressions was allowed to be asked,
Nichols v Dowding 1 Stark 81
remember the r
suggestion, but
allowed to be

matter has been exhausted, the
ught
with
of the
f the
rringt
lways
in of
the terms by questions necessary for that; it his memory is at fault, it may suggest contemporaneous events, with a view to stimulate or fix his recollection" *Wigmore* § 777 It ... necessary to name all the details, the mention of one or more o ... collect on of the remainder ... through out the person's e ... e or alien adult A related situation is that of a person too ill or too feeble of speech to be able to articulate sentences; here the sentences may be framed for him suggestively, leaving him as little as possible to articulate and yet avoiding the danger of a misunderstood signal of assent or dissent *Wigmore* § 778

... a witness may be asked ? v *Berenger* f the witness h a question, cases often iere it would be in the highest degree unfair so to prompt the witness. *Best* s. 643, *Whart* s 502

5 Contradiction Another exception arises where it is desired to show that a witness on the opposite side has, at another time made a statement contr ... statement When the attention of such witness has been ... lleged contradictory statement, and he has ... l the direct question whether the part ... *Best Ev 10th Ed* § ... r, 3 Stark 7, ... ion on this ... h a case, the ... said relative ... leading form ... ence, *Taylor* ... should only ... he cause; the ... parts of the ... ere, however, ... radiction, the ... *Ev* 444.

6 Adverse witness A similar situation arises where the witness, though called by party examining, is in fact biassed against his cause and is thus in... testimony *In such* ... § 774 "This ... to his impres- ... situation of the ... fair account, are also very proper circumstances to be taken into account in forming its decision A son will not be very forward in stating the misconduct of his father, of which ... a servant will not, in an action against his ma ... committed by itself" *W.* ... 74; *Rice* v *Howard*, 16 Q. I ... *oles*, L R 1 P & M. 70.

Discretion of the ... certain general rules governing this ... left to the discretion of the trial J ... and the allowing or refusing leading questions is not generally a groun for appeal.

Rice v *Howard*, 16 Q B D 681; *London* v *London*, 5 Ir L R N S 27, *Barindra* v *Emperor*, 37 C 467 = 14 C W N 1111 *Ammathayarammal* v *Off Assignee*, A I R 1933 Mad 137. **S.**

When they may be asked

143. Leading questions may be asked in cross-examination.

Principle Tl
removes all danger
cross examination
mony and weaken
not only the presumable bias of the witness for the opponent's cause, but also his sense of reluctance to become the instrument of his own discrediting deprives him of any inclination to accept the cross examiner's suggestions unless the truth forces him to Accordingly it is well settled that in cross examination of an opponent's witness, ordinarily no question can be improper as leading
Parl
a
tl
fc
E
n
to the cross exam
of a hostile witne

Scope of the section 'Leading questions are admitted in the cross-examination of a witness, when much larger powers are given to counsel than in the original examination Witnesses under cross examination may be led immediately to the point on which their answers are required If they betray a zeal against the cross examining party, or show an unwillingness to speak fairly and impartially, they may be questioned with minuteness as to particular facts, or even particular expressions There can be no danger in leading too much where the witness is obst
Vol II, p 472 So as a general
cross examination the objection
in chief not ordinarily holding here
to shift the

the cross examination takes place under the assumed disadvantage of being addressed to one reluctant to tell S ill the privilege must not be abused the examination must not be made a mockery *Goodeve Ev* 228 If the witness is in fact favourable to the party cross examining him it will often weaken the effect of his evidence if he is asked leading questions in cross examination It must not put the words into the mouth of the witness which he is to echo back again,—nor may it assume, as its basis, facts as proved which have not been proved,—or ascribe to the witness statements by him which have not been uttered It is probably not very easy without illustration to convey to a mind not vested in the experience of Courts, the precise meaning of the restrictive qualification here noticed As respects the '*echoing back of the words*, the case which first furnished the
expre one of the state trials,—
t being as to the proceedings
r, was a member, and the

ness und
able to the p
ing particul
Eyre thereupon reminded the counsel, that he could not put the very words into the witness's mouth," and when the subject occurred again on the following day, *Mr Justice Buller* observed "You may lead a witness upon a cross-examination to bring him directly to the point as to the answer, but not go the length, as was attempted yesterday, of putting into the witness's mouth the very words which he is to echo back again' But in a later case, *Alderson B*,

stated that the right to lead in cross examination exists whether the witness be favourable or not *Parkin* v *Moon* 7 C & P 408 In that case the plaintiff's
's witnesses (who, it seemed
willing one on the part of the
usual way The defendant's
leading questions ought not
rson B in admitting leading
questions said ' I apprehend you may put leading questions to an unwilling witness on the examination in chief at the discretion of the Judge, but you may always put a leading question in cross examination whether a witness be unwilling or not

further qual
alling him for
ading questions
nwilling or not
(*Parkin* v *Moon* 7 C & P 409) some restriction should surely be imposed where the witness betrays a vehement desire to serve the cross examining party It is no answer to say that the party, who originally called the witness has brought the evil on his own head for a fraudulent witness might purposely conceal his lies in favour of one party, and thus induce the other to call him, or he might be an attesting witness, or other person whom it was necessary to examine in order to establish some technical part of the case To allow such a witness to have the most favourable answers suggested to him through the medium of leading questions, would be obviously unjust" *Taylor Ev* § 1431 In America the Judge in his discretion, may prohibit leading questions from being put to an adversary's witness, who shows a strong interest or bias in favour of the cross examining party and needs only an intimation to say whatever is more favourable to his cause *Moody* v *Rowell* 17 Pick 495, *Taylor* § 1431

hat may be in
it affords the
not have stated
to the same effect Conversely such a question may become improper on cross examination because it may by implication put into the mouth of an witness, a statement which he never intended to make, and thus incorrectly attribute to him testimony which is not his *Wigmore* § 780, *Courteen* v *Touse* 1 Camp 43, *Edmonds* v *Walter* 3 Stark 8 The law on the subject was thus laid down by *Mr Joseph Chitty* in his Practice of the Law, 2nd Ed III 91 ' It is an established rule as regards cross examination, that a counsel has no right, even in order to detect or catch a witness in a falsity, falsely to assume or pretend that the witness had previously sworn or stated differently to the fact or that a matter had previously been proved when it had not Indeed it
oon be debased below the
w St Tr 751 *Mr Erskine*
alleged seditious meeting
asked ' Then you were never
aracter of
a spy ? '— As you call it
were as a
spy take any title you choose
L C J
Eyre ' There should be no name given to a witness on his examination He states what he went for, and in making observations on the evidence, you may give it any appellation you please ' After repetition of the practice, *Mr Gibbs* on the other side contended ' I am sorry to interrupt you but your question
the prop
s of a cro
u can but
emphas
as you have done just now *Mr Erskine* 'But, on a cross examination
counsels are not called to be so exa
you are
permitted to lead a witness" *L*
questions that are put are not to be
upon all the previous parts of
of everybody, they load us in point of time so much, and that that
the time for observation upon the character and situation of a witness is

apparent that as a rule of evidence it ought never to have been departed from." Wigmore § 780.

Evidence as to matters in writing

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to the produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitled the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevent facts.

Illustration

The question is, whether A assaulted B. ... C deposes that he heard A say to D ... and I will be revenged on him' Th... motive for the assault, and evidence may ... is given about the letter

Object of the section In this section we have a rule for the purpose of carrying ... evidence ... grant or ... writing, ... document enforced, or the right to give secondary evidence made out ... section merely points out the manner in which the provisions of sections 91 and 92 as to the exclusion of oral by documentary evidence may be enforced by the party to the suit 'Documents which in the opinion of the Court might be produced" would of course include the cases referred to in section 91 where the law requires a matter to be reduced to the form of a document Care must, however, be taken not to apply it to cases in which oral evidence is given of statements of other people about the contents of documents, when those statements are relevant (*Vide* illustration) Suppose for instance, that the question was whether A had murdered B A witness might prove that A had said "B's bond is inequitous, I will kill him sooner than pay it," without the bond being produced, the reason obviously being that what the witness wants to prove is not the contents of the document, but A's feeling about the *contents* of the document, as applying a motive for his crime *Cun Ev* pp 64, 326. Even where the adverse party does not object it is the duty of the *Court not* to allow inadmissible evidence *Vide* s 298 *Criminal Procedure Code*; *Emperor v. ...* 67=29 C W N 300 A private diary contain... ing ... for ... like under ss 141, 157 and 159 ... make the document itself evidence ... 41=23 Ind Cas 893

Cross examination as to previous statements in writing

145. A witness may be cross-examined as to previous st... ments made by him in writing or r... into writing and relevant to matt... question, without such writing bein... to him, or being prov... but, if it i...

o contradict him by the writing, his attention must, before the vriting can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Object of the section When the contradictory statement alleged to have [illegible] by the witness was contained in a letter or other writing, the rule [illegible] (2 B & B 286 290, 293 294) [illegible] e document as his evi [illegible] the witness upon it [illegible] om B 930 So it was [illegible] and, whether, in the [illegible] the writing [illegible] to be put [illegible] examina [illegible] only *contravene the rule which* [illegible] *nt so long as that instrument* [illegible] the Court to the partial contents [illegible] it. On the other hand [illegible] e witness would be at [illegible] e object of the enquiry [illegible] to the qualification [illegible] to be used [illegible] and this has [illegible] ommon Law [illegible] n that section [illegible] follows "A witness may be cross examined as to previous statement made by him in writing or reduced into writing, relative to the *subject matter of the cause* without such writing being shown to him, but if it is intended to contradict such witness by writing, his attention must, *before* such contradictory proof can be given be called *to those parts of the writing which are to be used for* the purpose of so contradicting him Provided always, that it shall be competent for the Judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit" The English Act was restricted to civil cases only but section 34 of Act II of 1855 was equally applicable to civil and criminal cases as well This section re enacts the *provision of* section 34 of Act II of 1855

[illegible] to the rule as laid down in Queen's case "The objections [illegible] seem to be required by [illegible] e witness's [illegible] counsel's [illegible] oral inquiry [illegible] by virtue of the Primariness rule that production is required, [illegible] "that the contents of a written instrument, if it be in existence, are to be proved by the instrument itself, and not by parol evidence" (*Per Abbott C J* in the *Queen's C* [illegible] & B 286) But this rule is not violated here; for (a) the cross [illegible] contents at this stage, but [illegible] ust be warned that [illegible] witness in answer [illegible] oof of its contents, [illegible] there is no violation of the [illegible] counsel sought to take the answer as evidence of the writing's contents the principle of the [illegible] violated, for that principle is based [illegible] produce the writing [illegible] tness as evidence [illegible] away (2) From [illegible] witness without [illegible] best test of the [illegible] on or candour as [illegible] ist been deposing [illegible] f the existence and contents of [illegible] *rs*), in other words, the chance of

S.

howing to the tribunal either that the witness cannot remember or incorrectly emembers or that he is willing to falsify as to the contents, is entirely taken way by the requirement that the writing must be shown to him at that stage he rule, then, so far as it does not allow the counsel to wait until the putting in f his own case, but requires him in advance, before cross-examining, to produce n l to show the writing to the witness, is both unsound in principle and unfair n policy" *Greenl Ev* § 463(a)

Scope of the section Under this section a witness may be cross examined s to previous statements made by him in writing, when his attention may be rawn to the parts of the former writing which are to be used for the purpose f contradicting him But in the examination in chief, before the Court of ession, his attention should not be directed to his deposition before the lagistrate *Queen* v *Ramchandra*, 13 W R 18 Cr The complainant's pleader ... ting ... so, ... ving ... the

udgment, *Ainslie J* said: "We observe that the Deputy Magistrate was ltogether wrong in refusing to allow the complainants' pleader in cross examina ion to question the w ... ad made statements bef ... n all the facts of the cas ... or the first time He was, moreover, at liberty to cross examine the witnesses, s to previous statements made by them and reduced to writing, without showing he writing ... per ... hat ... ms ... ect ... nd ... is ... e used as xplaining o s not given vidence"

Where a person employed by another for the purpose of writing up his ccount books had made entries therein on information furnished by that other erson, such entries could not be regarded as previous statements made by him n writing which could be given in evidence to contradict him as witness *Juchershaw* v *New Dhermsey*, 4 B 476

If the defence wishes to cross examine a witness on a previous deposition ... s drawn to ... n In such ... the whole ... and with a view to the discrepancies being pointed out ... the time of rgument *Subbiah* v *Emperor*, 1929 M W N 789 In view of the strict anguage ... is entitled to ... ment which are ... ractice in this ... v) = 26 A L ... 1930 Lah 991, ... 59, *Kallam* v ...

The depos ... which has not been read over to the witn ... ict he witness at ... 15 04 Ind Cas 10 ...

Previous statements of a prosecution witness used under s 145, for cross examining the person or under s 155 of the Evidence Act for discrediting the evidence of the witness cannot be used as substantive evidence against the accused *Bishen Dutt* v *Emperor*, 25 A L J 994 = 105 Ind. Cas. 677 = 28 Cr L J 945 = A. I R 1927 All 705

It is not neces ary in order that an accused person may be allowed und r s 162 to contradict
used by the witne
randum of what the
45 C L J 561=
I R 1927 Cal 644, see also *Jadunandan* v *Emperor*, 101 Ind Cas 242= A I R 1927 Oudh 321

Writing need not be produced in absence of intention to contradict *Ramalka* v *Nagaram*, 92 Ind Cas 133=A I R 1925 Mad 145-48 M L J 59

A statement made by a witness before a coroner is admissible at the trial of the accused for the purpose of impug
to cro
Ind

A report made ... try male
by him in ... idence in
a judicial ... *Bithi*
Ram v *B* ... A witness
cannot be disbelieved without his attention being drawn to the documents
inconsistent ... were produced after
his examinatio ... or further cross ex
amination *I* ... 138=33 M L T 309
(P C)=1923 ... *egam* v *Ali Begam*,
9 P W R 1914-127 P L R 1914=22 Ind Cas 861

Where the purpose of the production of the document must have been well understood by the witness and from the record of the deposition it was manifest that after being shown the document, he was directly asked whether it was not a fact that he was at a particular place on the alleged date as was clear from the document and when on re examination no attempt was made to elicit explanation; *Held* the witness was properly contradicted *Baikuntha Nath* v *Prasannomoyi*, 1923 P C 109 Where a Court finds certain discrepancies between a witness's statement made before it and that previously made before another Court, the witness should be asked to explain them as required by s 145 of the Evidence Act ... 291
Previous statements, unless usc
witness given in the suit, can
cular matter or point must be pl
in view of ... unless the specific state-
men ... they cannot be used
in ev ... Cas 267 The evidence
take ... onditions and for the
purposes described in the Evidence Act, section 145 *Nga Seik* v *Nga Pu* U B R (1913)) 3rd Qr 181=22 Ind Cas 676 The deposition of a witness in a previous case is not relevant in a subsequent case in which he is examined, except to contradict him *Queen Nobo* v *Kristo* 8 W R Cr 87 Although section 145 of the evidence Act admits of previous statements being referred to, for purpose of cross examination, it does not authorise a Court to treat such statements as evidence against an accused *Rilha* v *Emperor*, 157 P L R 1911=10 Ind Cas 119=12 Cr L J 214

In a trial for giving false evidence the record of a previous deposition ...

... to the Evidence Act to try to impeach a witness by means of contradictory statement unless the contradictory statement is put to him in cross-examination *Maung San* v. *Emperor*, Ind Rul (1930) Rang 91.

Police diaries It is only what is written in the Police diaries that can be used under s. 145 of the Evidence Act to contradict the witness and what the

Sub-Inspector of Police stated that a witness said or did not say, is inadmissible The way to prove these portions of the written statement of a witness which have been specifically put to him in order to contradict him is for the accused to mark the passage or passages in the copy from the police diaries given to him and then to ask the writer of the statement to say that it is a true copy *Dharam Singh v Emperor,* 105 Ind Cas 162 = 29 Cr L J 311 = A I R 1928 Lah 507 = 9 A. I Cr R 567 If police diary is used, the provisions of s 145, Evidence Act and s. 162 of the Criminal Procedure Code will have to be borne in mind *Kashi Ram v Emperor,* 26 A L J 159 = 9 L R 11 Cr = 109 Ind Cas 120 = 29 Cr L J 472 (2) = A I R 1928 All 280 A Police officer who recorded the statements cannot be cross-examined under section 161 of the Evidence Act, with regard to such statements, such cross examinations being allowable only with regard to the entries properly recorded in the diary kept under s 172 Cr Pro Code, if the Police officer refers to such entries for the purpose of refreshing his memories *Dalon Ga v Emperor,* 33 C 1023 = 10 C W. N 890 = 1 Cr L J 79

Where a police officer making an investigation under this section took statements from the persons who were afterwards called as witnesses, the accused person would be entitled to call for and inspect such documents and cross-examine the witness thereon, as such statements would not amount to a portion of the diary referred to in section 172 *Bikas v Queen Empress,* 16 C 610; *Sheru Sha v Queen Empress,* 20 C 642, *Emperor v* [illegible] 193, *Empress v Salem Teh* 9 C P I [illegible] *Emperor,* 32 C W N 280 A statement made [illegible] be used only to contradict the witness *E* [illegible] *King Emperor v Kumaramuthu* 29 Cr L J 251, *Bhulai v King Emperor,* 11 Cr L J 117 Only those portions of the statements of witnesses made before the police as have been actually used under s. 162, Criminal Procedure Code, to contradict the witness in the manner provided in s 145, Evidence Act, in the course c[illegible] parts of the judicial record and c[illegible] parts of the e statements cannot [illegible] in determining the guilt or in[illegible] Ind Rul (1920) Lah 162

First Informa[illegible] The statement of person r[illegible] corrobor[illegible] Evidence [illegible] Act prov[illegible] *Emperor,* [illegible] *Hayat v* [illegible] R. 1928 I[illegible]

Un[illegible] secution, [illegible] applies fo[illegible] is bound [illegible] a copy th[illegible] part of [illegible] matter [illegible] enquiry or trial or th[illegible] of justice and is [illegible] ecord such opinion [illegible] d When this copy [illegible] in the r[illegible] Lah, L [illegible] also *Em[illegible]* 820, *Ha[illegible]* [illegible] 348 = A [illegible] J 14 = [illegible] put to th[illegible] *Emperor v I*[illegible]

Statem[illegible] gati[illegible] the [illegible] ness *Ahmad ly v. Emperor* 41 C [illegible] ormation report against th

It is not necessary in order that an accused person may be allowed under s 162 to contr ... contain the very words used by the ... randum of wh ... 45 C L J ... I R 1927 Cal 644, see also *Jadunandan* v ... R 1927 Oudh 321

Writing need not be produced in absence of intention to contradict *Ramakka* v *Nagaram*, 92 Ind Cas 133 = A I R 1925 Mad 145 = 48 M. L J 89

A statement made by a witness before a coroner is admissible at the trial of the accused for the purpose of impugning the credit of the witness, even though the accused had no opportunity to cross-examine the witness *Emperor* v *Raghoo*, 28 Bom L R 775 = 97 Ind Cas 37 = 27 Cr L J 1061 = A I R 1926 Bom 404

A report made by a Police officer in connection with an enquiry made by him in the exercise of his lawful jurisdiction is not admissible in evidence in a judicial proceeding unless the Police officer is examined as a witness *Bil????* *Ram* v *Kunkun Ram*, 88 Ind Cas 586 = A I R 1925 All 808 A witness cannot be disbelieved without his attention being drawn to the documents inconsistent ... were produced after his examinati ... or further cross ex amination ... 138 = 33 M L T 309 (P C) = 1923 ... *egam* v *Ali B gam*, 9 P W R 1914 - 127 P L R 1914 = 22 Ind Cas 861

Where the purpose of the production of the document must have been well understood by the witness and from the record of the deposition it was manifest that after being shown the document, he was directly asked whether it was not a fact that he was at a particular place on the alleged date as was clear from the document and when on re examination no attempt was made to elicit explanation, *Held* the witness was properly contradicted *Baikunther* *Nath* v *Prasannomoyi*, 1923 P C 409 Where a Court finds certain discre pancies betwee ... usly made before another ... required by s 145 of t ... Cas 291 Previous statem ... nce of a witness given in the suit, cannot be legitimately used, and even then the parti cular matter or point must be placed before the witness as one for explanation in view of its discrepancy with the evidence tendered, unless the specific state ments are put to the parties sought to be contradicted, they cannot be used in evidence ... Cas 267 The evidence ... onditions and for the ... *Nga Seik* v *Nga Pe* ... eposition of a witness in a previous case is not relevant in a subsequent case in which he is examined, except to contradict him *Queen Nobo* v *Kristo*, 8 W R Cr 87 ... statements being ... horise a Court to ... *Emperor*, 157 ... vious deposition ... *nment of Bengal* ... 499

When the depositions in a former criminal trial were used to contradict ... xplanation ... was ... 45 of ... N ... trary ... stery to the Ev ... ion statement *Maung San* ...

Police diaries It is only what is written in the Police diaries that can be used under s. 145 of the Evidence Act to contradict the witness and what the

material to the issue, he might be afterwards contradicted by secondary evidence Still the question remains, as to whether the cross examining party might first interpose evidence out of his own turn, to prove the loss or destruction of the document, or to show that it was in the hands of the opponent, that he had notice to produce it, and that he refused to do so; and might then cross examine the witness as to its contents *Taylor* § 1447; *Greenl Ev* § 161

Admission not put to party When an admission is not put to the party making it and the party making it is not examined on it under s 145, the admission is not legal evidence and [illegible] party *Muhar ram v Barkat*, A I R 1930 Lah [illegible] R Lah 1923 714, *Saradamba v Patta bihara m* [illegible] M L J 13 *Gopi v Emperor*, A I R 1930 Lah 191 Failure to object to the admission of a previous statement made by a witness does not amount to the use of it as substantive evidence or its use against the provision of s 145 of the Evidence Act. *Gosml v Baldeo*, A I R 1929 Pat 308

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

Questions lawful in cross-examination

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

Scope of the section Sections 132, 146, 147 and 148 together embrace the whole range of questions which can properly be addressed to a witness *R v Gopal Das* 3 M 271 (273) In section 138 it is stated that cross examination must relate to relevant facts In addition to questions on those facts a witness can be asked any questions as regards the facts mentioned in this section So this section extends the power of cross examination far beyond the limits of section 138, which confines the cross examination to relevant facts, including facts in issue *Markby Ev* p 106 All the questions covered by s 146 are governed by the provisions of ss 148, 153 *Ibid* p 107 Sections 148 152 were intended to protect the witness against being improperly cross examined *Ibid* p 107 "Cross examination to credit is necessarily irrelevant to any issue in the action, its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against th [illegible]
the presen [illegible]
witness s [illegible]
that he was uncomfortable when he [illegible]
accounts is to adopt a course which th [illegible]
George Farwell, in Bombay Cotton [illegible]
Motilal Shivlal, 19 C W N 617—17 L [illegible]
statement of a witness being testim [illegible]
them, when [illegible] was to
require the [illegible] So "it
is no doub [illegible] cross-
examination [illegible] veracity
of the witne [illegible]
always be [illegible]
understandi [illegible]
J in *Perkins* [illegible]
usually allowed great latitude of enquiry, [illegible] only by the sound discretion,

6. of principle, the skill, the ... answers with each

the parties respectively, and th
of confidence they may safe
Hathaway v *Crocker*, 7 Metc 266; *Wigmore* § 911

... to test the truthfulness candour
any question to that
t a question may tend to
fairly directed towards
, 259 It is permissible
edit but when questions
answered them, the ex
s not allowed *Muang*
xamination it is usual to
1932 Cal 474.

To test his veracity A witness may be cross examined not only as to ... to all facts which reasonably tend to affect the
cross examination
hich are relied on
ame of the witness

But this term is perhaps somewhat misleading as suggesting that any cross-examination is permissible which tends in any way whatever to disparage the character of tl ... can be legitimate
unless it has so ... means
of knowledge, ... *lls Ev*
2nd Ed 323. ... ment's
witnesses was t ... *and 6*
R 67 (H L) "I cannot help saying, that it seems to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact ... that imputation
is intended ... it by as a matter
altogether ... to explain, as
s had been put to him,
story he tells ought
of credit My lords,
witness you are bound
aking any explanation
nly a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses Sometimes reflections have been made upon excessive cross examination of witnesses, and it has been complained of as undue, but it seems to me that a cross-examination of a witness which errs in the direction of cases may be far more fair to him than to leave him without cross examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that ... credibility
ment that
mis already
impeached, and is to be impeached, is
ry to waste time in putting questions to him
ill not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted"

To discover who he is and what is his position, etc As preliminary to ... is common practice
hose behalf he was
elongs towards the
ermissible in order
in favour of the
§ 259 "The range

S. 1

of external circumstances from which probably bias may be inferred is infinite too much refinement in analysing their probable effect is out of place Accurate concrete rules are almost impossible to formulate, and where possible are usually undesirable In general these circumstances should have some clearly

e, or, as it is usually
r sorts of circumstances
to one of the parties
Davi l, 7 C & P 350), or
than a party who is involved on one
is otherwise prejudiced for or against one
ment, present or past, by one of the

parties, is also usually relevant The tendency of civil litigation between the witness and the opponent is usually relevant not only as a circumstance tending to create *feeling* but also as involving conduct expressive of feeling; and while the mere fact of litigation upon a disconnected matter may not necessarily show bias, still it is useless to attempt to distinguish and refine for the purpose of exclusion That the witness is or has been under indictment may have several bearings; (1) if the indictment, present or past, was had by the opponent's procurement or for an injury to him, it is relevant as having tended to excite in the witness a hostile feeling to him; (2) if the indictment was

beyond
tion can be attempted
suggestive of personal prejudice; and the decision should be left entirely in the hands of the trial Judge" *Wigmore* § 919

Character ... of the Evidence Act,

his truthfulness, are actual qualities having probative force because conceived of as existent in or attributed to hi
or more of these qualities, to resor
reputation is not the immediate
telling
bias, resorted
to for ure the
impor osition,
and n

Kind of character, Veracity as the Fundamental Quality From the point of view of modern psychology, the moral disposition which tends for or against fal ... tant operation in connection with othe lity and force, make it s of testimonial credit. In determining the relevancy of character as affecting the credit to be given to a
Since the ar
truth upon
and in his c
or as truth This must be
and nference Character
for er, any other trait or
quality, ... as involving necessarily
or probal uth telling This
leads us namely, whether
bad more ity in particular,

is admissible The argument for the use of bad general character to discredit a witness is, in brief, that it necessarily involves an impairment of the truth telling capacity, that to show general moral degeneration is to show an inevitable degeneration in veracity, and that the former is often more easily betrayed to observation than is the latter *Wigmore* § 922 The argument in favour of the above statement is thus forcefully stated by *Toomer J* in *State* v *Boswell* 2 Dev 210, 'Should a witness, whose general character is proverbially false to licentiousness and lewdness, who is in his habits regardless of the precepts of religion and reckless of the consequences of vice, be entitled to the same credit as another whose character is without stain, and whose whole life has been marked by piety, virtue and truth? An unprincipled man, although grovelling in other vices which he has long practised, may for selfish purposes artfully conceal the weakness of his character on the score of veracity Should not such habits lessen the weight and impair the credit of a witness, although he may have established no general character bad as to truth?". "The arguments made in answer to these" says *Prof Wigmore* ' are chiefly three (1) that as a matter of human nature, a bad general disposition does not necessarily or commonly involve a lack of veracity, and that therefore the former is of little or no bearing probatively, (2) that the estimate of an ordinary witness as to another's bad general character is apt to be formed loosely from uncertain data and to rest in large part but on personal prejudice and on mere differences of ... of belief or conduct,—a chance of error which is relatively ... and (3) ... ed ... ho ... Ch ... is

in *Atwood* v *Impson*, 20 N J ... ere to always, though they may indulge ... ng or making close bargains With ... if elevated to be senators or, legislators, or made church members or deacons, it does not always reform them The object of the law is to show the character of the witness as to telling the truth *Wigmore, Ibid* In England for the purposes of proving character by repute general character is excluded, and character for veracity only is stated *Wigmore* § 923 The statement of the patwari that he heard the landlord say that a particular person had been admitted to tenancy can be used only for the purpose of contradicting the landlord while he is being cross-examined and not for the purpose of proving the tenancy itself *Sheoprosad* v *Gudar*, 12 L R 12 Rev

Intimidating and annoying questions by cross examiner 'An intimidating manner in putting questions may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject So also questions which ... shame or anger in the witness may un... ce that the impression produced ... testimonial ... of cross-examination ..., and always used by Judges only, ... a century ago as the ... is true, are as a whole ... are in many places ... too freq... occur at all The just ... ges have sometimes stigmatized these prac... can be no doubt that the law sanctions the ... he trial Judge to use a proper discretion to pre... them' *Wigmore* § 781

... England in ... Bravo, ... n account ... umstances ... through ... standing her ... ccess in at the head of ... Court, and L... ... h a high reputation for ability in jury trials, were severely criticised as 'forensic bullies,'

and complained of as 'lending the authority of their example to the abuse of cross-examination to credit which was quickly follow l by barristers of inferior positions, among whom the practice was spreading of assailing witness with what was not unfairly called a system of innuendoes suggestions and bullying from which sensitive persons recoil' And *Mr Charles Gill*, one of the many imitators of *Russell's* domineering style was criticised as bettering the instructions of his elders'

"The complaint against Russell was that by his practices as displayed in the *Osborne* case—robbery of jewels—not only may a man's, or a woman's whole past be laid bare to malignant comment and public curiosity, but there is no means afforded by the Courts of showing how the facts really stood or of producing evidence to repel the damaging charges

"*Lord Bramwell* in an article published originally in Nineteenth Century of February, 1892 and republished in legal periodicals all over the world ... *les Russell* and his imitators *Lord* ... perience of forty seven years' practice ... uaintance with the legal profession ... however much repented of, is not the ... consequent loss of character in addition which ... ever called to the witness stand' 'Women ... and whose husband die of poison, must not complain at having the veil that ordinarily screens a woman's life from public inquiry rudely torn aside' 'It is well for the sake of truth that there should be a wholesome dread of cross-examination' 'It should be understood to be no trivial matter, but rather looked upon as a trying ordeal' 'None but the sore feel the probe' such were some of the arguments of the various upholders of broad license in examinations to credit

'*Lord Chief Justice Cockburn* took the opposite view of the question 'I ... put ques ... when they ...

all ra ... fully ... trem ... box ...

Brodie, shiver as he entered the witness box ... just as necessary for the adminis ... entitled to be treated with the ... ivate lives ought to be held as ... the Judges or the jurymen I ... o allow no question to be put to a witness, unless such as are clearly pertinent to the issue before the Court except wh ... deliberately challenged by counsel and that ... grounds"

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto.

When witness to be compelled to answer

... the word "such" it is presumed refers to the last ... the word 'any', in the earlier part ... s can be asked in cross examination ... s of a twofold character, it may be directly relevant in its bearing on, elucidating, or disproving, the very merits of the points in issue In such a case, the witness is not protected from answering, notwithstanding the answer may criminate him For section 132 is

made applicable to this case There is another kind of relevancy which is collateral to the issue Such is the character of the witness, which is always relevant, because if he is dishonest, no faith can be put in the story he utters Where questions are put to a witness, not for the purpose of proving or disproving the point in issue, but exclusively and merely to show what is the character of the witness, the Court is to decide whether the question is to be answered or not This appears to differ from section 32 of Act II of 1855 which drew no distinction between the several kinds of relevancy. Under that Act a witness was bound to answer every criminating question, while the proviso threw a protection over him from all criminal consequences, other than those attaching to perjury *Nort Ev* 329

148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations :—

Court to decide when question shall be asked and when witness compelled to answer

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies :

(2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies ·

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence :

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

Scope of the section "Such questions" mean the questions referred to ... for the ... merely ... her the ... to the

asking of such questions that the answer to them might tend to criminate the witness, or expose him to penalty or forfeiture It is necessary however to make ... ard ... to ... to ... has ... the ... th

the view of testing or injuring the witness's character When a question is asked merely for this purpose the Court is to decide whether the witness is to be compelled or not to answer it In deciding whether such a question is proper or not the C

evidence given If the evidence is very unimportant, and the imputation on the witness's character very serious, the question ought not to be asked A witness, for instance, who proves the posting of a lett r or the entry of some important item, ought not to be asked questions, the answers to which might blast his reputation With a view to such considerations as these, it is further provided that the Court may infer from the witness's refusal to answer that the answer, if given, would be unfavourable to him, but that it is not bound to do so" *Cunn Ev* pp 65-66

In *Queen v. Gopal Das*, 3 M 271 (278), *Turner C J* said "Irrelevant questions should not be allowed, and it may be implied from the limitation in this section (i e s 132) that a witness should be excused from answering ... ich are irrelevant To under- ... connection with the subsequent ... embrace the whole range of ... a witness, By section 138 it is enacted that a witness must be examined and cross-examined as to relevant fact ... be r ... he ... cha ... If ... which I understand no more than was meant by relevant to a matter in issue, the provisions of section 132 are by section 147 declared applicable to it. If the ... so far as affects the credit of

matter in is ... injuring hi ... Court will c ... whether or ... or ...

... a matter which the witness is bound to ans ... answered an irrelevant question On the oth ... constraint put upon the witness by the auti ... authority has ... bound to ... witness whe ... give an ans ... xpressed in v ... isted by cou ... quainted with ... reas ... rele ... rest of the Act impel me to the conclusion tha ... the answers to which a witness has objected or has been constrained by the Court to give I am led to the same conclusion by a consideration of the alteration

that was called for in the English law of Evidence, which the Indian Legislature appear to have had in view Except where otherwise provided by special
no witness was bound to give
witness objected on this ground
considered the objection well
founded it excused him from answering it, on the other hand if the Court improperly refused to excuse the witness, and compelled him to answer, his answer could not be used against him to support a criminal charge, except a charge of having given false evidence by his answer"

In the same case *Muthusami Ayyar J* at p 285 said 'Section, 149 which confers upon a witness the privilege
that is material only in so far as it inju
his credit, expressly gives power to the
not criminate himself until it is decided that the question must be answered

Clause (2)—So remote 'On analysing the nature of the argument from witness's character we find it to be really this The moral qualities of the person who is now speaki
probability of his truthf
be sincere or the rever e,
Obviously, our argument, because it believes in the present influence of the testifier's disposition upon his testimony, expects and requires us to exhibit to
seems indisputable But it is
's character at the precise moment
directly We may have to go
back only an hour or a day or a week, but we are at least going back some space of time when we call for either personal knowledge (of another witness) or reputation, which cannot possibly carry the proof down to the precise moment of utterance, and, besides this, the character of a former period more or less distant, always enters into every estimate (reputed or individual) of character even though it may be expressly predicated as of the present moment Nevertheless there is nothing improper, in the resorting in part or entirely, to the character of a prior time We are simply adding another step to the argument, for while first using present character to throw light on the probability of shaking the truth, we then have this present character to prove in its turn and we argue from prior character to the probability of its persistence at the time of utterance The second step of the argument is an
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149. No such question as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded

Question not to be asked without reasonable grounds

Illustrations

(a) A barrister is instructed by an attorney or vakil that an important witness is a dakait This is a reasonable ground for asking the witness whether he is a dakait

(b) A pleader is informed by a person in Court that an important witness is a dakait, the informant, on being questioned by the pleader, gives satisfactory reasons for his statement This is a reasonable ground for asking the witness whether he is a dakait

(*c*) A witness, of whom nothing whatever is known, is asked at random whether he is a dakait. There are here no reasonable grounds for the question.

(*d*) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dakait.

S.
S.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

Procedure of Court in case of question being asked without reasonable grounds.

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed

Indecent and scandalous questions

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

Questions intended to insult or annoy

Questions in cross examination N [illegible] of the Indian Evidence Act ought to be [illegible] some reasonable grounds for supposing [illegible] true Barristers, attorneys and other professional persons offending against this rule are liable to be reported to the High Court or other authority to which they are subordinate *Cun. Ev* 66 The illustrations to s 149 show that the reasonable grounds which justify such questions may be much slighter than would justify a [illegible] barrister who is t [illegible] who bear such [illegible] in so far assumir [illegible] do so with no [illegible] *Ev* 381

According to the common Law of England, "neither party, witness, counsel, jury or J[illegible]r, civilly or criminally, for words spok[illegible] v Sc[illegible] v *Skinner*, 1 Lofft 55 In *Hodgson* for d[illegible] d *Ellenborough C J* that an action [illegible] not lie against a barrister for words spoken by him as counsel in a cause pertinent to the matter in issue In *Kennedy* v *Brown*, 32 L J C P N S 137, *Earle C J* said "The advocate is trusted with interests and privileges and powers, almost to an unlimited degree His client must trust to him at times for fortune and character and life The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of [illegible] concerning the deep [illegible] soul His wor[illegible] say duty to his c[illegible] in order that he r[illegible] ourt and himself, [illegible] privileges intrusted to him, by a constant recourse to his own sense of right See also *Dawkins* v *Lord Rokby*, L R 8 Q B 255, *Muster* v *Lamb*, 11 Q B D 588. Section 150 refers to questions put in cross examination by any barrister,

pleader, vakil or attorney of the class referred to in s 148 and gives the Court the power, if such Court is of opinion that such question was asked without
Court, but it limits
tances mentioned

a charge against
re made the charge
privileged only
in the sense of being protected from disclosure to the opponent There is no privilege as against the Court The Court's disciplinary power over advocates in relation to q
reflecting on the
parties as well
instructions; they have a responsibility in the matter and are not justified in making charges of fraud and crime unless they are personally satisfied that there are reasonable grounds for putting them forward *Donald Weston* v *Peary Mohan*, 18 C. W. N. 185=40 C 898

"The bill as originally drawn up provided, in substance, that no person should be asked a question which reflected on his character as to matters irrelevant to the case before the Court, without instructions; and if the Court considered the question improper, it might require the production of the instructions; and the giving of such instructions should be an act of defamation, subject, of course, to the various rules about defamation laid down in the Penal Code. To ask such c
Court in the person ask

made to the proposal we
first place, that the d
practically insuperable;
country were already
sufficient; and in the third place—and perhaps this was the most important argument of
under so ma
kind, that
be open to
amongst the rest, that the sections pro
have accordingly been substituted for
h of Sir
to 152 were substituted for the old ones

occasions been a grave
ice is concerned speak for
ound by all honourable
ect without a few remarks

whether she was made pregnant by a certain person The question was objected
witness
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t as a

witness, the Court will have to consider the provisions of s 146 and ss 148 to 152 of the Evidence Act. *Subala Dasi* v *Indra Kumar*, 1923 Cal 815; see also *Panda* v *Abdul*, 65 Ind Cas 693=5 N. L. J 138

Indecent and scandalous questions may be put either to shake the credit of a witness or as relating to facts in issue; or to determine whether or not a fact in issue existed If they are put merely to shake the credit of a witness the Court has complete dominion over them and may forbid such questions, even though they may have some bearing on the question before the Court. But if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed, the Court has no jurisdiction to forbid such questions, though they may be indecent or scandalous Advocates have ample discretion in the conduct of cases of which they are in charge and the Court cannot better their discretion by insisting that their case should be put to this witness or that *Mahomed* v *Emperor*, 53 Ind. Cas 54=20 Cr L J 566 When a question in cross-examination reflects not on the witness but on the third party, s 150 of the Evidence Act, which must be referred back to s 146 can have no application *Peary Mohan* v *Donald Watson*, 9 Ind Cas 509 There is nothing in the provisions of the Evidence Act to prevent the prosecution of a person for defamation, if he puts defamatory que ... convey is false and ... although such que ... Weir 819

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

Exclusion of evidence to contradict answers to questions testing veracity

Exception 1—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception, 2.—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

Illustrations

(*a*) A claim against an underwriter is resisted on the ground of fraud.
The claimant is asked whether, in a former transaction, he had not made a fraudulent claim He denies it.
Evidence is offered to show that he did make such a claim

... was not dismissed from a situation for disho... ... for dishonesty

... Lahore ... that day at Calcutta He denies it

A is asked whether he himself was ...

his ... question in Lahore

In each of these cases the witness might, if his denial was false, be charged with ... family

He denies it He may be contradicted on the ground that the que ion tends to impeach his impartiality.

Principle ... to discredit a witne s introduce matter ... that, if controversy about the matte ... rt would be occup ed ... but the merits of the witness an l thus ... *Cun Ev* p 66 In *Attorney General* ... *B* said 'When the question is not relevant, strictly speaking to the issue, but tending to contradict the witness ...

would follow from a continual course of those sorts of cross examinations will ...

of this nature and the time which it is practicable to bestow upon them it we lived for a thousand years, instead of about sixty or seventy, and every case were of sufficient importance, it might be possible and perhaps proper to throw a light on matters in which every possible question might be suggested, for the purpose of seeing ... or what portion of it was no ... statements made ... to be impossible ... *tend to divert the attention of the jury from the real enquiry* before the ... ren, to the ... n, and the ... evidence ... rial of the issue between the real parties to the cause, and such illegal testimony may make ... any

of clear and easy proof If a witness is asked whether he has been previously convicted and denies it the previous conviction may be proved; *and if he is* ... are

This general rule excluding evidence to contradict a witness on ... considera ... pared with ... cessary if ... indefinitely ... collateral ... d to prove ... d that he ... *s Ev 2nd Ed* 326

Scope of the section Where a fact which has a direct bearing on *the* issue is denied by a witness, it may, of course, be proved *aliunde* See illustra tion ... to the issue,—as for ... th the answer ... the answer ... The matter cannot be carried further at the trial, except in the two cases provided by this section The only redress which a party has, is to charge the witness with perjury, and try him for it To this rule there are however two exceptions *Nort Ev* p 332 So the right to cross examine to credit is subject to this rule,

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that with two exceptions, the answers of the witness as to matters not relevant to the issue are conclusive, in this sense that they cannot be contradicted by evidence in chief on the other side *Baker* v *Baker*, 32 L J P D & A 145 However untrue they may be, they cannot be treated as if their truth or falsity were an issue in the cause *Wills Ev. 2nd Ed* 325 The rejection of the ... this evil, ... ience that ... Ex R 93 ... *Company*, 13 B 292, forms no real exception to the above rule There an action was brought by a ship owner against under writers on a policy of insurance, and the plaintiff's claim to recover as for a total loss rested on the abandonment of the vessel by the captain The captain was called as a witness by the plaintiff, and, on cross examination, ... been an habitual drun ... establish that fact, and ... as tending to show that ... judgment in reference to the abandonment, and that consequently, the judgment actually exercised by him was not entitled to any respect from the jury *Taylor* § 1439 Sections 153 and 155 of the Evidence Act must be strictly construed and narrowly interpreted if the cases governed by the Act are to be spared ... material issues, w... ies *Bhogilal* v *B*... 593=108 Ind C... does not go fa... 91, on which it is based.

Evidence to contradict relevant facts Where witnesses have been examined ... a particular place ... in to prove ... d by them ... It is not to im... evider... the d... ted a... questi... note... 11 B H... one upo... the rule... ance to... Withou... course... of At... which may assist in determining the respective value of conflicting testimony And where the trial is by a Judge and not by a jury, there is probably less reasor... – *Greenleaf on Evidence* sectio... incapable of affording any ... fact or matter in dispu... which... evide... *Kazi*...

Exception I. At the common law a witness might be cross examined as to whether he had been convicted of any felony or misdemeanour, but if he denied it he could not be contradicted, unless the commission of the offence was relevant to the issue This state of law was altered as to civil causes by section 25 of the Common Law Procedure Act, 1854 (17 & 18 Vict C 125), and afterwards as to both civil and criminal causes by the statute 28 Vict C 18, of which section 6 enacts as follows —"A witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and, upon being so questioned, if he either denies or does not admit the fact or refuses

to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court where the offender was convicted or by the Deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken) shall, upon proof of the identity of the person, be sufficient evidence of the said conviction without proof of the signature or

the same" Although

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to his credit with regard to it ... C P 696; *Wills Ev 2nd Ed* 341 Similarly in *R.* v. *Watson*, 2 Stark 189, *Lord Ellenborough* observed "For the purpose of ascertaining the credit due to witnesses, the Courts indulge free cross-examination; but when a crime is imputed to a ... of law the Court knows

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sion might not be proved directly by actual proof of accumulated crimes which demonstrated the infamy of the witness ..... that the consequences would be enormous and alarming to the administration of justice, if such evidence were to be shut out, a witness who had committed a multitude of crimes, but who had not been convicted of one, would stand as a fair and credible witness in a Court of justice" But *Lord Ellenborough L. C J.* said: "This is so clear a point and so entirely without a precedent that it would be a waste of time to call for a reply . . . The Court does not sit for the purpose of examining into collateral crimes It would be unjust to permit it for it would be impossible that the party should be ready to exculpate himself by bringing forward evidence in answer to the charge, there would be no possibility of a fair and competent trial upon the subject, and therefore it is never done" In the same ... "If this evidence were admissible it would be impossible

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testimony he has given, and as those witnesses might be cross examined ... to their conduct, such a course would be productive of endless collateral issues Suppose for instance witness A is accused of having committed some offence, ... he is asked

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may be indicted for perjury."

of auxiliary policy i e (1) the reason of confusion of issues and (2) the reason of unfair surprise *Wigmore* § 979

But when the extrinsic testimony is in the shape or a record of a judgment of ... perate (a) There is no ... r of acts of misconduct ... so the judgment cannot be re-opened and no new issues (other than the occasional ones occurring in the process of authentication of the record) are raised thereby, (b) there is no danger of unfair surprise—not, however, because (as is sometimes said) the witness well knows whether he was ever convicted, this assumes the very thing in the controv... lgment is ... not use his ... Court It ... record of a judgment of conviction may be made not because an exception is carved out of the rule, but because the reason of the rule does not apply *Wigmore* § 980

A finger print expert was called as a witness who compared certain finger prints of the accused taken in Court with some other finger prints on a paper which contained a record of certain convictions which purported to be the convictions of the accused and pronounced them to be similar *Held* that the previous convictions were not properly proved *Ramdas* v *King Emperor*, 21 C W N 469=39 Ind Cas 302

Whether subsequent pardon affects the admissibility of such evidence A pardon does not remove the admissibility of the original judgment for the purposes of impeachment, for (unless otherwise expressly declared therein) a pardon does not imply a finding of innocence of the person convicted *Mr Winnington* in arguing in *Crosby's Trial* 12 How St Tr 1296, said 'Though the offence was taken away by the pardon yet the credit of the party must be diminished thereby, and no ... consequences of a crime (though ... man a new creature, as long ... malicious spirit still remains' " ... the ground of innocence or to ... does not change th... ple that the conviction of an infamous ... general character of a person ... as a witness must be bad ... is restored by the executive ... *Doe J* in *Curtis* v *Cochran*, 50 N H 242, *Wigmore* § 980

Exception 2 This exception refers to matter which is easily susceptible of proof and strikes at the very root of the witness's trustworthiness *Cun Ev* 383 ... The legislat... *Hitchcock* 1 ... always been ... answer of ... prove in evid... be allowed ... him ... I think the expression ... subject of inquiry' is far too vague and loose to be the foundation of any judicial decision And I may say I am not at all prepared to adopt the proposition in thes... that a witness may be contradicted as to any ... t be in any way connected with the sub... with the issue as a matter capable of ... must be so far connected with it as to be a matter which if answered in a particular way would contradict a part of ... he one nor the other of these ... as connected ... observed between ... radiction as dire... before the jury ar... ter of the witness ... lings to-

S. wards one party or the other. It is certainly allowable to ask a witness in what manner he stands affected towards the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him and prevent him from [illegible] whether he has not used express[illegible] d on some one or that he would [illegible] the cause in one way or the oth[illegible] dence as to what he said,—not with[illegible] re, but to show what is the state o[illegible] may exercise their opinion as to hov[illegible] here you may show the condition c[illegible] re parties, are not to be confounded with other cases where it is proposed to contradict a witness on some matter unconnected with the question at issue." In the same case *Alderson B* said: "The question is this, can you ask a witness as to what [illegible] him of any [illegible] e at [illegible] sked [illegible] ties, [illegible] nent [illegible] be [illegible] ntra- [illegible] ther [illegible] the [illegible] re is [illegible] that you can with propriety permit a witness to be examined first and contradicted afterwards on a point which is merely and purely collateral." *Wigmore* § 1020

[illegible] circumstances and expressions indicating [illegible] ny; they are therefore also provable in [illegible] r. C. 49; *Wigmore* § 1005. In *Thomas* v [illegible] "If the question had been whether the [illegible] I think that that would [illegible] a charge, [illegible] whether the [illegible] e her the [illegible] way as [illegible] and had denied that."

A party may call evidence to show that a witness on the other side has [illegible] motive, [illegible] re bias [illegible] on the [illegible] called [illegible] hers to [illegible] he has [illegible] epted; [illegible] ribe is [illegible] offer." [illegible] ness to [illegible] within [illegible]

[illegible] 1? He [illegible] id been [illegible] the words imputed to him [illegible] that, as [illegible] e might [illegible] *Tippet*, 2

It is allowable to ask a witness in what manner he stands affected towards the oppo- to that per unprejudi would be dispose of the cause in one way or the other; and if he denies it, evidence may be given as to what he said not with the view of having a direct effect, but to show what is the state of mind of that witness, in order that the jury may exercise their opinion as to how far he is to be believed *Att Gen v Hitchcock*, 1 Ex 93 In an action on a promissory note (in which the defence appears to have been that the note was forged), the female servant of the plaintiff, who was one of the attesting witnesses to the note, was asked on cross examination whether she did not constantly sleep in the same bed with the plaintiff, which she denied *Coleridge J* held that a witness might be called by the defendant to contradict her, as the question was whether the witness had contracted such a relat ... to conspire w ... nd been a ... ed that I ... witness ... prostitute, that would have been a collateral could not have been contradicted *Thomas* ... *Collier* 15 Q B 883, Russ Cr 2319

154. The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

Question by party to his own witness

Principle The examination of an adverse party some times becomes nec dir fav des circ of case ... tile, whether or not a necessity wi ... ostile when called A witness wh ... nner at variance with his state- ment o witness him, an rules o where he seems to have forgotten some material point, it may be suggested to his mind in the form of a leading question *Mckelvey's Ev* § 250.

Scope of the section A party is his own witness as correct It is very clea may prove the truth of material facts though the effect of such testimony is to directly contradict his own witness, "and this, not only when it appears that the witness was innocently mistaken but even where the ... collaterally have the effect of showing that he ... his is now recognized ... s taken by surprise ... witness, previously called by has been false or mistaken in his prove the truth by others" This common ... witness may have answered many questions satisfactorily, and some unsatis factor ... There is no impeach- men used the occu is n

though no other witnesses are called to contradict him, the party may rely on part of such testimony, although in other parts the witness denies the facts sought to be proved It has been well said that if the other rules should prevail, 'every one would be at the mercy of his own witness, and if the first witness sworn should swear against him he would lose the testimony of all the rest This would be a perversion of justice' *Small* v *Gregory* 37 Mich 500 The right to contradict the party s own witness does not extend to every fact testified to by the witness but is limited to those which are material to the issue The mistaken or false answer of a witness respecting a fact material to be shown at the trial of a cause may always be contradicted by other proof and which may be offered by either party, but it is otherwise as to statements by the witness of matters merely collateral As to these, the party calling the witness and making the enquiry is bound *Burr Jones* § 857 Before the party calling the witness can cross examine him it is not necessary that the witness should first of all be declared hostile and question to cross examine can be allowed by the Court to be asked even though the witness does not show himself to be hostile *Ammathayarammal* v *Off Assignee*, A I R 1933 Mad 137=56 M 7=64 M L J 208, *Baikuntha* v *Prasanna Moyi*, 72 Ind Cas 286 P C

But the rule as regards a witness called by a party, who turns hostile is quite different With the permission of the Court he can be cross-examined Leading questions can be put to him and he can be impeached like witness called by the adversary The discretion of the Judge under this section is absolute and not subject to review by the Appellate Court *Rice* v *Howard* 16 B D Q 681, *Price* v *Manning*, 42 Ch D 373

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First the reason why section 154 does not say that with the permission of the Court a party many cross examine his own witness is simply that this would in strictness be a contradiction in terms Cross examination means an examination by the adverse party as distinct from the party who calls the witness (section 137) This I think is the whole explanation of the use of the phrase put any questions to him which might be put in cross examination by the adverse party The second observation is that while the mere putting of a question in a leading form is not necessarily tantamount to cross examination there is no doubt as to the power of the Judge to give leave to put a leading question to one's own witne e second part of which goes further than the Jges to give permission in certain cases C 1401=35 C W N 731=A I R 1931 Cal 401 (F B), see also *Bikram ...* v *Emperor* 57 C 801=124 Ind Cas 66=50 C L J 467=A I R 1930 Cal 139

English law as regards hostile witness It was an established rule of common law that a party should not be allowed to give general evidence to discredit his own witness *i e* general evidence that he is unworthy of belief on his oath By calling a witness a party represents him to the Court as worthy of credit, or at least not so infamous as to be wholly unworthy of it and if he ly *mala fides* ty to destroy if he spoke poke against party might ce to show that the evidence which he gave was untrue in fact 10th Ed 5 6 d it would be in the unfavourable ity, and who are r it was competent for a party to show that his own witness had made statements out of Court inc point on *Taylor* *1st* the one

hand it was urged that . . . the general rule, that a **S.** party must . . . a witness *Ph & Am Ev* 904, that to . . . would tend to multiply issues; that it would enable a party to . . .

. . . make a statement out of Court, of the purpose of its being reserved, and afterwards used to contradict him; and that the jury might regard such a statement as substantive evidence in the cause Moreover, the use of oaths and other sanctions of truth is to extract facts which parties might be willing to conceal; and the allowing a witness to be thus contradicted holds out an inducement to him to maintain by perjury in Court any false and hasty statements he may have made out of it *Best Ev. § 645* The following reasoning was put forward on the other side: "It may be argued, the evidence is not open to the objection that the party *would thus discredit* his own witness by general testimony, that although a party who calls a person of bad character as witness, knowing him to be such, ought not to be allowed to defeat his testimony because it turns out unfavourable to him, by direct proof of general bad character, yet it is only just that he should be permitted to show, if he can, that the evidence has taken him by surprise, and is contrary to the examination of the witness, preparatory to . . .
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was originally applicable only to Civil Courts but has since been extended (28 & 29 *Vict*, C 18, ss 1 3) to all Courts of judicature as well criminal as all others, and to all persons having by law or by consent of parties authority to hear, *receive*, and examine evidence, and which enacts that "A party producing a witness shall not be allowed to impea . . .
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Judge shall consider him hostile and (2) that the Judge shall also give leave, which *he* need not do even though the witness is hostile; *Cockburn C J* not altogether assenting In *Coles* v *Coles*, L R 1 P & D 70, *Sir J P. Wilde* said An adverse witness is one who does not give in evidence what the party

calling him ... ance in which h ... uth to the C ... v *Jacks* ... construed "adverse" as merely "different and ... v *Wilson*, 4 F. & F. 301; *Faulkner* v *Brine*, 1 F. and F. 254; *Martin* v. *Ins Co* 1 F & F. 505; *Anstell* v *Alexander*, 16 L T R N S 830, *R* ... 188 In *Rice* v *Howard*, L I ... "adverse" as equivalent to ... 860 (869), *Mr Justice Mukerjee* ... the opinion of the Judge, ... and not merely when his testi... *Wilde J* remarked in *Coles* ... one who from the manner in ... desirous of telling the truth; and secondly, as *Lord Campbell C J* ... in *Faulkner* v *Brine*, 1 F. & F. 254, when a witness is treated as hostile and cross examined by the party calling him, this must be done to discredit the witness altogether and not merely to get rid of part of his testimony; see also *Greenough* v. *Eccles*, 5 C B 786; *Reede* v. *King*, 30 L T. 290; *R.* v *Smith*, 2 Cr App R 86, 106 A witness who is gained over by the other party is a hostile witness *Parmeswar* v *Emperor*, 94 Ind Cas 705= ... 19=44 Ind Cas 33 ... e manner in which he ... is willing to go back ... sirous of telling the truth to the Court *Panchanon* v. *Emperor*, A. I. R 1930 Cal. 276=34 C W 526=51 C. L J 203

... ing ... ng ... of ... out ... be ... mina ... out ... ation ... tially ... r the ... ings- ... ence, ... him ... with ... pump ... *Evans* to his ... be decided by the ... upon the trial ... ay have for withholding a fair account, are also very proper circumstances to be taken into account in forming his decision A son will not be very forward in stating ... he has been the only witness; a servant ... master, be very ready to acknowledge the

... *Appleton C J* said: "If the witness is ... adverse to the part ... on which author- ... is it ... have ... ows, ... lly, ... ness, ... rom ... terest, or withheld ... to elicit the truth ... ding questions are ... r interested by the r ... & Moo 126, *R.* v.

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Chapman, 8 C. & P. 559; *R* v. *Ball*, 1 C & P. 715; *Ohlsm* v. *Terrero*, L R. 13 Ch 129; see also *Alexander* v. *Gibson*, 2 Campb 556; *Bradly* v. *Ricardo*, 8 Bing 57; *Friendlander* v. *London Assurance Co*, 4 B & Ad 193. This rule is applicable in cases of witnesses unwilling for any other reason to tell all they may know *Parkin* v *Moon*, 7 C & P. 109; *R* v *Murphy*, 8 C & P. 306; *Wigmore* § 774; *R.* v *Ball*, 8 C. & P. 745 Putting leading questions to one's own witness with the permission of the Court under ss 154 and 143 of the Evidence Act does not amount to declaring the witness as hostile and cross-examining him so as
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cross-examine him The wording of s. 154 shows that the Legislature did not intend to distinguish the law in this country from the law which obtains in England."

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Lord Ellenborough L C J in *Alexander* v *Gibson* 2 Camp 555 "If a witness is called on the part of the plaintiff, who swears what is palpably false, it would be extremely hard if the plaintiff's case should for that reason be sacrificed, but I know of no rule of law by which the truth is on such an occasion to be shut out and justice is to be perverted" Similarly in *Bradley* v *Ricardo*, 8 Bing 58, *Tindal C J* said "The object of all the laws of evidence is to bring the whole truth of
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trials, neither party does know, and much less does he guarantee the character and trustworthiness of the witness called by him *Chief Justice May*, in 11 Amer common experience show
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persons as happen to have been cognizant of the facts, and are not such as the

parties have selected at their pleasure In point of fact it is substantially true that parties call particular persons as witnesses simply because they are obliged to and can call no others If a lawsuit was a manufacture, and the party bringing it could select his materials—facts and witnesses—, there might be some propri these materials but as bot character is out of the quest he can get to make out 19 L J Q B 493 So the Indian Legislature wisely departed from the rule of English law and under this section, a person who calls a witness may with the permission of the Court ask him questions to show his general bad character *Cun Ev* 384

Prior self contradiction—Party's own witness Prior self contradiction neutralizes the statement on the stand, by showing that the witness can not be correct in both statements and is as likely to be wrong in the latter as in the former, and further more, that his certain error in this one respect indicates a possibility of error upon other points But what is not to be necessarily implied from this error is any reflection upon the witness's character nor indeed upon any specific testimonial quality The implication is merely that in some respect his testimonial capacity is capable of error memory, perhaps through bias or disposition, but not definitely in any e rule forbidding the impeachment of one's own witness does not extend its prohibition to this sort of evidence fear of being is of adic tion as a legitimate reason for such apprehension on the part of the witness *Wigmore* § 902, see also *Parmeshwar* v *Emperor*, 94 Ind Cas 705=A I R 1926 Pat 316

Calling the other party as a witness If there is any situation in which mpeaching the first uch le t party ila he

§ 916 But it is not only the defendant at the very outset of the case, to be put in the witness nominally as plaintiff s of the plaintiff before tell his own story *Max* where a plaintiff was cross examine him Any refusal on the part of Court to allow such cross examination would cause miscarriage of justice *Radhajeebun* v *Taramonee* 12 M I A 380 (393) This case was explained and distinguished by *Mookerjee* J in *Lucharam* v *Radhacharan* 34 C L J 107 His Lordship observed In support of this position he placed Committee in *Radhajeebun* v *Taramor* 11 W R P C 31 That decision There the witnesses summoned for the plaintiff (except one) did not appear The plaintiff thereupon filed a petition praying that the case might deposition rt whether The defen submitted asked leave further questions to ntiff and dismissed expressed their d s the case went up to

the Judicial Committee, their Lordships fully concurred in the propriety of that censure Th
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a witness called by the Court. If the contention of the appellants were to prevent, it would
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Lal v *Chuni Lal*

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person who calls a witness to put any question to him which might be put in cross-examination by the adverse party The rule recognized in *Clarke* v *Saffery*, R & M 126 and *Boston* v *Carew*, R & M 127, namely, that when the witness stands in a situation which naturally makes him adverse to the party who desires his testimony, as for example, when a defendant is called as the plaintiff's witness, the party calling the witness is entitled to cross-examine him, cannot be held applicable in this country in view of the provisions of section 154 of the Indian Evidence Act Indeed, even in England, it has been ruled in later cases that the situation in which a witness stands towards either party does not give the party calling the witness a right to cross examine him unless the witness's evidence be of such a nature as to make it appear that the witness is unwilling to tell the truth; *Parkin* v *Moon*, 7 C & P 408, *R* v *Ball*, 8 C & P 745, and it now appears to be settled law in England that a party when called by his opponent cannot as of right be treated as hostile, the matter being solely in the discretion of the Court *Price* v *Manning*, 43 Ch D 373
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Necessary wi ... one of the attesting witnesses must be called ... ase of a Will (*Vide* s 68)
Hence it is conced ... peachment by the propo
nent of the Will ... , *Bowman* v *Bowman*, 2
Mos & Rob 501 ... S 745 747, *Cockburn*
C J said I ... who claims under a Will,
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See also *Jones* v *Jones*, 24 T L R 839; *Paul*
13 But in *Surendra* v *Ranee Dassi* 24 C
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called by the Court and liable to be cross-examined, as a matter of right, by ... this contention cannot be upheld under ... which provides that the Court may, in its ... alls a witness to put any questions to him which might be put in cross-examination by the adverse party. There is in this respect, no distinction on principle between an attesting witness whom a party is obliged to call and any other witness whom he may cite of his own choice, but the Court may, in the exercise of its discretion, be more easily persuaded in the former case than in the latter In view of the provision of the Indian Evidence Act, it is thus plain that there is no room for the application, in this country, of the view taken in the case of *Bowman* v *Bowman*, 2 Mo & Rob 501, *Jackson* v. *Thomason*, 1 B & S 717, and *Coles* v *Coles*, L R 1 P, & M. 70, 71, that a necessary witness, that is, one whom a party is compe ... of the C ... (1909) P ... doubtful ... in *Jones* v ... 42 Ch. D ... two important points must be borne in mind, first, that a witness is considered adverse when ... calling him ... words, as *Wil* ... from the ma ... of telling the ... v *Brine sup* ... party calling ... merely to get rid of part of his testimony."

The Court ... the discretion is given to the tri ... *Howard*, 16 Q B D 681 ... r appoint ed to examine a ... on vested in the Court under this section and the mischief due to improper cross examination could not be remedied in the trial Court *Surendra* v *Ranee Dassee*, 24 C W. N 869 It is not open to the prosecution in a criminal trial to cross ... stile witness ... in evidence ... v *Emperor*, 1 Pat 758=4 Pat L T 232=24 Cr. L J. 69=71 Ind Cas 117=1923 P. 62, ... witness is a ... le ... ore ... ce ... the witness would ... testimony ... witness by ... 1 Ind Cas. ... cution but ... *Ramjang* ... L T ... tements ... nt each ... and if ... *Jurla* v ... (596) ... Courts and the proper course in such a case is to give permission to the prosecution to ask the witness a leading question and then to read out evidence before the ... of truth *Moti* ... 151 ...

it necessary for the facts to be got from the witness by means of cross examination That ... to say "I propose to ... Court to allow such cross-exa... more than the mere position ...

... sought Such permission should ... Court indicating permission ... words by some other action of the ... *Ammo thayarammal* v *Offl Assignee*, A I R 1933 Mad 137=57 Mad 7.

The accused are entitled in cross examination to elicit facts in support of their defence from the prosecution witnesses, though the facts thus elicited had no relation to the facts to which the witnesses had testified in the examination-in chief In course of cross examination of this character, the defence are entitled in view of the generality of the provision of section 143, Evidence Act, to ask leading questions and the Court might, in its discretion under section 154 permit the ... even though he had ... d by the defence ... ge and his decision ... 19 C W N 676=

Effect of cross examining his own witness 'When a witness who has been called by the prosecution is permitted to be cross examined on behalf of the prosecution under the provisions of section 154 of the Evidence Act, the result of that course being permitted is to discredit that witness altogether and not merely to get rid of a part of his testimony *Lord Campbell C J* in *Faulkner* v *Brine*, 1 F & F 264 This has been held in a good number of cases in this country as w... of *Luchiran*, ... v *Satyendra*, ... these questions to be put by the prosecution was to deprive the accused of the benefit which might accrue to him from any statement which the witness might have made in favour of the accused and which the defence could have availed of if the witness had not been allowed to be cross examined by the prosecution For th... own ... ss examine its ... is a d... eby that there ... exam... to be cross-... That discretion has always to be exercised ... caution by the Court before which the matter comes up for consideration *Per Mookerjee J* in *Khyiruddin* v *Emperor*, 42 C L J 504 So if a counsel is given permission to cross examine his own witness it must be done to discredit his own witness altogether, and not merely to get rid of part of his testimony, because if that which is suggested sha... Therefore, his whole ... and disbelieved in part ... 173, see also *Makbul Khan* v *King Emperor*, 32 C W N 513 But in *Emperor* v. *Jehangir Cama*, A I R 1927 Bom 501–29 Bom L R 996=106 Ind Cas 106, the Court observed 'As to the legal consequence, the prosecution sought to discredit the statements of witnesses they considered hostile only on certain points It is contended for the defence that the legal result was to discredit the evidence *in toto* of those witnesses including those portions on which the prosecution wished to rely This view is founded on the dictum of *Lord Cambell C J* in *Faulkner* v *Brine*, 1 F & F 254, accepted by the Calcutta High Court in cases such as *Khyiruddin* v *Emperor*, A I R 1926 Cal 139=53 C 372 But as was pointed out in the lower Courts, the view of *Lord Campbell* is not accepted even in England. *Bradlay* v *Ricardo*, 8 Bing 57, *Halsbury's Laws of England*, Vol XIII, p 600 *It does not find support in any provision of the Indian Evidence Act or other enactment in India* With all respect, therefore, I am unable to say that the total discarding of the evidence of such witnesses can be formulated as a necessary legal result, amounting in fact to *Falsus in Uno, Falsus in omnibus* If it cannot be formulated, then the result must be the same as in other cases, and it must be a matter for the Court on

the particular facts in each case to credit or to discredit the different portions of the evidence of each witness in other cases The view taken by the Bombay Court appears to be consonant with law [illegible] d reason Nevertheless we should bear in mind the obse[illegible] v *Ricardo* 8 Bing 57, where he said [illegible] pic for counsel as to the degree of credit to [illegible] He maxim '*Falsus in Uno Falsus in omnibus*' [illegible] one point will [illegible] bility, but [illegible] t the maxim [illegible] n it merely [illegible] e told, and in the others it is absolutely false as a maxim of life, and secondly in point of utility, because it merely tells the jury what they may do in any event not what they must do or must not do and therefore it is a superfluous form of words Wigmore § 1008 Commenting on the decision of *Cunning* and *Lort Williams JJ* in *Mahbub Khan* v *Emperor, supra, Sir Courtney Terrel C J* said The theory so stated is fallacious A party is allowed to cross examine his own witness who displays hostility and not necessarily because he displays untruthfulness The theory has gained currency owing perhaps to the common belief that the sole object of cross examination is to discredit the witness whereas its main purpose is to obtain admissions and it would be ridiculous to assert that a party by cross examining a witness is thereby prevented from relying on admission and to hold that the fact that the witness is being cross examined implies an admission by the cross examiner that all the witness's statements are falsehoods The correct view was in my opinion expressed in *Jehangir* v *Emperor* 106 Ind Cas 100=29 Bom L R 996=A I R 1927 Bom 501 Moreover the opinion of *Lord Campbell* has never been followed in England and English law upon which the Indian Evidence Act is founded was clearly stated by *Tindal C J* in *Bradley* v *Ricardo*, 8 Bing 57=1 L J C P 36 *Shorai Sao* v *Emperor* A I R 1939 Pat 230 11 P L T 148 But [illegible] High Court took a different view *Panchnon* [illegible] set at rest by the [illegible] *la Kumar Sircar* v [illegible] 11 (F B) In that [illegible] was discussed The [illegible] net result of the Full Bench case is [illegible] as hostile need not be rejected, (ii) such [illegible] it is in favour of the party calling [illegible] rejected so far as it is in favour of the opposite party" See also *Ammathapuru mal* v *Official Assignee* A I R 1933 Mad 137=56 Mad 7=64 M L J 208

155 The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him —

Impeaching credit of witness

(1) by the evidence of persons who testify that they from their knowledge of the witness, believe him to be unworthy of credit,

(2) by proof that the witness has been bribed, or has accepted * the offer of a bribe or has received any other corrupt inducement to give his evidence,

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted,

*The word accepted in s 155 para (2) was substituted for the original word 'had by the Indian Evidence Act Amendment Act (18 of 1872) s 11

(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character. **S. 1**

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations

(a) A sues B for the price of goods sold and delivered to B C says that A delivered the goods to B

Evidence is offered to show that, on a previous occasion, he said that he had not del

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that A had given B the wound of which he died

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence

The evidence is admissible

Scope of the section Besides being asked questions tending to discredit, a witness may be discredited by the evidence of other persons to the effect that (1), they, from their knowledge of the witness, believe him to be unworthy of credit, (2) that the witness has been bribed or has accepted the offer of a bribe, (3) that he has on former occasions made statements inconsistent with his present evidence, and ... mns to rape in which the prosecutrix is a ... Any of the above facts ... witness and, with the con ... Here, again, precautions are taken to prevent the Court ... controversy by the following rule Where a witness states that he believes another to b ... asked his re ... his reasons ... course, they ... false evidence It is clear that but for some such rule, there might be a pitched battle fought over the character of every witness, and that suits would be simply interminable. *Cun Ev* 67 Cross examination is by no means the only method of impeaching the credit of a witness What he states as fact may always be disproved by other independent witnesses Generally speaking a party cannot discredit his own witne ... the witness of truth, and though the story he tells m ... ted, that affords no just ground for ... that the witness is not worthy of credit ... the party who calls him, is evidentl ... and the ... to impe ... *Norr Ev* ... counter ... *Best*, "there are three ways of throwing discredit on the testimony of an adversary's witness (1) By giving evidence of his general bad character for veracity, i e the evidence of persons who depose that he is in their judgment unworthy of belief, even though he made the st ... to what they know ... particular f ... occasions made statements inconsistent with the evidence he has g ... proving misconduct connected with proceedings, or other circumstances showing

S. that he does not stand indifferent between the contending parties Thus it may be proved that a witness has been bribed to give his evidence or has offered bribes to others to give evidence for the party whom he favours or that he has used expressions of animosity and revenge ... whom he bears testimony etc ' *Best* s 644 The Indi... first two instances *in toto* and has taken ...

...ssible to prove that a witness ... *Case,* 7 How St Tr 446, *All Gen* ... is also taken from the Engl...h ... f rape and when the prosecutrix is examined

Under the provisions of section 155 of the Evidence Act the credit of a witness may be impeached by proof o... ...nsistent with any part of the statement which is liable to ... *G Ay* *Maung* A I R 1927 Rang 247 = 6 I ... A I R 1927 Rang 247 This section does not allow evidence of witness's general bad character to be brought in *Maung San* v *Emperor,* Ind Rul (1930) Rang 91

Clause (1) This clause is chiefly based on *Queen* v *Brown,* L R 1 C C R 70 = 36 L J M C 59 At the close of the case for the prosecution the counsel after having called several witnesses to character, proposed to call witnesses to prove that they would not believe ... their oaths The Court decided on refusing ...

... the Court for the opinion of the Court of Criminal Appeal, whether the evidence tendered by the defendant's counsel ought to have been received or not The Court consisting of *Kelly C B,* *Martin B,* and *Byles Keating* and *Shee JJ* declining to hear any further argument on the subject observed that all the text writers were agreed that the evidence could be given, and that the practice was so ancient, and hitherto so undoub... ...e authority of the legislature ... an opponent's witness bears ... ...nworthy of belief *R* v *Watson* ... Stark 159 ... proposed questions being ' Have you the means of knowing what the general character of his witness was ?' and 'From such ... ...lieve him on his oath ?' *Mawson* ... v *Brown* L R 1 C C R 70 ... e put in that way, as it would ... bout the means of knowing the ... what degree of credit was due to the assertion, and the means that witness then called had of informing himself ... e the question may be shortened thus ... ss would you believe him on his oath ?' ... St Tr 253 counsel asked "Is he a ... oath or not ? Witness ' I must tell ... istakes about his own wife that by God, I would not take his word for a half penny" So the law is that ' you may ask ... at law ... s & B ... *Rudge* ... *'s Trial* ... *ckinson* ... ' When ... ...mitted to call after ... ou believe ... Tr 812 ... 126 In ... s is objected to ... e, but specific ... not admis... *Abbott J* ... ony of ... ne case

S.

Bayley J said: "The witness ...
his oath" See also *R* ...
R v *Hemp*, 5 C & ...
Cox Cr 48; *R* v. *Du* ...
enquire whether they ...
character, and whether ...
oath' *Phillipps' Evidence* 1st Ed 109 Commenting on this passage *Prof. Wigmore* says. 'We are now in a position to understand the language of the ...
... e, for instance,
... '*in the sense of particular acts*

... they employed the term 'general character', any meaning of 'reputation,' as distinguished from personal knowledge, was far from their minds, and would have been ...
L & C 520, se ...
character, and ...
both ...

... testimony of others cannot be ...
... entitled to depose ...
general opinion ...
oath" Vide 1s ...
Law Vol I, at ...
witnesses who w ...
oath" So the ... evidence
is to be given ... acts
The same law ... m the
explanation, which enjoins that in cross-examination he may be asked his reasons for his belief

Estimate of a witness in another case. Evidence of a particular estimate formed by ...
of a witness ...
matter of ...
L R 2 ...
a witness ...
before it and not on what another Court thought of the witness in another case, and therefore the opinion of Court in another case as to the witness cannot be put in to impeach his credit *Chandreshwar Prosad* v *Bisheswar Prosad*, A I R 1927 Pat 61 = 101 Ind Cas, 289 = 5 P 777

Re establishment of credit 'Where the general reputation of a witness has been thus impeached the party calling him may re establish his credit, by cross examining the witnesses (vide *Explanation*), who have spoken against him as to the means ... (*Mawson* v *Hartsink*, 4 Esp ... ose
testimony they ... by
calling other ... v
Murphy 19 How ...
tion of the impeachm ...
to impeach A, and C ...
end of this process, ...
in a mass of testimony amounting to not much more than mutual verification Three courses are open to pursue first, to exclude absolutely the impeachment of the character of an impeaching witness, secondly, to admit the impeachment of an impeaching witness, but no more, thirdly, to admit it only to such an extent as the discretion of the trial Court deems best The preferable rule is the third" *Wigmore* § 895

Foundation for discrediting a witness By the English law it is necessary, before giving evidence for the purpose of discrediting a witness, to lay a

foundation for the evidence to be given by the interrogation of the witness himself and his denial This is not necessary under the present Act *Cun Ev* 386

Clause (2)—By proof that the witness has been bribed or has accepted the offer of a bribe etc The word "accepted" was substituted by Act XVIII of 1872 for the word "offered" This substitution was probably made in accordance with the rule of law laid down in *Att Gen v Hitchcock*, 16 L J Ex 259= 1 Ex 91, where the defendant a maltster, was charged on information with having used a c ... entry thereof, as required by ... that the cistern had been used, ... excise officers had offered him £20 to say the cistern had been used, and he denied that he had made such statement The defendant's Counsel thereupon called Cook, and proposed to ask him whether the witness had told him so The evidence was disallowed *Pollock C B* in delivering his judgment said, "In the present case it would not be proved that a bribe was offered to the witness and not accepted, for such a fact is clearly irrelevant to the matter in issue, The offer of a bribe is a matter of no importance, if it be not accepted, for it does not disparage the party to whom it is offered" In the same case *Alderson B* said "The offer of a bribe by a witness to another, or the fact of a bribe having been accepted by him, tends to show that he is not impartial" *Rolf B* added "The offer of a bribe, if rejected, has no bearing upon the credit of the witness" "The alteration", says *Mr Justice Cunningham* "like several of the amendments introduced by Act XVIII of 1872, appears to have been made without adequate regard to the conside ... framers of the Act to word it as they did" *Cun* ... where the witness in question has merc ... any sort as to the witness's testimony can ... deprives the offer of all its force in that respect From the point of view of ... ption is admissible against ... but this involves the necessity ... a matter not always feasible

Wigmore § 96...

Receipt of money for testimony The witness's receipt of money for testimony may indicate corruption in two ways, first, from the conduct in receiving it, may be inferred a willingness to speak falsely, secondly, from the fact of its having been received or promised, may be inferred an interest in favour of the cause of the giver, just as any fact of pecuniary interests make probable such a partiality *Wigmore* § 961

Clause (3)—Evidence of former inconsistent statement Vide illustrations (a) and (b) Any statement, verbal as well as written, may be used for this purpose The witness must be specifically asked whether he made such and such statements, before he can be contradicted by them through another witness Where the statement ... section 145 *Norton Ev* 331 ... that derogates from the credit of a ... ntrary to what he asserts, and ... in as much as contraries cannot be ... overthrows his testimony is ... t he says be contradictory, that ... tally opposite cannot receive belief from the attestation of any man *Gilbert's Evidence* pp 147, 150 "We simply set the two against each other, perceive that both cannot be correct and immediately conclude that he has erred in one or the other, but without determining which one It is the repugnancy and inconsistency that demonstrates his error and not the superior credibility of the prior statement Thus, we do not necessarily accept his former statement as replacing his present one, the one merely neutralizes the other as a trustworthy one" *Wigmore* § 1018 It is ... forbids the use ... prior contra ... *Ibid* In All ... uestion is not ... contradict the ... at he in that

particular instance speaks falsely, and although it is (thus) not altogether im-
o general public convenience, for great
. continual course of those sorts of cross-
case of a witness being called for the
reasons of auxiliary policy, inconsistent
be shown This section lays down the
Kureem, 17 C 311, *Wilson J* said "I am
the Evidence Act the words, 'which is
... contradicted, mean 'which is relevant to the issue" Now the
question is what matters are not relevant The only test in vogue that has
of application—
"Could the facts,
e been shown in
evidence for any purpose independently of the self-contradiction?' In that
case *Pollock C B* said 'My view has always been that the test whether
the matter is collateral or not is this If the answer of a witness is a matter
which you would be allowed on your part to prove in evidence, if it have
such a connection with the issue that you would be allowed to give in evidence,
then it is a matter on which you can contradict him" In the same case
Alderson B said, "The question is this, can you ask a witness as to what
he is supposed to have said on a previous occasion? You may ask him any
fact material to the issue, and if he denies it you may prove that fact, as you
are at liberty to prove any fact material to the issue'

Th ... enough
to per ... witnesses
made ... writing
it is undesirable to permit the putting of such questions In such a case the
written ... proper and right thing to
prove ... the provisions of s 145,
Eviden ... will have to be borne
in mind A copy of the statement made before the police cannot be used as
against the witness till he has been confronted with it The right procedure
then when ...
look
cop
All
is admissible under this section and may be relied on by the defence to impeach
the informant's credit *Azimuddi* v *Emperor*, 44 C L J 253=A I R 1927
Cal 17

Statements made by third parties to the police in the course of their
investigation are admissible to impeach the credit under s 155 of the Evidence
Act provided the person who made the statement is called as a witness *Azimuddy*
v *Emperor*, 44 C L J ... Statements made before a
police officer and reduced
to contradict a witness,
the Evidence Act had been complied with in the matter of putting specific part
of it which were to be relied upon to the witness in cross examination *Thomas*
v *Kedar Nath*, 30 C W N 835=91 Ind Cas 801=A I R 1925 Cal 1017, see
also *Ram Charitar* v *Emperor*, 3 Pat L J 568 4 Pat L W 325=45 Ind Cas
272=19 Cr L J 512

A statement made by a witness before a Coroner under the Coroner's Act
is admissible in evidence at the trial of the accused *Emperor* v *Ragho* 22 Bom
L R 775=97 Ind Cas 37=27 Cr L J 1061=A I R 1925 B 404, *In re*
Bayana, 2 Weir 821 When the persons who made certain statements are
called as witness, then those statements become admissible, not as substantive
evidence in the case, but merely as evidence to corroborate or contradict their
statements in Court *Nagina* v *Emperor*, 19 A L J 447, see also, *Malaya*
Goundan, In re, 14 L W 612=(1921) M W N 872

The statements ... in a judicial proceeding cannot be
used in any subse
down in section 33
be used either to
s 157 of the Act

5. It is not illegal to examine a police officer for the purpose of impeaching the credit of a witness who gives evidence in favour of an accused at his trial,
ment to the police officer different from and
nt statement at the trial *Emperor* v. *Jogordro,*

used under s 155 (3) o
in the case *Emperor* v
16 C W N 431 = 13 Cr i
11 B 657 In a police investigation where the statement is not reduced to writing, the officer may be examined to impeach the credit of a witness who made such statement,
11 B H C 120 The re
investigation is not adm
may be proved either
witness in Court *Baha*

Section 155 only lays down that the credit of a witness may be impeached *inter alia* by proof of former statements inconsistent with any part of his evidence which is liable to be contradict
in which the former statement is to b
statement in writing when it is sought to
dicting a witness is provided in s 145
s. 145 and is not independent of it *Gopichand* v *Emperor*, A I R 1930
491, see also *Mahla* v *Emperor*, A I R 1931 Lah. 38 = 32 P L R 259

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Emperor v
1061 = 5 Bur L J 30 (1 B)

Previous depositions of witnesses examined for the prosecution in a criminal trial can not be used to contradict what the witnesses state in their cross examination in the present trial *Jamal* v *Emperor,* 86 Ind Cas 153 = 26 Cr L J 713 = A. I R 1925 Pat 381.

A recital as to the ... not by itself admissible in evi
or cannot be found o
If he is examined as a
same *Prohlad* v *Ra*
to have strangled a pers
that the eye witness at the spot immediately after the offence was co
g helped to strangle the deceased, their
(3) to impeach the credit of the eye witness
= A I R 1931 Lah. 189 = 32 = Cr L J

Preliminary warning To obviate the objection of unfair surprise, a

... by proof of anything he may have said or declared touching ... and or words ... essary ... on or ... es of ... might

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offering such explanatory

So that if evidence of this sort could be adduced on the sudden and by surprise, without any previous intimation to the witness or to the party producing him, great injustice might be done. . . . and one of the great objects of the course of proceeding established in our Courts is the prevention of surprise, as far as practicable, upon any person who may appear therein" *Wigmore* § 1025 If the previous deposition was intended to contradict the witness at the trial, it was contrary to principle to admit the evidence in the manner adopted without first drawing the attention of the witness to every point upon which it was to be used to contradict him If the statement was intended to corroborate the witness as a whole it could not have been put in cross-examination *Emperor* v *Lakshman Totaram* 17 Bom L R 590=31 Ind Cas 351=16 Cr L J 751 If a Magistrate finds that a witness is rec

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be given an opportunity of explaining why the contradiction has occurred If he denies having made such a statement then the statement must be duly proved before it can be used to imp

made in the committing Magistrate's C

of that Court and brought on the

proof because the deposition proves itself Not so a statement attributed to a witness on police papers *Nga Pyu* v *Emperor*, 18 Cr L J 811=41 Ind. Cas 663=10 Bur L T. 259 Under this section, a witness cannot be contradicted by his previous statement if his attention has not be drawn to it as required by s 145 of the said Act *Mt Amir Begam* v *Mt Begam*, 9 P W R. 1914=127 P L R 1914=22 Ind Cas 831

Proviso (4) One of the relevant uses is that of the character of a rape-complainant for chastity The non-consent of the complainant is here a material element; and the character of the woman as to chastity is of considerable probative value in judging of the likelihood of that consent *Wigmore* § 62 In *R.* v *Ryan*, 2 Cox Cr 115, *Platt B* said "It is important to consider whether a young person in such a state of incapacity was likely to consent to the embraces of this man, because if her habits, however irresponsible she might be, were loose and indecent, there might be a probability of consent being given and a

party" Gener

woman be not

cross examinat

(*R.* v *Clarke*

counsel for the defence cannot go further, and prove specific immoral acts with the prisoner, unless he has first given the prosecutrix an *opportunity* of denying or explaining them *R* v *Cockcroft*, 11 Cox 410, *R* v *Martin*, 6 C & P 562, *R* v *Robins*, 2 M & Rob 51' It further appears *to be* the law, that although the prosecutrix may be cross examined as to particular acts of immorality with other men, she may decline to answer such questions, and if she answers th

her *R* v *Cockcroft*,

Taylor § 363 It

character or trait for

§ 62 The reason

in *People* v *Jackson*

virtue,

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Besides, if proof of particular instances should be admissible,

would be allowable, and thus there might be one or more collateral issues to

occupy the time and divert the attention of the jury Such would be the evils if the prosecution could require previous and timely notice of the particulars of the intended attack upon the conduct of the complainant but as no such notice can be enacted, there would be no means of meeting the evidence of the dissolute companions of the accused however mistaken or corrupt it might
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is 439=
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having had connection with the prisoner previously to the alleged rape (R v *Martin* 6
shew
that she
rk Ev
3rd Ed 9
refers
to such e
or that
she had the general reputation of giving about and committing immoral acts with a number of men It is not enough to show that she ran away with a man once or twice or that she had on specific occasions done something immoral *Wahid Ali* v *Emperor*, 36 C W N 356=A I R 1932 Cal 593

Explanation In the examination in chief a witness cannot be asked the reasons for his belief that another witness is unworthy of credit Such questions can only be asked in the cross examination But it is very dangerous in
for believing a witness to be
led to state any unfavourable

Impeaching credit of ones own witnesses A party is not obliged to receive as unimpeached truth every thing which a witness called by him may swear to If his witness has been false or mistaken in his testimony he may prove the truth by others *Brown* v *Bellows* 4 Pick 187, 194 (Am) According to English law 'a party ... general evidence to discredit his own witness for tha... the witness if he spoke against him and ... spoke for him
... not him
It is
oral
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than to ask a jury to find truth upon the testimony of a witness *notorious* for not speaking the truth, all the while concealing from them the fact that he is or may be a false witness, and how can it be of importance to the main purpose of the trial how or by whom the fact that the witness is not to be relied upon is made known? If he betrays the party who calls him and *falsifies* in every statement which he makes the opposite party will of course accept the treason say nothing of impeachment and leave the jury no alternative but to find an unjust verdict upon evidence which both the parties know to be rankest perjury Certainly a rule which may produce such a result ought to be at once discarded unless it can be shown to be of some some special use in the general purposes of legal controversy That a Court of justice should permit such a miscarriage on the merits because it sees or fancies it sees a shadow of unfairness in one of the parties in a matter collateral to the suit and in no way touching the justice of the case is a reproach which ought to be done away with *No body* can profit by the rule but the witness and the antagonist of the party who calls
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1J Cr L J 512

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies

Questions tending to corroborate evidence of relevant fact, admissible

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Illustration

A, an accomplice, gives an account of a robbery in which he took part He described various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself

Scope of the section This section provides for the admission of evidence given for the purpose, not of proving a relevant fact but of testing the witness's truthfulness There is often no better way of doing this than by ascertaining the accuracy of his evidence as to surrounding circumstances, though ... the facts of the case as to

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calculated to produce the same results as facts already given in evidence This
distinction ... clearly marked
although or...
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same fact

157 In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact may be proved.

Former statements of witness may be proved to corroborate later testimony as to same fact

English law
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although otherwise
date of the fact to be ...

7. But facts which are not mor
the reverse are inadmissible
by cross examination or othe
in certain cases no verdict can be obtained without the production of such evidence The corroborative facts and evidence must, however, be proved otherwise than by the testimony of the witness to be corroborated Formerly the fact that a witness had made a previous statement similar to his testimony in Court could
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establish his credit, when impeached by proof of a previous contradictory statement (*Phipson Ev* 140) When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless The witness is not helped by it, for, even if it be an improbable or untrustworthy story, it is not made more probable or more trust-worthy by a number of repetitions of it Such evidence would be both irrelevant and cumbersome to the trial, and is rejected in all Courts *Wigmore* § 1124

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can scarcely be satisfactory to any mind to say that, if a witness testifies to a statement to day under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath ... The idea that the mere repetition of a story gives it any force or proves its truth is contrary to common observation and experience that a falsehood may be repeated as often as the truth Indeed it has never been supposed by any writer or Judge that the repetition had any force as substantive evidence to prove the facts, but only to remove an imputation upon the witness . If he stood before the Court unimpeached, it was unnecessary and mischievous to encumber the Court and oppress the defendant with his garrulousness out of Court and when not on oath" *Wigmore* § 1124.

Whether this section violates the Hearsay Rule 'Though Hearsay may not be allowed as direct evidence, yet it may be in corroboration of a witness's testimony to show that he affirmed the same thing before on other occasions and that the witness is still consistent with himself" *Gilbert Evidence*, 68, 150 In this instance the utterance is used otherwise than as an assertion to be credited, and therefore the Hearsay rule is not applicable *Wigmore* § 1792

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From the position in which he stands it is considered unsafe to act upon his evidence alone Hence the rule requiring confirmation of it as to the prisoner's guilt by some independent reliable evidence But his statement, whether made at the trial or before the trial, and in whatever shape it comes before the Court is still only the statement of an accomplice, and does not at all improve in value by repetition The force of any corroboration by means of previous consistent statements must evidently depend upon t[illegible] who is consistent deserves to be believed If [illegible] true, what becomes of the virtue of previous [illegible] persistently adhere to fal ehood once uttered, there is a motive for it, and should the value of [illegible] ever come to be rated higher that it now [illegible] designing and unscrupulous persons to proc[illegible] by f[illegible] people at different times and [illegible]

This section provides an exception to the general rule of excluding hearsay ev d[illegible] is cast [illegible] proximity [illegible] statement [illegible] Cr L J [illegible] to call [illegible]ses whose evidence will be merely relevant under s 157 of the Evidence Act *Mathura* v *Emperor*, 10 Pat L T 117=8 Pat 625=A I R 1929 Pat 343 A statement by the father in the vaccination register made three years after the birth of the child does not satisfy the terms of s 157 of the Evidence Act and the same cannot be relied upon to prove the paternity of the child *K*[illegible] A sale deed dated 1910 b[illegible] to the sale It also [illegible] Poona and asked my [illegible] llot to me my one ninth share of our ancestral property, but they refused to give my share ' It was conten[illegible] were not adm ssible as evidence [illegible] ed a share of th[illegible] that though th[illegible] that it was not [illegible] in 1909 but [illegible] ence given by [illegible] *rao* 56 I A [illegible] W N 1006

Sections 157 to [illegible] that Police officers entitled to [illegible] in the Crimin[illegible] officer within [illegible] ector of the C[illegible] legally competent to investi gate', [illegible] s 157 of the Evidence Act The p[illegible] by law Whether any authority is legally competent to investigate the fact or not, is not a question of fact or a mixed question of fact or law *King Emperor* v *Nilakanta*, 1912 M W N 207=13 Cr L J 305=22 M L J 490=11 M L T Sup 1=35 M 247=14 Ind Cas 849 The ob[illegible] 288 of the Criminal Procedure Code is to [illegible] as the [illegible] the m[illegible] durin[illegible] *Chan*[illegible] suit f[illegible] land [illegible] neighbouring lands [illegible] land in suit, and [illegible] if the person in whc[illegible] admit the correctn[illegible] 1930 Cal 311=33 [illegible] proceeding, if he [illegible]

to contradict or corroborate him *Ponnusami* v *Kalyan*, A I. R 1930 Mad 770 Previous statements of witnesses are only ordinarily admissible to corroborate or contradict the witness who have made statements at the trial As to corroborating a witness it is unnecessary for the prosecution to corroborate their witnesses by previous statements until the statement made at the trial has been in one way or another, challenged *Abdul Jalil* v *Emperor*, A I R 1930 All
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aconite was administered *Held* that her statements were admissible in evidence *Emperor* v *Amode Ali*, 58 C 1228=35 C W N 573=A I R 1931 Cal 757

Absence of substantive evidence In the absence of substantive evidence first information report and other reports by witness cannot be used as corroborative evidence consequently, where a prosecution witness has gone back on the original complaint made to the police the previous statement cannot be used as corroborative evidence *Emperor* v *Nga Hlaing*, 6 R 481=A I R 1928 Rang 295 Earlier statements cannot be let in under section 157 of the Indian Evidence Act if there is present trial which may be co ud lin v *Emperor* 49 C L J 50 laimant's statements recorded aft stantive evidence *Girimalla* v

Time for giving corroborative evidence Before corroborative evidence is admissible, the evidence sought to be corroborated must have been given *Nistarince* v *Rai Nundo*, 5 C W N XVI It is doubtful whether s 136 gives the Cour ... witness to be given under s *eror* 5 L B R ative evidence been given given used under s fore and only fury he is ex ments of the corroborating witness s given by s 136 of the Evidence Act =5 Cr L J 411.

Test identification Any Magistrate is competent to hold a test identification and can prove the statements made before him under s 157 of the Evidence Act even though he is not empowered to deal with the matter under enquiry Also s 164 Criminal Procedure Code, covers the case where a records a statement made to 109 Ind Cas 225=29 Cr L J fication in the jail cannot be n the trial Such identification made by certain persons whom they recognize as having been concerned in a particular crime These statements proceedings ses, then case *but* t When obviously il is not a witness held by the police in the course of the investigation may be proved by oral evidence though the written record of the statement is not admissible *Emperor* v *Wahiuddin*, A I R 1930 Bom 158=32 Bom L R 327

ainst the accused prosecution case 17, *Chogalla* v ah 179 Section first information

received to be recorded and not a statement made by a witness during investigation after the Sub-Inspector has actually arrived on the scene and himself seen what has happened Technically speaking, it may be conceded that a first information report taken down by a police officer amounts to an entry in an official reco[illegible]
servant in th[illegible]
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[illegible] nformation report although a document of [illegible]stantive evidence, and can be used only as a previous sta[illegible] [illegible]adict the author of it and for no ot[illegible] Rul (1930) Mad 698, see als[illegible] C W N 1213=11 Cr L J 642 [illegible] L J 233=A I R 1927 Cal [illegible] A I R 1930 Mad 632=58 M L [illegible] I R 1932 Oudh 99=137 Ind [illegible]

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1925 Lah 483 [illegible] witnesses to the police in the course of [illegible] dmissible under section 157 of th[illegible] those witnesses at the trial altho[illegible] statements are rendered in admiss[illegible] lure *Baladeo* v *Emperor,* 6 Pat [illegible] 22 Cr L J 433 Statements [illegible] ised to corroborate them except [illegible] v *Emperor*, 4 Pat L W. 325=3[illegible] 512

Whether this section is affected by s 162 Section 157 of the Evidence Act is affected by s 162 of the Criminal Procedure Code so far as statements to the Police taken under s 161 whether oral or recorded are concerned *Emperor* v *Ngu Tha Din*, 4 Rang 72=96 Ind Cas 145=27 Cr L J 881=5 Bur L J 30=A I R 1926 Rang 116 (F B) The main object of the legislature in enacting this section was to prohibit the use of the statements of prosecution witnesses as [illegible] 157 [illegible] Evidence Act *Jagwa Dhanuk* v. *Emperor*, 5 [illegible] J 396=27 Cr. L J 481=A. I R 1926 Pa[illegible] 157 Evidence Act. is controlled [illegible]
Procedure Code Not only [illegible]
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7. gating Police officer; that section, so far as oral statements of the witnesses ... conflict with s 157, Evidence Act, and those oral state ... by calling him as a witness in order ... *Bhulai* v *K E*, 13 C W N 197 ... v *King Emperor*, 7 A L J 468= ... so *Emperor* v *Hanmasuddi*, 16 Bom ... *Jiybhai* 22 B 596, *Bhulai* v *King Emperor*, 13 C ... L J 117

Deposit ... The effect of section 288 of the Criminal ... a witness before the committing ... is the deposition in the Sessions Co ... s 157 of the Evidence Act and statements made by the witness before ... investigating officer are admissible for the purpose of corroborating such 'testimony'. It is in the discretion of the Sessions Judge to believe and act upon the statements before the committing Magistrate in preference to contradictory statements made before himself on the ground that the former are corroborated by statements made before the investigating officer *Velliah Kone, In re*, 45 M 766=43 M L J 222=16 L W 239=31 M L T 175 (H C)

... evidence Where ... witnesses ... ight to be ... te the oral ... Court may look into ... sion in the Indian Evidence Act which prohibits such a course ... *abuddin* v *Nafar Chandra*, 44 C L J 382=99 Ind Cas 907=A I R 1927 Cal 230 The ... Judge in a civil suit permitted an officer in charge of the Record of Right ... and to produce the statements ... notwithstanding ... statements, as ... they were exa ... sion of s 157 *Mt Hakima* v ... 209 A petition put in by a client for adjournment on the ground ... pleader could not appear on account of *hartal* is admissible in evidence in proceedings under the Legal Practitioner's Act, under s 157 of the Evidence Act in corroboration of ... his attention ... were *true* to ... N. 589=35 C

I ... th and death ... Where ... *subidar* at ... d that they made the entries at the request of ... entries are admissible in evidence under s 157 or s 159 of the Evidence Act or possibly under both sections *Rama Koer* v *Gobordhan*, 1919 Pat 352=2 Pat L J 42 ... C ... *Ballet* v *Abhoy Ram*, 12 A L J 945=24 Ind Cas 540 ... to live his statement ... the Evidence ... to corroborate ... *Emperor* v

... mortgage, and ... saction is only ... rden of proof ... t instance If ... f the revenue ... not admissible in evidence to prove ... the headman or surveyor, who maintains the register But if such officer ... as a witness and gives evidence of the terms of the report from his own memory, then such

pyitpaing is admissible in order to corroborate his testimony under s. 157. *Shwe Pan* v *Maung Po* 3 L B. R 250

A statement made by a witness to a chief constable can only be used under s 157 of the ... of the first witness at the trial Such ... furnish no legal basis for a conviction. (... 508

Previous statements might be used to corroborate or contradict statements made at the trial; not to corroborate statements made prior to trial *Emperor*, v *Akbar Badu*, 12 Bom L R 663=7 Ind Cas 933=11 Cr L J 512=34 B 599

A police inspector is an officer "legally competent to investigate the fact" ... him by the ... a v *Emperor* ...

... ing, and the witness wrote another letter to which he got a reply containing a statement of what that witness had written previously to such person, *held* that the reply ... ate the evidence of the witness *Held* ... f he was alive, may be admissible ... fact that a statement was made by a third person to the witness is admissible, but evidence of the terms of the staten ... 2 Weir 823

... trial is admissible under this s ... N 1886, 257

A statemen ... to contradict a ... But when the s ... statement is ... ng that the witness had previously (at the ... n agreement and partly in direct material ... *na*, 2 Weir 821

Under the general provision of law, any body who has seen a place may be ... the inquiry may give his dep ... idence Act in order to ... da, 12 Cr L J 480 =12 Ind Cas 83

It is doubtful whether a statement as to an event, made three days after its occurrence, is admissible under s 157 of the Evidence Act, to corroborate the witness ... *ana Thiar*, 6 M L T 17=11 Cr L J

... witnesses during a police investigation ... evidence But such statements may be ... ate the testimony of the same witness ... ment of a raped girl that she ha ... sh ... 12 ... Ind Cas 142

... evidence This section ... else as evidence for ... *Ambica Charan* v ... 91 A letter written by a Police officer to his superior ... son would make a certain statement for a certain sum of money is not under s 157 properly receivable in evidence for any purpose *Bhogilal* v *Royal Insurance Co*, 6 Rang 142=26 A L J 377=32 C W N 593=108 Ind Cas 1=47 C L J 650=30 Bom L R 818=28 L W 276=A I R 1928 P C 54=54 M L J 575 (P C)

Oral statements by witnesses in Police investigation which do not corroborate their evidence at the trial are inadmissible *Venkata Subbiah* v *Emperor*, 48 M 640=21 L W 190=1925 M W N 68=86 Ind Cas 209=26 Cr L J 721=A I R 1925 M 579=48 M L J 195 A statement made to a Police officer, not ... under s 154 of the Code of Criminal Procedure, ... that the particular statement was made ... Cas 650=22 Cr L J 418 The previous ... boration of his evidence It must be

corroborated as regards every material particular and the identity of the accused must be proved by reliable independent testimony *Reg* v *Malapa* 11 B H C A C 196 Although the mere repetition of a statement without contradiction of material discrepancy is under section 157 Evidence Act some corroboration of the truthfulness of that statement that section does not justify the use against accused persons of a previous statement by an approver relevant to contradict his retraction *Pallua* v *Emperor*, 3 P R 1904 Cr Where an entry in the vaccination register which includes a statement by a woman that a person bearing the name of the alleged father of her illegitimate child was the father of the illegitimate child is made three years after its birth the entry does not satisfy the terms of s 157 and is not admissible in evidence *Kunappa* v *Kullammal*, A I R 1930 Mad 194 = 1929 M W N 696

158 Whenever any statement relevant under section 32 or 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matters suggested

What matters may be proved in connection with proved statement relevant under section 32 or 33

Scope of the section The statements admissible under sections 32 and 33 are exceptional cases and the evidence is only admitted from the improbability or great inconvenience of producing the authors of the statements It is only just therefore that all the same safeguards for veracity should be provided as if the authors of the statements were themselves before the Court and subjected to oath and cross exa[illegible]
a person whose statement has b[illegible]
category is a witness actually [illegible]
his statement by a previous s[illegible]
which has been admitted in evi[illegible]
statement of the same person n[illegible]
v *Emperor* A I R 1926 L[illegible]
a witness is entitled to credit or [illegible]
before it and not on what another [illegible] ness in another case
because there are no [illegible] to the credibility
of the witness in [illegible] not *Chandreswar*
v *Bishwar* 5 Pat [illegible] previously made is
used as evidence under the provisions of ss 32 and 33 then any other state[illegible] s 158 for the purpose of [illegible] ared in Court and was cross- [illegible] being asked had denied the [illegible] *v Emperor*, A I R 1930 Lah 403

159 A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory

Refreshing memory

The witness may also refer to any such writing made by any other person and read by the witness within the time aforesaid if when he read it he knew it to be correct

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court refer to a copy of such document.

When witness may use copy of document to refresh memory

Provided the Court be satisfied that there is sufficient reason for the non-production of the original **S.**

An expert may refresh his memory by reference to professional treatises.

Principles When a witness's statement is offered as the basis of an evidential inference to the truth of his statement it is plain that at least three distinct elements are present, or put in another way th r u thr e pr c sses, in the absence of any one of which we cannot conceive of testimony First, the witness must know something; to this element may b iven the generic term Observation Secondly, the witness must have a recollection of the impres sions th . . may be term d Recollection Thirdly he to the tribunal, that is, the e must ba . . R lation *Wigmore* § 478 Now the is between the el m nt of Observation or the el ment of Communication or (Narration) ... is in turn reproduced and made apprehensible by others The general canon applicable to Recollection is simple, the Recollection should (as far as can be expected) correspond to and represent the impressions originally gained by observation or knowledge Various situations are conceivable, in which this essential quality of Recollection may be lacking and various detailed requirements with reference to curing or avoiding these possible deficiencies are also conceivable. *Wigmore* § 725 The cardinal principle of Narration is this, that it must correspond to the Recollection, the story told by the witness, whether orally or in writing, must represent his knowledge and recollection. *Wigmore* § 734

It is to-day generally understood that there are two sorts of recollection which are properly available for a witness,—past recollection and present recollection In the latter and usual sort, the witness has either a sufficiently clear recollection, or can summon it and make it distinct and actual if he can stimulate and refresh it, and the chief question is as to the propriety of certain means of stimulating it,—in particular, of using written or printed notes memoranda, or other things as representing it In the former sort, the witness is totally lacking in pr there was a time when h recorded so that he c use it as sufficiently This use of a past recollection depends of course on certain con ... the stimulation of ... be subject to fixed rules and it is through the ... tations of the one case to the other that ... n *Greenl Ev* § 439(a) Section 159 deals ... tion 160 refers to Past Recollection The reason of the rule has been said to be that a witness should not suffer from a mistake, and may explain an inconsistency *Per Montague Smith J* in *Holliday* v *Holgate*, 17 L T 18

Present Recollection whether there should be any fixed rules of limitation " Here the witness is pr ... existing recollection, but he is unable to ... al effort and th question is whether ... give it is under the circumstances improper ... finite it will be futile for the law to attempt to determine by fixed rules what things have or have not a potency to stimulate recollection It can only act on th circumstances of each ... the desired and only when it is apparent or likely that th ... for of words of whose truth he ... stimulation by refere ... s that any paper may in ... *Lucas* v *Leel*, 2 Lew Cr C 15 ... not ... icular (2) that the paper was not written by the witness himself is no ... *Hurry* v. *Lee*, *supra*; *Lanes* v *Reed*, *supra*, *Smith* v *Morgan* 2 M o & R ... 7, *R* v. *Watson*, 3 C & K 111, *R* v *Williams*, 6 Cox Cr 343), and it is therefore incorrect (confusing this with the Past recollection) to require that the paper be one written by the witness or under his direction or known to him to be

9. correct Nevertheless, papers prepared by others may under the circumstances of the case, be so suspicious or questionable as to make their use improper (*Noel's Motion*, 3 T R 752, *Alcock* v *Ins Co*, 13 Q B D 292, 305 *Lager* v *Wagstaff*, 5 Beav 462) (3) Further more it is not an objection that the paper is a copy, and not an original, provided it does in fact serve to revive the recollection *Turner* v *Taylor*, 3 T R 754, *Doe* v *Perkins* 3 T R 749 *Anon*, 1 Lew Cr 101, *R* v *Williams*, 6 Cox Cr 343 (4) Again, it is equally immaterial that the paper was not made at or about the time of the event for it is not used as a record of past memory, and its power to stimulate and revive the memory by the allusions which it contains must be precisely the same whether it was made at the time or not This is the necessary result of the principle involved and is maintained by a number of Courts (*Bank* v *Zorn* 14 S C 444, *Folsom* v *Logg Driving Co*, 41 Wis 602), but many, misled by the limitation applicable to a record of past recollection require that the paper should be one contemporaneous with the event (*Steinkeller* v *Newton*, 1 C & 313 *Whitfield* v *Aland*, 2 C & K 1015) (5) Upon the erroneous view just referred to, it has recently been declared that, on being surprised by the testimony of one's own witness one may not refer to former testimony or a deposition by the same witness and endeavour to stimulate the memory to a correction, basing this result chiefly on the supposed principle that the reference for refreshing must always be to a contemporary writing That this supposed principle as applied to refreshing by deposition or former testimony is wholly unsound may be understood by noting the numerous deci ... has been allowed (*R* v *Watson* 3 C & K ... *Smith* v *Morgan*, 2 Moo & R R 257), principle, there is no reason why refreshme... by the counsel's oral reference to or reading from the depos tion etc, as by the witness's own perusal of it and the precedents abundantly sustain this practice *R* v *Edwards* 8 C & P 26 (31), *R* v *Barnet* 4 Cox Cr 269 *R* v *Ford*, 5 Cox Cr 184; *R* v *Williams* 8 Cox Cr 313, *R* v *Quin* 2 F & F 818) (6) As a matter of fairness and to prevent imposition the paper must b produced in Court, on demand, for inspection and cross examination by the opponent (*Hardy's Trial* 24 How St Tr 824, *R* v *Ramsden*, 2 C & P 603 *Lord* v *Colvin* 2 Drewr 205) (7) But since in *Lord Ellenborough's* words 'it is not the memorandum that is the evidence, but the recollection of the witness,' (*Henry* v *Lee* 2 Chitty 124), the party whose witness uses it has no right to have it read to or handed to the jury (*Gregory Taverner*, 6 C & P 281), it is only the opponent who may do this in case he wishes to cast doubt on the reality of the refreshment of memory" *Greenl Ev* § 439 (c)

Scope of the section It is a well settled and undisputed principle of the law of evidence, that a witness, under certain legal restrictions, may refer to written or printed memoranda documents, papers or letters for the purpose of refresh... his recollection and memory with regard ...tifying The rule requires that a witness ... within his own knowledge and recollec... violated by permitting him to refresh his memory in the ... nted out the advantages and ... nd to consult notes or memoranda ... 'On the one hand what you ... f you allow him time to consult notes, you partly lose the advantage of that lively and quick examina... e of Judicial ... assistance is ... testimony, ... t is univer... sally agreed ... equal, and tha... or writings ir... few witnesses ... and sums, af... papers and writings which they knew to be correct at the time they were ma... *Burr Jones* § 874 *Mr Justice Strong* in the United States Supreme Court said 'How far papers, not evidence *per se*, but proved to have been true

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statements of facts at the time they were made, are admissible in connection with the testimony of a witness who made them has been a frequent subject of inquiry, and it has many times been decided that they are to be received And why they should not be? Quantities and values are retained in the memory with great difficulty If at the time when an entry of aggregate quantity or value was made, and the witness knew it was correct, it is hard to see why it is not at least as reliable as is the memory of the witness ' *Insurance Co* v *Weids*, 14 Wall (81 U S) 375 A witness, who has the means in his power can lawfully be required to look at such papers, to enable him to ascertain a fact with more precision to verify a date or to give more exact testimony than he otherwise could as to times, numbers quantities and the like *Burr Jones* s 874 "Although in general' says *Mr Starkie* ' leading questions are not to be put to a witness yet where his memory has failed, he may, even during examination, read or if necessary, hear the contents of a document read for the purpose of reviving his former recollection And if by that means he obtains a recollection of the facts themselves as distinct from the memorandum, his statement is admissible in evidence A witness is, of course, competent to testify as to his actual present recollection of a fact, although in the interval his memory may have failed, and although such defect, and the means of restoration, may be the subject of comment in cases to which any suspicion is attached' *Starkie on Evidence* p 209 'Generally speaking an instrument used for the purpose of refreshing memory, ought to be in the handwriting of the person using it, and as nearly as possible contemporaneous with the fact which it records, at the same time, neither of these conditions is absolutely indispensable A witness may refresh his memory from a dc
made, he has seen
correct
insta
woul
by it if he could swear that he examined it shortly after the time of the entry and that it was correct and that by looking at the entry he remembered that the circumstance it narrated had taken place
are kept by
time after
memoranda
that the weight to be
stances A man may
ings at which he was
a report of the procee
memory, and he kn
C 189 A Judge will attach much more weight to the evidence ... speaking ... made by his own hand than to that of on ... a memorandum made by a third pa ... some time after it was made ... requires the production of the best evidence, the memorandum itself must be produced not a copy of it, unless, indeed, the Court is satisfied that the non production of the original has been sufficiently accounted for It frequently happens that a witness makes an extract from his books, which would be themselves good sources for refreshing his memory, while the extract as a mere copy of such books is not receivable' *Starkie on Evidence* cited in *Nort Ev* 338 339 A witness who being asked in reference to any particular transaction, if he had made any entry in a register or book at or about the time when an occurrence took place such as the posting of a letter of which an entry was made might refer to such entry or memorandum to refresh his memory, but beyond that he cannot go *Queen Empress* v *Sayad Surf* ... Bat II Cr C 344 ... his memory ... onsequence of by ... le to have a his ... 10 C W N look ... ining records 107 = 4 Cr L J 247 A most regularly kept ... of facts contemporaneously made may be used for contradicting or corroborating a witness or refreshing his memory and the like under ss 141 157 and 159 of the Act, but such user does not make the document itself evidence

9 *Mukundaram* v *Dayaram*, 10 N L R 41=23 Ind Cas 893, see also *Nuna Koer* v *Gobordhan* 3 Pat L J 42=37 Ind Cas 421 A certificate of age of a private patient is not relevant as a public record under s 35 of the Evidence Act but could only be used for the purpose of refreshing the memory when he is examined as a witness [illegible] Cas 142 A reference can [illegible] as regards the date of [illegible] 72 Ind Cas 985 1923 C[illegible] over to him for the purpose of exciting his recollections *Taylor* § 1410 'If the witness cannot read and write, the proper practice is, not to read the memorandum to him in the presence of the jury, but to allow him to retire with counsel on each side and to have the memorandum read in his presence without comment' *Commonwealth* v *Fox* 7 Gray (Mass) 585, *Burr Jones* § 880

The dying statement of a deceased person must be taken in the presence of the accused, if not so taken, the writing cannot be admitted to prove the statement made The statement may be proved in the ordinary way by a person who heard it and the writing may be used for the purpose of refreshing the witness's memory *Empress* v *Samiruddin*, 8 C 211 A medical expert can refer to his report to refresh his memory *Roghuni* v *Empress*, 9 C 455 (461) =11 C L R 569, see also 2 W R Cr Let 14, 6 W R Cr Let 3, *R* v *Jadab Das*, 4 C W N 129 'When a dead body is sent to the Civil Surgeon in order to the making of a *post mortem* examination, a printed form is sent therewith which the Civil Surgeon fills up on examining the body This report is not itself legal evidence [illegible] Surgeon, who refreshes his m[illegible] *Field Ev* 7th Ed 531—532 [illegible] the head constable cannot [illegible] section 162 (1) of the Criminal Pro[illegible] be used by the Sub Inspector as a [illegible] as to what was said by the accu[illegible] ran him by witness can be used in [illegible] witness or refreshing his memory *Keyarsosh* v *Gorbad*, A I R 1930 Nag [illegible] see also *Mukundram* v *Dayaram*, 10 N L R 41=23 Ind Cas 893

Scope of sections 159 and 160 distinguished If it is merely a question of a man refreshing his memory the document itself is not tendered in evidence and the witness merely gives evidence in the ordinary way after reading what has been written To such a case s 159 applies But where the witness says in so many words that he does not recollect the facts recorded by him in the statement but it is said that they were correctly recorded, then section 160 applies and the document itself may be tendered in evidence In either case the fact [illegible] by law to [illegible] where such [illegible] statement, [illegible] 348=1931 [illegible] *an Nath* v

Any writing This section entitles a witness to refresh his memory by any writing So he is permitted to refresh and assist his memory by the use of a written instrument, memorandum or entry in a book So a ledger a log book, a workman's time book previous deposition, letter, bill of articles furnished etc can be seen by a witness to refresh his memory *Taylor Ev* §§ 1406—1410 The *pyatpaing* or outerfoil of the revenue register of mutations may also be used for refreshing the memory of a witness *Shue Pan* v *Maung Po*, 3 L B R 250, see also *MaDun* v *Lee O*, 5 L B R 40=2 Ind Cas 53, For purposes of section 159, Indian Evidence Act, 1872, it is not requisite that the writing used to refresh the memory of a witness should have been admitted in evidence Accordingly a document not produced in Court within the proper time and in consequence rejected as evidence under the provisions of Order XIII r 2, C P C may nevertheless be referred to by the party producing it or his witness to refresh his memory of the document and is otherwise within the purview of s 159 of the Evidence Act The weight of evidence, the objection to the document upon the ground that its not having been produced at the proper time renders its authenticity the subject of suspicion and all other grounds upon

which a document can be successfully impeached still remain open, but refusal to permit a man to refresh his memory by proper relevant contemporaneous document might lead to a grave injustice *Jeuan Lal* v *Nilmoni*, 55 I. A 107= 7 Pat 305=30 Bom. L R 305=107 Ind Cas 337=47 C L J 302=32 C W. N 565=A I R 1928 P C 80=26 A L J 121 The word "writing" used in this section also includes printed matter. *Ram Chandra* v *Emperor*, A I R 1930 Lah. 371

Made by himself The writing may have been made either by the witness himself, or by others, provided in the latter case, that it was read by him when the facts were fresh in his memory, and he knew the statement to be correct. *Phip Ev* 451. The witness must be able now to assert that the record accurately represents his knowledge and recollection at the time The usual phrase requires the witness to affirm th . . .
Wigmore § 747 A witness may refresl
wasil baki papers when it was prepared l
Kaya, 10 C 248, *Keramant* v *Bejoy*, 7
11 C 407, 409

At the time of the transaction The document must have been written either at th . . . . ntly afterwards that these facts wer . . . *ttn*, 2 Camp 112, *White-fiel* . . . Ir C L R 213 But so far as . . .) is concerned the fact that the paper was not drawn up about the time of the events' should not be a fault The recollection may be equally refreshed by a recent note or by some contemporaneous record It might, in fact, be argued that there was less danger of reliance upon the record itself and more probability of actual refreshment where the paper was one confessedly having no value as a contemporaneous record of past recollection There is adequate authority for the result thus required by principle Yet the greater number of decisions, and most of the *obiter dicta*, announce as a requirement that the memorandum used must have been made 'contemporaneously or nearly so' with the events, 'at or near the time' with the same varying phrases used in the rule for Past Recollection" *Wigmore* § 761 The framer of the Indian Evidence Act, in this respect also, following the English rule did not make any discrimination between Present Recollection (s 159) and Past Reollection So now the rule is that a witness may make use of notes taken at the time the fact happened *Kinloch s Case*, 25 How St Tr 937 'Where the witness goes back to a past recollection which can less easily be tested by cross examination, he may properly be asked for something more positive,—something of a quality satisfactory in itself and not merely the best available This quality the law has attempted to define, and even to test by an arbitrary rule There is found first, a general principle that the recollection, when recorded, should have been fairly fresh,—each instance being dealt with on its own circumstances, and, secondly, there is, more commonly, an arbitrary list defining the recollection as are recorded at or near the time of the events *Wigmore* § 745 In England it is not essential that the memorandum should have . . . it is enough if it has been ma . . . time when the facts we . . . reading such memo-rar . . .
enables h . . .
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Aland, 2 . . .
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of several weeks or six months was held to be . . . *Whitefield* v *Aland supra*, How St Tr 934, *Jones* v *Stroud*, 2 C & P 196, The document, however, must not have been *Steinl* . . . *ige*, 6 App Cas 159 Section 159 does . . . evidence *Our Prokash* v.

Writings made by any other person But this testimonial guarantee of
immaterial whether the witness
or printed the record It may
, it from the moment when the
witness saw it and passed judgment upon its correctness, it became for him a correct record As the mere fact of his writing it would count for nothing in itself so the mere fact of his not having been the writer is immaterial *Wigmore* § 748 If the witness saw the writing soon after it was made, and the entry corresponded with what he had himself then observed, that was tantamount to an entry made by himself *Digby* v *Steelman* I Esp 328, see also *Jacob* v *Lindsay* 460, 1 East *Burton* v *Plumer*, 2 A & E 341, *Toppan* v *Mc Gieor* 1 C & K 320, *R* v *Philpots* 5 Cox Cr 329, *Anderson* v *Walley* 3 C & K 54, *R* v *Langton*, L R 2 Q B D 296 In *Burrough* v *Martin* 2 Camp 112 *Lord Ellenborough* said 'If a witness looked at the log book from time to time, while the occurrences mentioned were recent, and fresh in his memory, it is as good as if he had written the whole with his hand' Similarly in *Lord Talbot* v *Cusack*, 17 Ir C L R 213 *O Brien J* said '(The use of memoranda made by the witness himself) has been extended to the case of entries which, though not in the witness's hand writing, were either made in his presence and read by him at the time of the transaction, or were read and examined by him shortly afterwards when the facts were fresh in his recollection and when he was enabled to ascertain that the facts stated in the entry were true" *Wigmore* § 748 When a witness wants to refresh his memory under this section, he is to do so by referring in Court to the document which he had read at or near the time of the transaction and it is the fact that he had known it to be correct when he read it that is the justification for his doing so It is quite immaterial that a document to which the witness refers in Court was not printed by the witness himself or in his presence It is essential only that he should have read it at or soon after the transaction to which it relates *Ram Chandra* v *Emperor*, A I R 1930 Lah 371

' not be admissible in evi
Tomlin 5 A & E 856) or
or an unstamped document
referred to, and user for this
ock v *Roy*, 13 Q B D 29?

Copies of documents Whether the witness can refresh his memory by referring to a mere copy of his original memorandum is a question of some difficulty and doubt in England *Taylor* § 1408 That the paper is a copy, not an original, is no essential fault The only question is whether in fact it is
genuine
1 for this purpose a
copy n
Taylor, 3 T R 754,
Duchess
erl ins 20 How St
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Cr C
umer, 2 A & E 341,
Horne v
re is no necessity of
accounting for the original in any way in the case of Present Recollection *Wigmore* § 760 But as neither the English law nor the Indian Evidence Act makes any distinction between Present Recollection (s 159) and Past Recollection, use cannot be made of copies of a document unless the Court be satisfied that there is sufficient reason for the non production of the original *Mr Starkie* lays downs the rule as follows In accordance with the rule which requires the production of the best evidence the memorandum itself must be produced
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admitted under section 160 as a record of Past Recollection a great stringency should be observed in allowing the witness to use it 'It remains to make sure' says *Prof Wigmore*, 'that the record which the witness now puts forward as a record of his prior knowledge is in fact the genuine embodiment of his past recollection While the witness's guarantee of its correctness may be

on of his guaranteed paper, S
, but also as insuring the
on his veracity, as affording
a means of testing him, and as the best proof of what was really recorded In short, the original record itself must be used in testifying, if it is procurable This rule is almost universally recognized, and of course, if the original is lost or otherwise unavailable, a copy may then be used *Tanner* v *Taylor*, 3 T R 751; *Doe* v *Perkins*, 3 T R 751, *Jones* v *Stroud*, 2 C & P 196; *R* v *Harvey* 11 Cox 546, *R* v *St Martins* 2 A & E 210, *Horne* v *Mackenzie*, 6 Cl & F 628, *Topham* v *McGregor*, 1 C & K 320, *Lord Talbot* v *Cusack*, 17 Ir C L R 213 It is true that the use of a copy lacks certain advantage, but this defect is no greater than in the ordinary instance of a contract or a deed which cannot be produced, nor is the importance of using the original here any greater." *Wigmore* § 719 Thus a sale was allowed to be proved by a clerk who refreshed his memory from a ledger, copied under his supervision from a waste book kept by himself *Burton* v *Plummer*, 2 A & E 341 A surveyor has been allowed to refer to a printed copy of a written report made by him to his employers which latter was substantially but not literally transcribed from rough notes taken by him at the time *Horne* v *Mackenzie* 6 C & F 628, *contra*, *Murrary* v *Mason*, 18 Ir L R 8, *Phip Ev* p 155 The question whether secondary evidence was in any given case rightly admitted is one which is proper to be decided by the Judge of the first instance and is treated as depending very much on his discretion His conclusion should not be overruled except, in a very clear case of miscarriage *Ningawa* v *Ramappa*, 5 Bom L R 708=28 B 94 Where the plaints in suits upon bonds by the same plaintiff having been destroyed by fire, while under the Court's custody,
were re-instituted upon duplicate copies containing particulars of the lost bonds,
might not be secondary evidence of the contents of the bonds, was a document that might be used for refreshing a witness's memory under s 159 of the Evidence Act *Tarak Nath* v *Jeamat Nasya* 5 C 353 A copy of the statement of injuries recorded in the register of medico legal cases may be used by the medical witness for the purpose of refreshing his memory but it cannot be treated as evidence *Mahomed* v *Emperor*, A I R 1926 Lah 51

Expert In all cases where skilled witnesses are called to pronounce their opinions on some scientific question they may refresh their memory by referring to professional treatises, tables, calculations lists of prices and the like For instance, an actuary might refer to the Carlisle Tables" when called upon
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he should not be asked, after such a reference whether his
not thereby confirmed *Taylor* § 1422 Ss 159 to 161 permit a limited use being made
his memory
v *Emperor*,

Statement reduced to writing by police officer A statement reduced to writing by a police officer under s 162 Criminal Pro Code cannot have the effect of a deposition, but though it is not evidence the police officer to whom it was made, may use it to refresh his memory under s 159 of the Evidence Act, and may be cross examined upon it by the counsel against whose case the testimony aided by it has been given *Queen Empress* v *Sitaram* 11 B 657, see also *Reg* v *Uttamchand* 11 B H C R 120, *Crown* v *Baloch* 4 S L R 38 Cr =7 Ind Cas 38=11 Cr L J 498 *R* v *Imam*, 11 B 659, *Rajhum* v *R* 9 C 155 Documents wherein statements of persons examined by police officer under s 119 of the Cr Pro Code
reduced
giving
being

9 C 455=11 C L R 569, *R* v *Stewart*, 31 C 1050 A witness is not entitled to insist upon a police officer refreshing his memory, during his examination in Court, by referring to certain notes prepared by such officer under s 119 of the Code In *the matter of the petition of Kali Churn Chunari*, 8 C 154=10 C L R 51

Confession A Magistrate who took down a confession, may while being examined as a witness, be allowed under s 159 or s 160 Evidence Act to refresh his memory by referring to his record of that confession *Emperor* v *Chaitu Gahera* 16 C P L R 122

Special diaries A criminal Court may permit the Police officer, who made the special diary, to look at it for the purpose of contradicting such police officer Where the Police officer does look at an entry in the diary for the ... 161 of the Evidence ... such diary and to ... ary cannot be used to enable any witness other than the Police officer who made it to refresh his memory by looking at it, and it cannot be used to contradict any witness other than such Police officer *It is the Court which is entitled to use the special* diaries for the purpose of seeking for sources and times of enquiry, and for the names of persons who may be in a position to give material evidence Neither the accused nor his agent is entitled to see the special diary for any purpose unless it has been used by th ... who made it to refresh his memory for the ... case is an accused person or his agei ... or any part of it His right is limited to that of inspection in certain cases *Queen Empress* v *Mannu*, 19 A 390 (F B)=A W N 1897, 14

Arbitration proceeding A witness who was present at an arbitration and had compared the draft and fair copy minutes made by the clerk and had found the latter to be correct, was allowed to refresh his memory as to what occurred at the arbitration, by reference to the fair copy minutes made by arbitrator s clerk *Nistarinee Dasee* v *Nundo Lal Bose*, 5 C W N xvi

Police diary If, upon the question being asked of a witness there is a lapse of memory on his part and that failure of memory can be remedied by reference to any memorandum or other ... prepared by the witness at the time, and the Court invites the witness ... ference to the writing the witness is under ar ... its duty to lay the whole truth before the Court ... *Harkhu* v *Emperor*, 19 A L J 76

160 A witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document

Testimony to facts stated in document mentioned in section 159

Illustration

A book keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept although he has forgotten the particular transactions entered

... note

record h
Jacob v
L R 2
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may be able to do either by virtue of his general custom in making su records, or (as in the common case of an attesting witness) by his assurance

S.

that he would not have made . . . *Pearson* v *Wightman*, 1 Mills Co . . . 1 5; *R* v. *St Marten* 2 A & E 213. . . . t a copy (*Doe* v *Parkins*, 3 T R . . . *Toppam* v *McGregor*, 1 C & K 320, *Lord Talbot* v *Cusack*, 17 Ir C L R 213); nevertheless, a copy may be used if the original is lost or otherwise unavailable Since the process of making a copy of it is a distinct thing from the process of making

same, except that the salesman, workman, etc, instead of handing to the bookkeeper, clerk, etc, a written statement of the transaction, makes an oral statement which is transcribed, and in effect represents the first person's recollection as orally reported by him The joint testimony of the two ought to be receivable on principle; and such is the result generally reached by the Courts, though . . . ve been made in the regular course of . . . a written record brings to the mind . . . any recollec-

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knows to be genuine, the witness may
looking at the record *Abdul Salim* v *Emp*
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those parts only which refer to the subject matter of the case (*Burgess* . . . 20 W R 720, though in *Betts* v *Betts*, 33 T. L R 200, *Low J* allowed a . . . examination thereon *Phip Ev* . . . d to by witness does not make (*Gregory* v *Tavenor*, 6 C & . . . 41) though it is otherwise with cross examination upon independent parts *Gregory* v *Tavernor*, 6 & P 280, *Phip Ed* 456 In a suit for damages for negligence in supervising a building, . . . an Engineer's Report is admis . . . Engineer makes the contents of . . . refresh his memory *Nagendra* . . . Cas 200=A I R. 1926 Cal 988.

Difference between section 159 and section 160 Under section 159 of the Indian Evidence Act, it is not necessary that the witness must be sure, that what was reduced to writing by him is a correct record It is enough if, on reading it, the true facts are recalled to his memory But if he does not actually recollect himself what the appellant said, if the words are not called to his memory, then the notes may be admitted under s 160 of the Evidence Act, if he is sure that the facts are co . . . If the words have not been correctly recorded, but . . . of those words are recorded, then the notes . . . of the Evidence Act. *In re Mylapore Krishnasami* . . . J 456=32 M 384=2 Ind Cas 33, see also *Krishnappa* v *Emperor*, 60 M L J 404=A I R 1931 Mad 430, *Jagannath* v *Emperor*, 32 Cr L J 172

161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it, such party may, if he pleases, cross-examine the witness thereupon.

Right of adverse party as to writing used to refresh memory

P . . . the use of the origina . . . an opportunity to verify . . . Even where

a copy is permitted, there is still a need in fairness or fairness for the opponent, to see the document, in order to prepare, to test the witness upon its contents Thus it is a necessary implication that the document used, whether an original or a copy, when produced in Court, shall be shown to the opponent on his request to inspect and to use in cross examination In *R* v *St Martins*, 2 A & E 210, *Patteson J* said "If he could not recollect the facts independently of the writing, the original writing ought to have been in Court in order that the other party might cross examine, not that such writing is to be made evidence itself, but that the other party is to have the benefit of the witness refreshing his memory in every part" 'If the witness cannot be compelled to produce it, he might use documents made for him by the party calling him of the accuracy of which he knows nothing , The right of a party to protection against the introduction against him of false, forged, or manufactured evidence which he is not permitted to inspect, must not be invaded a hair's breadth *Mullin J Tibbets* v *Sterbery*, 66 Barb 201.

Scope of the section, In all cases where documents are used for the purpose of refreshing the memory of a witness, it is usual and reasonable —and if the witness has no independent recollection of the fact, it is necessary,—that they should be produced at the trial and that the opposite counsel should have an opportunity of inspecting them, in order that in cross or re examination he may have the benefit of the witness's refreshing his memory by every part Neither is the adverse party, bound to put the document in, as part of his evidence, merely because he has looked at it, or examined the witness respecting such entries as have been previously referred to, but if he goes further than this, and asks questions as to other ... seems that he thereby makes it his own evider ... which the opposite party is permitted to ... ie full ... check

... his oral testimony with the ... ok at the writing to see what ... e of improper document, but it is doubtful whether he is entitled except for this particular purpose, to question the witness as to ot ... the same writing *In re Jhubboo Mahtan* ... iter foil of Land Records Register IX ... oot or the transla tion to which it refers ... re the report It does ... ng the report But ... oral report he c ... in that way, the e ... on 3 of the Evidence Act and should be placed on the record *Ma Dau* v *Lee O*, 5 L B R 40=2 Ind Cas 535

The question sometimes arises whether *memoranda*, used to refresh the memory, are ... Of course, the memoranda under discussi ... used with such writings as books of acc ... discussed, are competent as evidence, whe ... tness, after examining the memorandum finds his memory so refreshed that he can testify from recollection, independently of the memorandum, there is no reason or necessity for the intro duction of the paper or writing itself, and it is not admissible In such case the jury have no knowledge of the contents of the paper, unless opposing counsel calls for such contents for cross examination Of course, the cross-examiner has the right to inspect and use the document in order that he may test the candour and credibil ... not ... d ... s

... the use of ... ed to in his ... was in- ... missible ... remem ... y been ... moran-

dum, cannot testify to an existing knowledge of the fact, independently of the memorandum, but can testify that, at or about the time the writing was made, he knew of its contents and of its truth or accuracy In such cases, both the testimony of the witness and the contents of the memorandum are held admissible 'The two are the equivalent of a present positive statement of the witness, affirming the truth of the contents of the memorandum" *Hancock* v *Kelley*, 81 Ala 386 There are many every-day transactions in commercial

ment, and when their original entries and memoranda have been duly authenticated, and there is
danger in allowing them to b
2 Hill (N Y) 531 But
in the

ier recollects
ile the facts
earsay, and is
, *Burr Jones*

No oral statements of witnesses should be recorded in the "special" diary kept by a police officer under s 172 of the Criminal Procedure Code Whether incorporated or
by the police
produced, but o
accused may at the t
to refer to them, and th
furnish him with cop
credit of the witness
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being allowable only with regard to the
kept under section 172 Criminal Proce
police officer refers to such entries for the purpose of refreshing his memories *Dadan Gazi* v *Emperor*, 33 C 1023=10 C W N 830=4 Cr L J 79

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility The validity of any such objection shall be decided on by the Court

Production of documents

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence, and, if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code.

Translation of documents

Scope of the section If the person is required to produce a document, he is served with a *subpoena duces tecum* A *subpoena duces tecum* ought to specify the documents required, and the Court will not enforce a *subpoena* which is too general, but if a person served
documents required with him, he must pro
Eq 59, *Re Emma Silver Mining Co* I
be a document and therefore liable to production
Daye, (1908) 2 K. B. 333 A witness who is merely called to produce a docu-

sworn and in that case he cannot be cross examined *Wood* , *Cock* 197 But he may be asked what docu ... to answer the question without being

not The witne ... documents *Powell Ev* 653; see also *Pickering* v *Noyes*, ... objects he is to state the grounds of his objection *Griffith* v *Ricketts*, 7 Ha 299 If he does not att ... attends and refuses to produce the writing on any ... evidence will not be admissible, ... *R* v ... A person cannot ... elled by ... Thus ... s of the ... ing the comp ... oena by books they having been removed from him since ... the board of directors of the Company *R* v *Stuart*, 2 T L R 141; *Powell* 654 ... shall be deemed to have produced instead ... *Order XVI, rule* 6

An order cannot be made for ... s of persons not parties to the action [*Starker* v *Reynolds*, (1889) 22 Q B D 262] although such persons may be ordered to attend and produce them before the Court or Judge or examiner *Re Smith, Williams* v *Frere*, (1891) 1 Ch 323 Section 123 makes the production of evidence as to unpublished official records of affairs of State ... of th

... in custody of whi ... with him to Court to ... ere is no necessity ... ction on the grounds ... The Head of the ... he fit Vide s 123 ... even inspecting

... he must pro ... rd person But ... so as to justify

relating to the questions in issue ... any' is not enforceable *Lee* v *Angus*, L ... *Mining Co*, L R 10 Ch 194, *Burchard* ... (247) The *subpoena* should not be oppressiv ... This *subpoena* is incidental to the power of Courts and necessary to the ... v *Lones* 9 East 473 It is a writ of compulsory ... He has no ... han whether ... with him the ... 1 273, *Peq* ... they should ... on, 3 Burr ... ould be with 1687 Thus, the Court ... of his tit ... that they will deprive the wit ... bject him to a penalty or a criminal charge ... 352, *Whitaker* v *Izod*, 2 Taunt 115), or ... e of a confidential communication to an ... *Copeland* v *Watts*, 1 Stark 95 *Bustros* v *White*, ... *nnedy*, 27 Ch D 1, vide ss 126 127) or whether his excuse for not producing the same is valid or reasonable *Bull* v *Loveland*, 10 Pick (Mass) 9, *Burr Jones* § 801

In a case where an attorney claimed the protection of his lien, the Court said · "The exception to the general rule of production seems to me a reasonable one That an attorney's lien on his client's papers should not be permitted

in amb ... ay liable for the debt is reasonable, but, if papers amounts to anything, I think he may ven when summoned by him to produce the papers by a *subpoena duces tecum* The value of the lien often les apers from use as evidence and y a *subpoena duces tecum* to seems to me unjust *Davis* v *Davis*, 30 Fed 791, see also *Hope* v *Liddell*, 7 De G M & G 331, *In re Cameron's Coolbrook, etc R Co*, 25 Beav 1, *Brassington* v *Brassington*, 1 Sim & S 455, *Kemp* v *King* 2 Moody & R 437 So a Court will punish the witness for his failure or refusal to produce documents if properly subpoenaed in case he has no excuse for such failure or refusal *Vide s 175 of the Indian Penal Code*, *R* v *Daye*, (1908) 2 K B 333 A *subpoena duces tecum* is only to be employed to secure the production of books and papers that are to be introduced in evidence in the trial of an action, it is not to be used to secure papers to refresh the memory of a witness It cannot be used for the production of thin *Burr Jones* § 801

The fact that the documents are in the possession of a corporation does not prevent their production ... a private individual would l ... amba sadors and consuls, ... their official papers *Burr Jones* § 802

Where the witness declines to produce an instrument on the ground of professional confidence, the Judge should not inspect it to see whether it was one which he ought to withhold (*Doe d Carter* v *James*, 2 M & Rob 47, *Volant* v *Soyer*, 13 C B 231 = 23 L J C P 83), and it seems that the mere assertion on oath by the solicitor that it is a title deed or other privileged document ...

... Q B 140 It seems to be sufficient if one only of several interested parties objects *Per Maule J* in *Newton* v *Chaplin* 19 L J C P 374, *Kearsley* v *Phillips*, 10 Q B D 465 When the production is excused, secondary evidence is admissible *Marston* v *Downes* 1 Ad & E 31, *Doe d Gilbert* v *Ross*, 7 M & W 102, *Roscoe N P* 1585

If a ... he production of certain doc ... and once the summons ... d on if the party who obtai ... 5 Ind Cas 393

Statements made before the Income Tax Collector do not relate to affairs of state and so are not governed by s 123 of the Evidence Act The Income Tax Collector summoned to produce, is bound to produce the books in his possession, in spite of the rules made under s 38 of the Income Tax Act forbidding disclosure Under *s 162 of the Evidence Act*, a witness should not decline to bring documents into Court on the ground of privilege Under the same section, the Court has power to inspect the documents for the purposes of deciding objections regarding productio ... non disclosure of information, g ... not apply to the production ... v *Sampathu* 4 M L T 317 317 = 32 M ... The ... ch privilege is claimed is entirely wit ... its section and its refusal to inspect ther ... *Nagaraja* v *Vythianatha* (1911) 2 M ...

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so

Giving as evidence of document called for and produced on notice

Principle The production of papers upon notice, does not make them evidence in the cause, unless the party calling for them inspects them so as to become acquainted with their contents, in which case he is obliged to use them as his evidence (*Calvert* v *Fowler*, 7 C & B 386; *Wharam* v *Routledge* 5 Esp 235 *per Lord Ellenborough*) at least if they be in any way material to the issue *Wilson* v *Bowie* 1 C & P 10, *Sayer* v *Kitchen* 1 Esp 210 *Taylor* § 1817 The reason for this rule is that it would give an unconscion

notice to produce a paper in evidence must be supposed to know its contents If he does not he ought not to be permitted to speculate through the forms of law and obtain from his adversary the inspection of any paper or document he may choose to demand Such a privilege could be liable to abuse' *Radcliffe J* in *Laurence* v *Van Horne* 1 Cannis 276 285, *Wigmore* § 2125

Scope of the section The mere calling for the documents from the opposite party is not enough to make them evidence But when the party calling for the document inspects them he is bound to give it as evidence if the party producing it requires him to do so *Burr Jones* § 226 If the party giving the notice decline to use the papers when produced, this though matter of observation will not make them evidence for the adverse party *Sayer* v *Kitchen* 1 Esp 210 But it is otherwise if the papers are used or inspected by the party calling for them, and are material to the issues *Wilson* v *Bowie* 1 C & P 10 *Calvert* v *Fowler* 7 C & P 386, *Wharam* v *Routledge* 5 Esp 235, *Roscoe N P Ev* 13 Inspection by a party includes inspection by an agent as well as personally *Norey* v *Keep* (1909) 1 Ch 557, 565 This section is intended to prevent the somewhat undignified squabbling which frequently takes place in England as to whether a document which the other party has received notice to produce, should be put in *Mark Ev* p 113 In *Calvert* v *Fowler* 7 C & P 386 the documents called for were books of account In that ... of them and ... is the paper ... said ... upon the ... it you make it evidence for the other side, if he think fit to use it' In *Wilson* v *Bowil* 1 Carr p 10 the paper produced was a receipt which was not material to the case and *Park J* said ' If the plaintiff's counsel call for a paper and look at it, he must read it in evidence if it is at all material to the case, if it does not bear on the case he need not read it This paper is of the latter ...

special provisions of this section must be deemed to be conclusive evidence against the party who has inspected the documents There is certainly nothing in the language of the section itself to justify such a conclusion All that happens is that the documents which the other party has produced become evidence in the case for what they are worth *Ram Dhan* v *Ram Dayal* 23 O C 106 = 57 Ind Cas 993 In a pending trial the defendant produced certain account books and gave ins... however did ... the document ... rebutting evidence if any, *held* that the procedure of the lower Court was not justified by s 163 of the Evidence Act Section 163 does not render the proof of the document to be executed unnecessary or alter the normal incidence of that burden It is doubtful whether section 163 of the Evidence Act is

appl cable to accounts produced under the procedure for discovery or only to accounts produced after the trial has begun *Raj Gopala* v *Ramanuja*, 1923 M W N 292=72 Ind Cas 459=1923 Mad 607=18 L W 165 Application of this section is not restricted to civil proceedings only. It is applicable also . . . . . . utor Where departmental tatements are produced, inspected and used for cross-examination of several witnesses the Crown is entitled to have the whole of the statement as evidence Departmental enquiry by a Magistrate in his executive capacity is not judicial enquiry and . . . . . Such statements the . . applied to such stater . . I R 1930 Cal 370

164 When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court

Using, as evidence, of document production of which was refused on notice

Illustration

A sues B on an agreement and gives B notice to produce it At the trial A calls for the document and B refuses to produce it A gives secondary evidence of its contents B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped He cannot do so

Principle Where an opponent in possession refuses to produce on demand, he is afterwards forbidden to produce the document in order to contradict the other party's copy or evidence of its contents This is in one sense a proper penalty for unfair tactics, but the original refusal may also be regarded as a judicial admission in advance, of the correctn . . . . to this extent *Wigmore* § 1210 In *Doe* v *Cocl* B said "You must either produce a docum See also *Lewis* v *Hartley*, 7 C & P 405, *Doe*

Scop . . . . . . having a document in his possession refu at liberty *Hodgson*, to the inte that his refusal to comply the effect of letting in secondary evidence, such notice is . . insure the production of the document *Wills Ev 2nd Ed* 361 If he once refuses, b . . has proved a copy, and is about to have it read, pr . . without the evidence of an att . . B 413, 439, *Jackson* v *Allen*, 3 St . . be permitted to put the document into the hands of . . for the purpose of cross ex . . 527 528) or to produce and prove . . on, 12 A & E 135 He is not entitled . . who should be called (*Jackson* v *Allen*, . . 131); or to refresh the memory of a . . (*Hill* v *Ainsworth* Bristol, 1831, *Wilde C J M S*), or it seems for any purpose (*Collins* v *Gordon*, 2 F & 47, *Byles J*) He is, in effect bound, by any legal and satisfactory evidence produced on the other side *Roscoe N P* . . . . 0 W R C R 218, *Nort Ev* 252 This . . . for inspection What . . —to produce . . to produce . . his opponent It . . failure of the to produce the document and use it . . .

accused to produce certain documents fc . . . ' . . . . ' ... does not deprive him of the right to defence or to put them to the complain *Kapur* v *Emperor*, 36 C. W N. 1127 "I am by no means convinced that s 164 applies to criminal proceedings"—*Per Pankridge J* in *Ibid*

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Judge's power to put questions or order production.

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

Principle "Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth The effect of this section, is that in order to get to the bottom of the matter before it the Court will be able to look at and enquire into every fact whatever" *Steph Intro, Ev Act* p 162 "We know of no limit" says *Lumpkin J* in *Epps* v *State*, 19 Ga 118 (Am) "to the right which belongs to the Court of interrogating witnesses, either in civil or criminal cases, especially the latter The life or death of a man may ... ition that this liberty be tolerated for a ... which

ought to have been brought out, it is not only Judge to call the attention of the witness to the prosecution, his aim being neither to punish the innocent or screen the guilty, but to administer the law correctly"

English rule The sporting theory of the common law in which litigation was a game of skill to be conducted according to the specific rules and to be ... tended to place the ... me, whose duty it was ... les of the game h ... the Judge's functions ... idge there has never ... of the proceedings and ... the judicial function, ... wer and duty to put ... esirable to elicit the truth more fully. This just exercise of his function was never doubted at common law; the Judge could even call a new witness of his own motion and could seek evidence to inform himself judicially; much more could he ask additional questions of a witness already called but imperfectly examined Fortunately, inspite of the strong but subtle tendency to force the purely judicial function into the back ground, the tradition of the common law has never

been lost; the right of the Judge to interrogate as he thinks best has always been preserved in theory *Wigmore* § 781 So under the English law a Judge has always a discretionary power, with which the Court above is very unwilling to interfere (*Middleton* v *Barned*, 1 Ex R 213 *Per Parke B*), of recalling witnesses at any stage of the trial, and of putting such legal questions to them as the exigencies of justice require *R* v *Watson*, 6 C & P 653 *Taylor* § 1477 So a judge may put all such questions to a witness as the interests of justice require (*R* v *Remnant*, R. & R 836; *R* v *Watson*, 6 C & P 653, *R* v *Jameson*, ... ased not only on matters a... owledge (*R* v *Antiim* ... he jury may ask admissibl... (1896) 2 Q B, 167, 177 ... in *Mr Warren Hasting's* Trial said ... apparently materi... negligence, ignoranc... has a duty of his ... truth If no prosec... Court is obliged, through ... cross-examine every witness ... done effectively, and to act h... *Hastings Trial*, 31 Part Hist 348

Scope of the Section It seems to be the general rule, well supported by the d... questions to w... order that the t... at a trial is n... rn officer charg... maintain truth ... of rules of pract... question the ... ny *Per Bick*... *y* v *State* 55 ... lly necessary ... the facts and circumstances of the case on trial as possible, in order that he may instruct the jury, and correctly, to the extent his duty demands, shape the determination of the litig... and doubtless it ... resi-ding Judge ... the exigencies may warrant in exercise of ... not capable of very precise statement, but it may be said that the right here in question is one which should be very sparingly exercised, and, generally, counsel for the part... relied on and allowed to manage and bring out their ... be such as to ... the one or the other party to the cause ...

As regards the incl... *James Fitzjames Stephen* in ... of English Barristers to ... which they practice I would appeal to every one who ... subject, whether the observations referred to are not strictly true, and whether the main provision founded upon them—the provision which empowers the Court to ask what question it pleases—is not essential to the administration of justice here In saying that the Bench and the Bar in England play their ... England, cases are fully ... nothing ... India in ... ly neces-... ers, but ... and In ... s which ... ing that ... section

165, which has been so much objected to has been framed" *Speech of the Hon'ble Fitzjames Stephen on he 12th March 1872, in submitting the Report of the*

power" says *Mr Justice Cunningham* "to
ask their questions
elicit all the facts ne use A plaintiff
may have some weal traying and so
dexterously avoids, or a defendant may import of some
answer given and allow it to pass uncritisized; in any such case it is highly
be armed with full power enabling him to get
subject to conditions to be immediately

about any matter rel
document or thing

however, is very clearly
ased on relevant facts, and those relevant
cannot compel a witness to
to
refuse to answer or produce at the instance of the he
Judge ask any of the questions as to credit which would be improper if asked by
the adverse party, nor can he dispense with primary evidence of a document
unless the facts of the case show that secondary evidence is admissible A
Judge, accordingly, cannot, by the exercise of the powers conferred by this
section, impart into the d ot relevant under
the Act, nor can he in mode of proof, or
ask questions to credit, if asked by the
parties Thus restricted of obvious utility
in a country like India, s no advocate is
employed, but the Judge has to make out the truth as best he can from the
false accounts of ignorant, excited

in any form at any stage of the
cause, and to a certain extent even allo
This, however, does not mean that he can
for if such be left to the jury, a new
from the Bench,
ted by technicality, to secure indictive
fixing the amount of punishment"
of the Court to propound pertinent and
properly framed questions to a witness The exercise of the power, if the
questions propounded by the Court are directed to crucial points of the case is
of the one or the other of, the
of great embarrassment if
ading and suggestive in form
or improper for any cause It is believed the instances are rare and the
conditions exceptional in a high degree which will justify the presiding Judge
examination of a witness and the
able
t the
hich
ffect
s his
lping
ealy
inty,
may help or hurt The Judge will ive a
fact he

Of course, the examination by the Judge must be done in a reasonable al impartial way, so as not to indicate his opinion of the facts, and thereby rejudice the rights of the parties His questions should be propounded, not

proceed
manage a
the trial
ment it is necessary to elicit the truth, he may interpose with questions to the witness, either in direct or cross examination and he may put leading questions or suggest the form of a question, and it has even been held that a Judge may call a witness and examine him and permit or refuse either side to cross-examine such witness *Coulson* v *Disborough*, (1894) 2 Q B 316 It is obvious that these privileges of the Court should be so exercised as not to prejudice the rights of the parties, or to unduly interfere with the presumption of the cause of action or defence The discretion of the trial Court will not be interfered with except in a clear case of abuse While the Judge may, of course, state the grounds of his rulings in receiving or rejecting testimony, comment upon the weight of the evidence at the time of its production should be avoided as an invasion upon the province of the jury The Court may often with great propriety ask questions of a witness on the stand for the purpose of bringing out the facts of the case but should never indulge in remarks to witnesses or in comments upon their testimony, which may either magnify or diminish its effect upon the jury as to credibility or value While the Judge may so interpose questions, his comments, if any should be so guarded as not to prejudice the parties, even though not directed against them For example, when the Judge said "I don t think going over the same ground so much does any good I suppose that the jury knows more about forest fires than any of the witnesses that are testifying or any of the attorneys in the case,' the Court held the remark
of forest fir
the witnes
an improp
Beene 16 A
disregard
Jones § 815 I think that under section 165 of the Indian ...
judgment must be based upon facts
proved *Shah J* in *Ismail* v *Emp*
16 Cr L J 83=2 Bom Cr C 252
Indian Penal Code, the Sessions
...
Indian Evidence Act,
ing the years of his life previous to the
in a lunatic asylum, record medical
of the opinion formed as to his particular
or, Rat. Un Cr C 279

The provisions contained in this section and in Order XIII, r 10 of the Civil Procedure Code are intended to arm the Court with a power of initiative in getting at the truth The essential duty of the judicial officer is not to decide wh ... judicially
possible, ... The act
of sendin ... under
Order X ... evidence
in the ca ... after it
has been ... R 11=13
Ind Cas ...

Under this section a Magistrate is entitled to put to a witness any question at any time and in any form *Pratap* v *Emperor*, In l Rul 1930 Nag 273.

Construction of the Section This section is capable of two widely different interpretations (a) It may mean that the Judge may introduce into the case without any restrictions except those stated in the second proviso any irregular evidence he pleases that he might for example ask a witness what some respectable persons had told him about the matter in dispute evidence which though properly speaking is inadmissible, might be quite trustworthy But then what is the meaning of the first proviso? How is the Judge to make use of the irregular evidence at all if he is not allowed to base his judgment upon it at least to some extent? Even if he uses it only to corroborate other evidence he still bases his judgment partly upon it (b) The other possible construction of the section is that it only empowers the Judge to ask irregular questions in order to discover or obtain proper, that is, regularly admissible evidence For example in a case of murder when the weapon had not been found, a witness might state in answer to the Judge that he had heard that the accused had secreted it in a certain ditch The statement being hearsay would be inadmissible but the Judge by means of it, might be able to direct an enquiry which would lead to the weapon being found Upon the second of these two constructions of the section the first proviso would prevent less difficulty But then it is not easy to see why the last clause of the second proviso was inserted This clause would be quite intelligible if the section were intended as a general relaxation of the rules of evidence, but why should not a Judge who was merely hunting up evidence look to a copy in order to see whether it was worth while to endeavour to procure the original It may further be observed that if that clause on the other hand refers to the evidence to be accepted in the case itself it appears to be mere surplusage as the first proviso has already declared that the facts must 'be duly proved i e where the fact is contained in a document primary evidence of that document must as a general rule be given In the first view it would modify the rules of evidence to a very considerable extent In the second view the section would add little if anything, to the already existing law *Marl by Ev* pp 111 113

asking irrelevant questions to a roof of relevant facts, but if he asks being taken again t him he is not bound to answer him and cannot be punished under s 179 I P Code *In re Lakshman* Cr Rg 14 10 1885

Ask any question The ordinary practice in a properly constituted Court is that where a witness for the prosecution is not called on the part of the Crown he is placed in the witness box in order that the defence may have an opportunity of cross examining ... it necessary to call one of these w... which he thought material for ... allowed an opportunity of putting any question that he thought necessary ... cross examination *Per Jackson J* in *Empress* v *Girish Chandra*, 5 C 614 Under s 165 of the Evidence Act a Judge has power to ask any question he pleases about irrelevant facts if he does so in order to discover or obtain proof of relevant facts *Queen Empress* v *Hari Lakshman* 10 B 185, see also *R* v *Atrin* 2 I R 603 ' It is not the province of the Court to examine the witness unless the pleaders on either side have omitted to put some material question or questions, and the Court should as a general rule, leave the witness to the pleaders to be dealt with as laid down in s 138 of the Act The Judge's power to put questions under s 165 is certainly not intended to be used in the manner in the present case *Per Garth C J* in

to the Court ... 42 C
... section 162 ... ection
L J 598 = A ... Code
165 cannot be ... L J
Maung Hin Gya ... 109
219 = A I R 19 ... or the
= A I R 1931

S.

purpose of eliciting what the law expressly and deliberately forbids being admitted For instance it should not be used for proving a confession made to the police which is shut out by s 25 of the Evidence Act or a confession made while in police custody except as mentioned in s 27 *Pullama v Emperor*, A I R 1932 Mad 625 The Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony *Luchmi ... v Radha*, 34 C L J 107; *Bhagwan v Shamsher*, 33 P L R 1918=44 Ind Cas 433 ... it unless it is established that ... with a view to clear up obscu... the bounds of the provisions ... counsel engaged in the same ... justice *Surendra Krishna* ... 33 C L 34= 9 Ind Cas 814

A Judge is justified in using his knowledge about the character of the parties in a suit to come to a decision upon the credit to be attached to their evidence on the case set up by them *San Hla v Mt Khoron* 9 L B R 160=45 Ind Cas 734=12 Bur L T 98

Cross examination on answers given to the Court In *Sukharam v Munji* 11 B H C R 509 at p 510 *West J* said When the counsel for the prisoner has examined or declined to cross examine a witness, and the Court afterwards, of ... the permission o... examination of ... him in hand, he is put under special pressure as the Judge is empowered to ask any question he pleases, in any form abo... (s 165, Indian Evidence Act), and he is the ... under the special protection of the Court, ... party to cross exam... ...it this cannot be asked for as a matter of right This ... to the wi... tor any q... the effect ... ing out an... ion answers—upon every answer given to the Court—... rt's control' In *Coulson v Disborough*, (1894) 2 Q B 316, *Lord Esher M R* said 'If what the witness has said in answer to the questions put to him by the Judge is adverse to either of the parties, the Judge would no doubt allow, and he ought to allow, the party's counsel to cross examine the witness upon his answers A general fishing cross examination ought not to be permitted" This dictum was approved by *Farwell L J* in *In re, Enoch and Zaretzy*, 79 L J K B 363=(1910) 1 K B 327 C A The words "any witness" in this section include a Court witness It is doubtful how far the right to cross-examine such a witness is an absolute right or requires the leave of the Court *Makund Singh v Mt Ghafurunnissa*, 9 O & A L R 512=74 Ind Cas 108 The Court should not examine a witness without notice to the parties or their pleaders, and ... to cross examine him or to rebut his statem... t does justify such procedure When ... t notice to the pleaders and bases its deci... ness, it acts with material irregularity in ... the meaning of s 115 of the Civil Procedure Code *Pearilal v ...* ... Cas 407

It follows that a Judge's questions may be leading in form "Folly my lords," said *Lord Ellenborough C J* 'has said that ... in examining the witness ... almost too ... objections ... rsons in ... I have ... leading ...

however, may put what questions he pleases, and ...

Construction of the Section This section is capable of two widely differ
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some respectable persons had told him about the matter in dispute evidence
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evidence to a very considerable extent In the second view, the section would
add little if anything to the already existing law *Mirl bj Ev* pp 111 115
Under this section a Judge has the power of asking irrelevant questions to a
witness, if he does so in order to obtain proof of relevant facts, but if he asks
questions with a view to criminal proceedings being taken against him he is
not bound to answer him and cannot be punished under s 179 I P Code
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. — nest on The ordinary practice in a properly constituted Court
ie prosecution is not called on the part of the
s box in order that the defence may have an
him and certainly where the Judge thought
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the prosecution, the prisoner ought to have been
allowed an opportunity of putting any question that he thought necessary in
cross examination *Per Jackson J* in *Empress* v *Girish Chandra*, 5 C 614
Under s 165 of the Evidence Act a Judge has power to ask any question he
. . to discover or obtain proof
10 B 185, see also *R* v
ourt to examine the witness
ut some material question
le leave the witness to the
udge's power
or questions, and the C n the manner
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. . put questions
ficer in
e police
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order to the law
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provision of section
al Procedure Code
019=23 Cr L J
N 317=58 C 109
not be used for the
165 cannot be
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purpose of eliciting what the law expressly and deliberately forbids being admitted For instance it should not be used for proving a confession made to the police which is shut out by s 25 of the Evidence Act or a confession made while in police custody except as mentioned in s 27 *Pullama* v *Emperor* A I R 1932 Mad 625 The Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony *Luchmim* v *Radha*, 34 C L J 107, *Bhagwan* v *Shamsher*, 33 P L R 1918=14 Ind Cas 433 A Court of appeal cannot set things right on appeal unless it is established that the intervention with questions of a trial Judge, with a view to clear up obscurities and generally to elicit the truth, exceeded the bounds of the provisions of s 165 and so impeded the legitimate work of counsel engaged in the same as to ... *Krishna* ... Cas 811 ... the parties ... evidence ... the case set up by them *San Hla* v *Mt Khorou* 9 L B R 160=45 Ind Cas 734=11 Bur L T 98

Cross examination on answers given to the Court In *Sukharam* v *Mundji*, 11 B H C R 509 at p 510, *West J* said "When the counsel for the prisoner has examined or declined to cross examine a witness, and the Court afterwards of its own motion ... the permission of the Court, ... examination of a witness by ... him in hand he is put under special pressure as the Judge is empowered to ask any question he pleases in any form about any fact, relevant or irrelevant (s 165 Indian Evidence Act), and he is therefore at the same time placed under the special protection of the Court which may at its discretion allow a party to cross examine him but this cannot be asked for as a matter of right This princip ... the witness s ... any questior ... effect of all ... out an incor ... answers—upon every answer given to the Court—and is subject to Court's control In *Coulson* v *Disborough* (1894) 2 Q B 316 *Lord Esher M R* said "If what the witness has said in answer to the questions put to him by the Judge is adverse to either of the parties the Judge would no doubt allow, and he ought to allow the party's counsel to cross examine the witness upon his answers A general fishing cross examination ought not to be permitted This dictum was approved by *Farwell L J* in *In re Enoch and Zaretzky* 79 L J K B 363=(1910) 1 K B 327 C A The words any witness in this section include a Court witness It is doubtful how far the right to cross examine such a witness is an absolute right or requires the leave of the Court *Makund Singh* v *Mt Ghafurunnissa*, 9 O & A L R 542=74 Ind Cas 108 The Court should not examine a witness without notice to the parties or their pleaders, and without affording them an opportunity to cross examine him or to rebut his statements section 165 of the Evidence Act does justify such procedure When a Court examines a witness without notice to the pleaders and bases its decision upon the evidence of the witness it acts with material irregularity in the exercise of its jurisdiction within the meaning of s 115 of the Civil Procedure Code *Pearilal* v *Pearilal*, 22 Ind Cas 407

It follows that a Judge's questions may be leading in form Folly my lords ... and that in examining the witness, ... is ridiculous it is almost too absurd t... ing the fact can it be object ed to a J... be objected to persons in the situ... t leading questions? I have always understood ... that the meaning of a leading question was ... produces a wi... terrogatories a... favour the pa... however, may

purpose, because then the rule is changed; for there is no danger that the witness will be too complying But even in a case where evidence is brought forward to support a particular fact, if the witness is obviously adverse to the ' " ' not prevail, and the most leading . that the Judge on the bench may not pleases can only originate in the the age" 25 Hansard Part Deb 207

Proviso (1) Having regard to the str ngent prov s on of this section 1 judgment based 41 M 731=34 M' 609=56 Ind Cr Court must be based upon facts declared by the Act to be relevant and duly proved, and it would be intolerable that the Court should decide rights upon suspicions unsupported by testimony" *Per Jenkins C J* in *Sreemutty Mohun Bibi* v *Saral Chand* 2 C W N 17 (27); see also *Ismail* v *Emperor*, 26 Ind Cis 995=16 Bom L R 934, *Luchiram* v *Radha*, 34 C L J 107; *Bhagwan* v *Shamser*, 33 P L R 1918=44 Ind Cis 138; *Queen* v *Pitamber*, 7 W R Cr 25, *Emperor* v *Jalub Das*, 27 C 295=4 C W N 129 Court ought not to comment adversely on witness's conduct relying on matters which are not evidence *Amar Nath* v *Emperor*, 85 Ind Cis 143-26 Cr. L J 463=A I R 1925 Lah 187 ntaining an opinion on an *ex parte* It is the duty of the Judge to record a *Baldeo* v *Sheoraj*, 56 Ind Cis 807

Proviso (2) Where the question is asked with a view to criminal proceedings being taken against the witness, the witness is not legally bound to answer it, and he cannot be punished under s 179 I P Code, for refusing to answer *Queen Empress* v *Hari Lakshman*, 10 B 185 A witness should not be coerced to answer a question *Queen Empress* v *Ishri*, 8 A 672 (675)

Power of jury or assessors to put questions

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

Scope The privilege to examine witnesses has long been extended to jurors, when exercised to draw out or clear up some uncertain point *Schaefer* v *St Louis*, 128 Mo 64, *Burr Jones* § 815, *R* v *Lilluman*, (1896) 2 Q B 167 questions through the *mal*, 24 M 523 It is viewing the spot in controversy, since the knowledge derived by these means is far more satisfactory than any obtainable by the mere examination of maps or places which are often s, have been prepared with an expre also, *In the matter of petition of Lalji* 19 Procedure Code But the jurors and assessors can only view the scene of the alleged offence, and cannot examine any witnesses on the spot, because by sub section (2) of s 293 the officer conducting the jurors or assessors to the spot cannot suffer any other person to speak to them. *Queen* v *Chutterdhoree*, 5 W. R 59

CHAPTER XI.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE

No new trial for improper admission or rejection of evidence.

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such

objection is raised that, independently of the evidence objected to and admitted there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

S 1

Scope of chapter XI The Act concludes with repeating the provision of Act II of 1855 to the effect that the improper admission or rejection of evidence
or for a new trial of the case if the
evidence improperly admitted there
or that, if the rejected evidence had
been admitted, it ought not have varied the decision When therefore, an appeal is grounded on the improper exclusion or admission of evidence the appellant must be prepared to show, not only that there has been an improper admission or exclusion, but that a miscarriage of justice has been thereby caused *Cun Ev* 70 71 In his introduction to the Indian Evidence Act, *Sir James Fitzjames Stephen* observed in connection with sections 5—11 "Important as these sections are for purposes of study and in order to make the whole body of law to which they belong easily intelligible to students and practitioners not trained in English Courts they are not likely to give rise to litigation or to nice distinction The reason is that s 167 of the Evidence Act which was formerly s 57 of Act II of 1855 renders it practically a matter of little importance whether evidence of a particular fact is admitted or not The extreme intricacy and minuteness of the law of England on this subject is principally due to the fact that improper admission and rejection of a single question and answer would give right to a new trial
of a con
admission
thinks th
turned th
suggested
under s 1 Steph Introduction p

Retrospect in English law Whenever the Court admits irrelevant evidence the party affected by such evidence should then and there make objection
the clo
sible
whom
or (2) he
is denied, then ender his bill
v *Pole*, 9 M & W 351 360
a decision
the Court
not acquiesc
necessary for determining
of evidence the objection
ption taken *Wigmore* § 20
motion for a new trial By
rial and of bill or exceptions
Moreover, the bill of excep-
errors in evidence rulings,

Material error new trial under English law rejection of a piece of English Rule is plain An erroneous admission or rejection of a piece of evidence was not sufficient ground for setting aside the verdict and order a new trial unless upon all the evidence it appeared to the Judges that the truth had thereby not been reached In *R* v *Bell* R C R 133, the Court observed "Whether the Judges on a case reserved would hold a conviction wrong on

he ground that some evidence had been improperly received, when other evidence had been properly admitted that was of itself sufficient to support the conviction the Judges seemed to think must depend on the nature of the case and the weight of the evider ... If he case were clearly made out by proper evidence, in such a way ... n the mind of any reasonable ma ... new trial in felony, such a conviction ought not to be set ... other evidence had been given which ought not to have been received But if the case without such improper evidence were not clearly made out, and the improper ... effect on the minds of the Jury ... uch was the rule in the King s Bench ... R 133 R v Teal, 11 East 311, R v ... ht v Wynne, 2 B & Ald 554 559 ... Mansfield C J in Harford v Wilson, 1 Taunt ... that case the learned Chief Justice, sai l ... "Neither will the Court set aside a verdict on account of the admi sion c evidence which ought not to have been received provided there be sufficier without it to authorize the finding of the jury" This rule was also expl citl approved in Doe v Tyler, 6 Bing 561 Such was equally the practice i Chancery, when issues had been sent to a jury in a Common Law Cour Wigmore § 21 In Pemberton v Pemberton, 11 Ves 50, 52, Lord Eldon L said If upon the whole record he is satisfied that justice has been don though he may think, that some evidence was improperly rejected at law he at liberty to refuse a new trial' Similarly in Lorton v Kingston, 5 Cl & 263, 310 Lord Cattenham, L C said "The true consideration always is wheth ... the whole there appears to be such a case as enables the Judge in equi ... the parties without the assistance ... In that decade ... e decade of 1830 ... 835) 1 C M & R 919, announced ... signified that an error of rul ng ... ed party a right to a new trial created per se for the excep ... Langfield 16 M & W 497, 515 The new Wigmore § 21, see also Doe v ... the other Courts (Vide Rut en v Exchequer rule was speedily accepted in ... 7 A & E 313, 330), and for something Fair 4 A & E 53, Wright v Tatham ... until it was reformed more than a generation it remained the law of England ... In R v Gibson, L R 18 away, for civil causes in 1875 Wigmore § 21 ... Until the passing of the Judicature Q B D 537, 540, Lord Coleridge C J said ... legally admissible, which Acts, the rule was that if any bit of evidence not ... the party against whom might have affected the verdict, had gone to the jury, ... See also Campbell v Looder, 34 L J it was given was entitled to a new trial ... Ex 58

Now the civil cases in England are governed by the Judicature Act, 1883 and Rules of the Supreme Court, Rule 6 of Order 39 of the same runs as follows ' A new trial shall not be granted on the ground of misdirection or ... Unless in the opinion of ... wrong or miscarriage ... al will not be grante l ... ome legitimate effect ... ior when the evidence ... e admissible in the ... And the same rule ... re is other evidence ... has occurred in ... 5 C A Sec, to sustain the ... the trial, the verdict must star ... ins v Miller for examples Maclarn & Son ... 2) 2 Q B 5 1 Tylfil Urban Council, (1899 ... illegal agree-

For a case where a new trial was granted because evidence of ... see Harper v ment was wrongly admitted in support of the claim for damages ... is not applicable to the Eyjolfsson (1914) 2 K B 411 In England the rule 6, ... the possibility of Divorce Cour ... Allen v Allen (1894) P 255 "I doubt ... to the construction formulating a ... of Rule which ... the attempt ... (1896) A C 4 ...

S.

wrong is occasioned where the defendant has not been permitted to present his case to th[illegible] topic has been practically with- [illegible] & Co v Deutch Bank, (1919) A

The fact that evidence was improperly admitted or rejected at the trial is a good *prima facie* ground f[illegible] no substantial wrong or misc[illegible] dent *Anthony* v. *Halstead* 37 v *Beggs* (1905) 22 Ir. R 525 [illegible] ave been met by calling further evidence 130, *Powell Ev* 701

So far as criminal cases we[illegible] state a case for the Court of Crown [illegible] 1848 (11 & 12 Vict C 78), wh[illegible] improperly made The jurisdiction under this Act was transferred to the Judges of the High Court by the Supreme Court of Judicature Act of 1873 and though sections 3 and [illegible] Criminal Appea[illegible] in a point of [illegible] In practice however, such cases are now submitted to the Court of Criminal Appeal *Step Dig Ev Art* 113 Section 20 (1) of the Criminal Appeal Act, 1907 (7 Ed VII C 23) runs as follows "The powers and practice now existing in the High Court in respect of motions for new trials or the granting thereof in crim[illegible] been a nullity the Crim[illegible] the Cr[illegible] *Crane* v *Parker*, [illegible] In *King* [illegible] illegal [illegible] dant guilty of man slaughter.

English and Indian Law differentiated Under Rule 6, Order 39 of the Rules of Supreme Court, the Court will interfere only when some substantial wrong or miscarriage has been occasioned on the trial by improper admission or [illegible] interference is legal when such im- pr[illegible] ried the decision In th[illegible] only a new trial can be granted but under this Act the decision may also be reversed

Scope of the secti[illegible] This section is a verbatim reproduction of section 57 of Act II of 1855 [illegible] of England In *Hugh*[illegible] The Court will not [illegible] given for the party offering it would be clearly against the weight of evi[illegible] or if without the evidence received there be enough to warrant the verdict" The reason [illegible] forcefully stated by *Porter J* in an American case "The [illegible] confessedly competent, [illegible] jury could refus[illegible] shield guilt from [illegible] the protection of law to [illegible] efore, the [illegible] tion [illegible] in i[illegible] could work no legal injury to the prisoner As [illegible] that the accused was one of the question, by undisputed and competent proof, that the jury murde[illegible] moral obligation to assume that the jury [illegible] admission might [illegible] ween of oth[illegible] irely civil [illegible] injurious to the party objecting to its ad[illegible]

refusal" *Wigmore* § 21 This section affirms a reasonable principle often before laid down authoritatively by the Privy Council If, after setting aside what has been improperly rejected or omitted, the residue of the evidence is sufficient to support the finding of the original Court, no Appellate Court should set it aside Thus, in *Ranee Surnamoyee* v *Maharaja Suthes Chunder Roy Bahadur*, 10 M I A. 123, . . . d by false evidence, the Court . . . ident . . . F K . . . sa 7 . . . *Moharajah Juggut* v *Bhupo Tarinee*, 14 W . . . 6 B L R P C 495 In *Mohar Singh* v *Ghumba*, 6 B L R P C 495, the Court said; "It seems to their Lordships . . . more . . . trial, it is shown that evidence improper to be admitted has been admitted before the jury The Court in those cases are not Judges of fact, and are unable to say . . . evidence that ought not to have . . . who are Judges of the fact . . . ought not to have been admitted, th . . . support the decrees Their Lordships, . . . that the Court of first instance . . . have been as lax at it has been in . . . is always to be . . . See also *Unide R* . . . 7 M I A 128; *Nort Ev* 343

In cases of doubt, the Judge should decide in favour of admissibility of the evidence under consideration rather than of inadmissibility. *Collector of Gorakhpur* v *Palakdhari*, 12 A 1 (F B)

This section is equally applicable to civil and criminal cases The section applies to criminal as well as to civil cases whether or not the trial has been had before a jury *Imperatrix* v *Pitamber*, 2 B 61; *Queen* v *Hurribole Chunder*, 1 C 207=25 W R Cr 36; *Reg* v *Navroji*, 9 B H C R 358 The words "in any case" in s 167, Evidence Act, are wide and include criminal trials by jury *Queen Empress* v *Ramchandra*, 19 B 719

If it shall appear to the Court etc . . . section the Court before . . . Court *Impe* . . . and are, the . . . Letters Patent, . . . such judgment and sentence as . . . *Straight C J contra* per *Bayley* . . . trials by jury in the High Court . . .

Effect of improper admission and rejection of Evidence in civil cases The improper admission of the . . . is not, *ipso facto*, ground for a new trial, . . . the decision independently of the e. . . . *Narain*, 20 W. R 384. In civ . . . on principle as regards the workin . . . well as criminal cases the Court is not a judge of facts The jurors are judges of facts, and as such some difficulty may be felt by the Appellate Court to decide the effect of evidence improperly admitted in the minds of the jurors So in India in civil cases, "it is the duty of their Lordships who are Judges of the fact . to consider whether throwing aside the evidence which ought not to

have been admitted there still remains sufficient evidence to support the decree" *Mohar Singh* v *Ghunila*, 6 B L R 195 P C = 15 W R 8 P C So under this section th ... rev ... self for a evi ... ntly of the A ... decision. adn ... wrongly the ... support ... Judicial Committee will not determine an appeal against a decree upon the mere fact that some evidence has been improperly admitted by the Court below It is the rule of that ... suf ... there is Co ... which the *Ba* ... : see also ... 1, *Lala Bansidhors* v *The Government of Bengal*, 9 B L R 374 = 14 M I A 86 P C; *Bommaran~e* v *Rangasuami*, 6 M I A 232, *Maharaja Jagadindra* v *Bhaba Tarinee*, 5 B L R Ap ... *Abdul* 20 W R 458

In Nitrasur Singh ... W R P C 51, their Lordships of the Privy ... rned counsel for the appellant has not strongly contended that the proper order to be made on this appeal is one remanding the case for retrial We have rather insisted that on the mate ... made in his f ... desire to ... right in ... events f ... to prove ... if he h ... judgmen ... were irregular, it is not for him to complain of an irregularity committed at his instance or with his consent And the suspicion however probable, of the Judge, that a party wh ... may be more ... on a second and fulle ... trial" The decision ... legal testimony and ... *Bijoy Singh*, 25 C. W ...

Objection in second appeal An erroneous omission to object to inadmissible evidence d ... the admissibility ... objection is taker ... document made ... be raised even ... *Choonilal* ... Ind Cas 731 = A I R 19.. Cal 1034, see ... C, *Jagadis* v *Harihar*, 40 C L J 39; ... 107

Wh ... based on unproved and consequently ... is vitiated thereby and must be set aside; where an appellate Court has relied for its decision upon a document which is inadmissible in evidence a Court of second appeal will be justified in remanding the case for decision to the appellate Court with a direction to exclude that document from its consideration *Hem Raj* v *Nihal Singh*, 7 Lah L J 35...

T ... ground for a new trial ... ision But there is difficu ... the High Court in sec ... the evidence ... the Judge dec ... dispute the proper procedure for the High Court ... 31 C W N 32 lower C ...

If a inadmissible ... evider ... to either ... at the ... n by the p...

or their Where the lower Court has based the High Court will not in second in the case is sufficient to support the findings arrived at, s 167 is not a bar to such a case being remanded *Mussamat Sumitra* v *Ram Kuer Choubey* 5 P L J 410=57 Ind Cas 561

On second appeal the High Court has generally speaking no right to look at the evidence to decide whether the remaining evidence in a case other than that which has been improperly admitted is sufficient to warrant the finding of the lower Court The only cases which can be with propriety disposed of under such circumstances without a ...lently of the evidence admitted the lower upon other grounds *Hoomesh Ch*

An objection as regards the modes of proving a document should be taken at the time when the document is tendered *Madhabi* v *Gaganendra*, 9 C W N 11

When a subordinate Court has refused in the erroneous exercise of its discretion to receive documentary evidence which might have been accepted, the High Court has power to interfere in second appeal *Taleuar* v *Bagauan Das*, 8 C L J 117=12 C W N 312

...document in the (...appeal *Ram* ...am v *The Secretary of State* 6 C L J 678=34 C 1059 P C=9 Bom L R 1192, *Akbar* v *Bheya Lal* 6 C 666

...cases The words include crimir of new trials India Wher is held to be admissible, it is open to the High Court in appeal either to ...old the verdict upon the remaining evidence on the record, or to quash the verdict and order a new trial *Queen Empress* v *Ram Chandra* 19 B 749 Where no objection was raised to the reception of improper evidence in the lower Court ...regarding the ...ourt should ...90 Though ...evidence is ...less it was ...he Criminal ...discretion to ...ed to by the party or not *Reg* v *Dayanand* 11 B H C 44 Improper admission of evidence of character of the accused goes to the very root of the administration of criminal justice and w ...fluence the Magistrate' consideration of ...should be set aside *Phelan Singh* ...49=1? Pat L T 471=A I R ...ence to justify the conviction indep ...ion of the lower Court should be a ...)

When a case has been ...en set aside on the ground of n ...is c e retried by a jury, and as a matter of procedure and in justice to the accused this course should be adopted Acting on this principle the Court declined to exercise its powers under section 167 of the Evidence Act and sent back the case for retrial *Sheikh Hajir* v *King Emperor*, 14 C W N 593=11 Cr L J 301=5 Ind Cas 315

At the trial of a party of Hindus for rioting the Magistrate, instead of examining the ...copies of the examination in ...or led at a previous trial ...Hindu is in the same riot ...then cross-examined by ...taken on the

prisoners' behalf The accused were convicted *Held*, that although the procedure adopted by the Magistrate was irregular the irregularity was cured by the ... of s 167 of the Evidence ... failure of justice ... matter elicited in cross examination ... *Queen Empress* v *Nand Ram*, 9 A 609 ... 789 = 32 B 111 F B *Datar J* ... "Then again under s 167 of the Evidence Act all that we ...

adjudicated upon We are not a Court of appeal in the ordinary sense of the term I do not think it is open to us under the present circumstances to go behind the record of the case, scrutinize every piece of evidence and enter upon an elaborate investigation as to whether each particular piece of evidence recorded by the learned Judge and to which the accused's counsel now takes exception was or was ... does not appear to be intended to be follo... in s 167 of the Evidence ... to

Where inadmissible evidence has been received the Court of appeal ... consider whether the reception of inadmissible evidence influenced the minds of the jury so seriously as to lead them to a conclusion which might have been different but for its reception and whether it has in fact occasioned a failure of justice *Harendra* v *Emperor*, 84 Ind Cas 451 = 26 Cr L J 307 Under section 165 of the Evidence Act the improper admission of evidence is not ground of ... apart from it there is other evidence to support ...

relied upon by the Court below, there was ample legal ... the High Court in revision the p... will ... interfere *Achhaibat* v *Emperor*, 2 Pat ... J 374 Where a trial Court convicts an accused on the evidence part of which has been wrongly admitted and the Sessions Court excluding the wrongly admitted evidence upholds the conviction on the ... and the trial has taken a course substantially different ... body of inadmiss... Act, and should

SCHEDULE

ENACTMENTS REPEALED.

(*See section 2*)

Number and year	Title	Extent of repeal
Stat 26 Geo III Chap, 57 *	For the further regulation of the trial of persons accused of certain offences committed in the East Indies, for repealing so much of an Act, made in the twenty fourth year of the reign of his present Majesty intituled (An Act for the better regulation and management of the affairs of the East India Company, and of the British possessions in India, and for establishing a Court of Judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies)," as requires the servants of the East India Company to deliver inventories of their estates and effects for rendering the laws more effectual against persons unlawfully resorting to the East Indies, and for the more easy proof in certain cases of deeds and writings executed in Great Britain or India	Section 38 so far as it relates to Courts of Justice in the East Indies
Stat 14 & 15 Vict, Chap 99 †	To amend the Law of Evidence	Section 11 and so much of section 19 as relates to British India ‡
§ *	* * *	

* The East India Company Act 1786

† Short title The Evidence Act 1851—*see* the Short Titles Act, 1896 (59 & 60 Vict., c 14)

‡ Certain entries after this repealed by Act IV of 1927 have been omitted

§ The entry relating to ss 7 and 8 of the General Clauses Act 1868 (1 of 1868), was repealed by the General Clauses Act, 1897 (10 of 1897)

APPENDIX A.

FIFTH REPORT OF HER MAJESTY'S COMMISSIONERS

TO THE QUEEN'S MOST EXCELLENT MAJESTY.

We, your Majes. [illegible] of substantive law for India, [illegible] of law which [illegible]

[illegible] upon the subject Within [illegible] force, modified by certain [illegible] is the most important [illegible] It extends the range of [illegible] nts, of foreign system of [illegible] competency to testify by reason of interest or relationship, renders parties to suits liable to be called as w[illegible] competent witnesses for or against each [illegible] lying declarations admissible though the [illegible] es of recovery, provided that witnesses may be cross examined by the party who called them, and that they shall not be excused from answering questions because they may thereby criminate them selves D[illegible] niary interest of the persons who made [illegible] course of business, both of which kir[illegible] its only in cases of death, are under this Act admissible if the person who made the declaration or the entry has become incapable of giving evidence or if his testimony cannot be procured The Act also gives to t[illegible] ments the character [illegible] makes entries in such t[illegible] it extends the class [illegible] pedigree, and provides in effect that mistake committed in the rejection or reception of evidence shall not lead to a new trial or to the reversal of a decision unless a substantial failure of justice has been caused thereby The Act, however, bears reference in many places to the existing law, and it appears to have [illegible] body of rules, but as supplementary to, and [illegible] and also of the customary law of evidence [illegible] h India where the English law is not administered

The customary law has not assumed any definite form, the Mahomedan law since the enactm[illegible] have any validity in th[illegible] Courts have in fact [illegible] of 1855 They are not required to follow [illegible] where they regard it as the most they are not debarred from following it where they regard it as the most equitable

In laying down uniform rules for the guidance of the Indian Judges in general, as well as in the Courts [illegible] law of evidence has hitherto p[illegible] advisable to adopt a system so artificial [illegible] country [illegible] and

legal [illegible]
be un[illegible]
which [illegible]
preser[illegible]
safely [illegible]
variou[illegible]
nounced inadmissible, [illegible] absolutely dispassionately considere[illegible] s dangerous excluded On the other [illegible] r testimony at that which is shut out [illegible] be asked a for or against each other

question on the trial of her husband unless the trial be for an offence committed *against herself* In matrimonial cases the inconsistencies of the law as to
e evidence cause frequent embarras

of judicial investigation is attended with peculiar difficulties, and where it is the duty of the Judge in all civil and in some criminal cases to decide without a jury, there is a great danger of *miscarriage* from the m
unduly influenced by the
to afford every facility
falsehood or error may be
exclusion of falsehood, the channels by which truth is admitted It is of course, *impossible to* admit all evidence that may be offered, for this would lead to excessive waste of tim
expressly excluded by or
few cases where the law
evidence, the Court shall
The Judge
nce
y in
the early stage of a trial to show the exact bearing of each piece of evidence upon the issues It is by no means our desire that our rules should be understood as imposing upon the Judges the use of excessive strictness in excluding *evidence* of which the applicability cannot be fully shown at the moment when *the* evidence is tendered We have, however, inserted provisions intended to guard
questions asked with a
view t
I
e rules which
limit
whole of the
evider
Act for the
registration of assurances or of the Code of Criminal Procedure which recognise certain things as *prima facie* evidence that is to say, as conclusive unless met by counter evidence, yet we do not by our own rules attach this character to evidence of any class nor except where the testimony of a witness has been *attacked*,—do we reco
evidence We have pr
single witness even
or of perjury, or of
alone

An attempt to define all the cases in which and the purposes for which *particular* evidence may be received would in our opinion impede instead of aid the investigation of truth We hope that the course which we have adopted *will render it* easier for those who ad
often committed in practice where a strict
of supposing that whatever evidence is
dited to the Court

The exclusion of even of relevant evidence may be desirable, when the
evidence is such that peo
to it, when it is such as can
forgery, or when it is such
without injury to interests
investigation of truth

Although we have laid it down generally that all relevant evidence shall *be admissible*, we have thought it necessary to make certain exceptions from this rule These exceptions relate chiefly to that kind of evidence which is *described in the English law* books under the title 'hearsay' We have however, abstained from making use of the word 'hearsay' from the uncertainty and vagueness of
says as to wha
one sense of
ments by a witness of what he has heard another person say may be, in (as in cases of slander) the very matter in issue, or in other cases may be part *of the* circumstances which it is essential to ascertain On the other hand "hearsay" may be defined to be that which a witness does not say as of his own

knowledge, but says what another has said or signified to him This is probably a more strict and accurate definition of the word "hearsay" as used in the English law . . . is known in that law as hearsay , we have thought that it would . . . ir meaning, and be of more practical . . . exclude the word altogether We . . . efinition of the word hearsay", en- . . . of that class of evidence in the cases in which we think it ought to be excluded, and for the admission of it in the cases in which we think it ought to be admitted We have accordingly gone through the various classes of evidence in which arises the question of admissibility or exclusion what is called in the English law "hearsay" and have endeav . . . each class Most of the rules for the admis . . . recognized by the English law, others . . . of 1855, above referred to, or are intended to relax the English rule still further than was done by that enactment

We ha . . . that which has been spokon, . . . iness by a person . . . r whose presence . . . s kept in the ordinary course of business We have also made admissible written acknowledgments of the receipts of money, goods, securities, or property of any kind, and documents used in commerce Declarations which under the English law are only admitted because they have been made against interest will, by the effect of our rules, be excluded, unless they have been made in the ordinary course of business The test of pecuniary interest is exceedingly difficult of application, and appears to us to be of little value as a test of truth

We have admitted statements as to matters of reputation and of pedigree made b . . . whose presence cannot be pr . . . it the person who made th . . . dge We have discarded th . . . he statement shall have be . . . af . . . af

The indulgence afforded to witnesses by the existing law in permitting them to refer to contemporaneous memoranda appears to us to be carried too far when copies of such memoranda are allowed to be used for the purpose, and our rules do not permit the use of copies

Another clause of exclusion applies to documentary evidence unless some degee of caution were observed with regard to the authentication of writings, great facilities would be afforded for the fabrication of documents We have, therefore, laid down rules for the evidence to be required of the proper execution of documents, and, retaining the distinction between primary and secondary evidence have prov . . . against the admission of the latter where the . . . with the . . . assu ran . . . sion wou . . . nora lity . . . ourse betv . . . ot be asked merely . . . ction 19 of Act . . . m producing their own title deeds—a provisi . . . become every day le . . . from the production . . . to the cause We . . . law on the subject o . . . evidence

To those judgments which are admitted by the laws of all other countries as conclusive evidence not only between the parties but as against strangers, we

have affixed the same character in India, in all other cases we have provided

As regards strangers, we have provided
evidence that such a judgment was pro

We hav ... the truth more accurately it
left to draw ... les
of presumpt ... le
universally a ... ject
of evidence ... s of
the draft now submitted certainly border closely on Procedure Those sections however, have not found a place in either of the Codes of Procedure We have therefore inserted them (with some modifications) as it appears to us that the law of evidence ought not to be left to be gleaned from many different enactments but that so much of it as it not to be found in the Codes of Procedure should be, as far as possible comprised in the rules of law now submitted by us and that the enactments which will thus be rendered unnecessary should be repealed

... II of 1855 and XIX of 1853
as ... which does not
form

EVIDENCE

MEANING OF WORDS

1 In the following rules the word 'Court' shall be taken to comprise all Courts of justice, civil or criminal, and all persons having by law or consent of parties authority to take evidence, and the word 'cause' shall be taken to comprise all judicial proceedings civil or criminal

Admissibility

... it is not meant that it ... if any, which the deci ...

... n issue in a cause the ... lecision of the cause, is admissible, unless it is excluded by the rules contained in this chapter

3 No statement by a witness of anything, or founded upon anything spoken or written, or otherwise intimated by another person, and no statement contained in any document is admissible in evidence, except in the cases specified in the rules hereafter contained

Illustrations

... evidence that D told him that he saw ...

... evidence that D, a deaf and dumb pers ... he saw B rob C The evidence is inadmissible

(c) A gives evidence that B robbed C Being asked how he knows it he says that he knows it only because E told him so The evidence which has been admitted must be struck out.

(d) A says that B was alive on the 1st January 1860 It appears that A does not speak to this fact of his own knowledge, but that he learnt it from a letter written to him by C, or from a newspaper or from a printed book or a picture In each of these cases A s statement is not admissible as evidence that

... Being asked how ... B whose handwriting ... alive on that day

(1) Where the fact that a thing was spoken, stated or otherwise intimated is a question in issue

Illustration

A says that he has been told by B that he saw C pick D's pocket This is admissible in an action against B for slandering C

(2) Where the fact that a person by or to whom the thing was spoken, written, stated or otherwise intimated was acquainted with such thing is a question in issue

Illustration

A writes to B "I have just heard that C has failed" The letter is received by B The letter is not admissible as evidence that C had failed, but when it is proved that C had then failed, the letter is admissible as evidence that the

h the letter was written

erwise intimated tends to

Illustrations

(a) A says on a trial of C for robbing D's house that he heard B say to C "D's house has been robbed," and that thereupon C fled This evidence is admissible

(b) On a trial of B for robbing C's house it is proved that B fled immediately after the robbery A witness is produced who says that he heard A tell B before B fled that a warrant had been issued for his arrest under a decree of Civil Court Th s ev dence admiss ble

ill him It is alleged of what A said at the

g him to be appre n committed in B s

that C told B that he saw A running away immediately after, is admissible

(e) A sa B C P me the 1,000 rupees which you ... but it is evidence that ... troduce evidence of wh

sedit ... ined with B for ... ing part in a riot in furtherance of those purposes is admissible against A

(4) Where the thing was spoken written or stated or otherwise intimated by a party to the suit, or some one whom he represents in interest and it is sought to be used against him

Illustrations

(a) A ... of way across B s fi ld Evidence that ... had while owner admitted A's

(b) A w ... will ship for him 100 bales of co ... direct

B an ... as a ... but

Crim

in e ... the same subject and betwe ... in erest and where the ... become incapable of givin ... vided that if each perso

(7) Where the thing spoken, written, stated or otherwise intimated was spoken, written stated or otherwise intimated in the ordinary course of business by a person who has died or become incapable of giving evidence, or whose presence cannot be procured

Illustrations.

(*a*) A, the shipping agent of the firm of B and Co states in a letter to B and Co, that he has just seen a certain ship of theirs sail from the port of Calcutta The letter is admissible as evidence of the sailing of the ship

(*b*) A an attorney, prepares the draft of an intended deed to which B was to be a party, and endorses upon it a memorandum that a copy had been sent to another attorney on a certain day The draft contains a statement that B was in insolvent circumstances The draft and endorsement are admissible as evi

[illegible] are not

[illegible] tain

[illegible] the

[illegible] of

[illegible] A's

cotton, and in the same letter he mentions the state of the silk [illegible] letter is admissible as evidence of the order given to him but not of the state of the silk market

(8) Where the thing intimated consists in entries in books kept in the ordinary course of business, or consists in written acknowledgments of the receipt of money goods, securities of property of any kind, or in any document used in commerce

Illustrations

(*a*) Entries made by a clerk of a firm in the books of the firm to the effect that the firm has received a consignment of cotton from A and has purchased 50 chests of indigo from B These are admissible in evidence against all the partners in the firm

(*b*) A one of two partners makes an entry in the partnership books that he has lent his partner B £ 100 The entry is not admissible in evidence against B that A had left him the £ 100

(*c*) A clerk whose business it is to make entries in the books of the firm of all monies paid by him makes an entry in the books that he had paid away £ 100 for the firm The entry is admissible in evidence that he had so paid away the money

(*d*) The firm of A and Co, keeps a book in which the despatch and receipt [illegible] An entry in this book of the despatch

[illegible] f B and Co, is admissible in

[illegible] by A and Co, to B and Co

[illegible] and Co are, according to the

[illegible] and afterwards despatched A

[illegible] d terms was despatched by them

on a certain day to B and Co. tendered in evidence an entry in their letter book purporting to be a copy of a letter addressed by them on that day to B and Co, and an entry of the fact that such letter was despatched The entries are admissible

(*f*) A guarantees the payment by C of a sum of money due from him to B A pays the amount to B and sues C for repayment A tenders in evidence a receipt given to himself by B for the amount due The receipt is admissible in evidence

(*g*) A sues B for the proceeds of a cargo of cotton consigned by A to B and sold through a broker The account sales rendered by the broker are admissible in evidence

(*h*) A a wharfinger, gives to B an acknowledgment that 100 tons of copper have been deposited at A's wharf This acknowledgment is admissible in evidence of the fact that the deposit has been made

(*i*) A effects a policy on his ship against sea risks The ship goes to sea and sustains injury A institutes a suit to recover damages from the underwriters The log book of the ship is admissible in evidence

(9) Where the thing spoken, written, stated or otherwise intimated relates to the usages or tenets of any body of men, the constitution or government

of any religious or charitable foundation, or the meaning of any technical or conventional words of terms or of any words or terms used in particular districts, or to any matter or public or general interest, and was spoken, written stated, or otherwise intimated by a person who has since died or become incapable of giving evidence, or whose presence cannot be procured

Illustrations.

(a) A, in order to show the religious tenets of a certain sect, tenders in evidence a manuscript treatise, proved to have been written by a deceased member of the sect The treatise is admissible

(b) It is a disputed fact in a suit whether a certain spot is or is not a public landing place Statements made on the subject by A and B now deceased

intimated has
spoken written,

stated or otherwise intimated by a person who has since died or become incapable of giving evidence, or whose presence cannot be procured, provided that such person was a member of the family or had otherwise special means of knowledge

Illustrations

(a) It is a disputed fact in a suit whether A is the son of B A statement made on the subject by C, who was a nurse in B's family about the time of A's birth, is admissible in evidence

(b) A alleging that he is the son of B, deceased, produces the following documents in which he is mentioned as the son of B

1 An entry made by B in a memorandum book stating A's birth
2 Letters which passed between two of B's brothers since deceased
3 A deed executed by B

A also produced witnesses who state that B told them that A was his son The contents of the documents and the testimony of the witnesses are admissible in evidence

(1[illegible] by
a recital [illegible] or
after th[illegible] n of
the Gov[illegible] ting
to be t[illegible] ship
of Brit[illegible]

(12) Where the thing intimated is and there has been a public meeting or public proceeding and such intimation is contained in a report thereof published in any newspaper or journal

Explanation Such report is not admissible in evidence of any fact reported to have occurred or of any statement reported to have been made at the meeting or proceeding

EVIDENCE OF LAW OF FOREIGN COUNTRY

(13) Where the thing intimated purports to be the law of a foreign country [illegible] to be printed [illegible] ntry, or in re[illegible]

MAPS

5 Maps made under the authority of Government shall be admissible

RES JUDICATA

6 [illegible] shall have effect as provided [illegible]

7 [illegible] ... s never were husband [illegible] is proof that the parties [illegible] ch

8 [illegible] is proof that the ship [illegible]

9 The judgment of a Court of competent jurisdiction upon a matter directly in issue is admissible as evidence between the same parties, and those who represent them in interest upon the same matter, directly in issue in another cause, but not between any other parties, except as provided for in the next following section of the chapter

Illustrations

(a) A sues B for a horse, alleging that it was stolen from himself and that B brought it, knowing it to be stolen Judgment is given in B's favour B afterwards loses the horse, A finds it and B sues A for it A in defence makes the same allegations as in the former suit The judgment pronounced in the former suit is admissible as evidence in B's favour

(b) A sues B for rent in the Court of the Collector, which has cognizance of such suits ...
retain the ren...
genuineness of ...
A's suit Afte...
... rtgage The
... as evidence
that such judgment was pronounced between the parties, but is not as against any person other than the parties thereto and those who represent them in interest, evidence of any other fact thereby appearing

Illustrations

(a) A sues B for compensation for injury sustained through the negligence of C, who is B's agent A obtains judgment In a suit brought by B against C for compensation for loss sustained by B through C's negligence the ... amount which A has been adjudged ...

... ause B yielded up to C certain lands which B held as guardian of A, who was then a minor A decree passed in a prior suit, whereby B was directed to yield up possession to C as owner, is admissible in evidence

(c) A is tried on the charge of having forged a deed of gift from B He is acquitted Afterwards C alleging the deed to gift of be forgery institutes a suit against A for certain lands ... session under it The record of A's acqu...

(d) A one c... in estate, dies and his brothers, B and ... D a portion of the land which they posses...

E, claiming as the adopted son and heir of A, sues for A's share of the land sold to D ... e afterwards claiming as ...

... in one of them for compensation ... were sustained by him through the negligence of their captain B sues the owners of the ... goods The judgment is not ... negligence ... whom A alleges to be B's son ... at C is B's son and decrees payment by B of A's claims.

B dies, C alleging that he is B's son, sues the executor of D for a legacy of A 10 000 rupees, D having by his will bequeathed that sum to every child of B The judgment is not admissible in evidence that C is a son of B.

App

PROOF OF WRITINGS WHICH CONSTITUTE PRIMARY EVIDENCE

11 A writing which is not required by law to be attested, but which is alleged to have ... written wholly or in part by a ... rovided for by sections 17 1 ... nce, unless the signature attached thereto, or so much of the same writing as is sought to verify, be proved to be in the handwriting of the person by whom it is alleged to have been written or signed

12 A written instrument which is required by law to be attested shall not (except in the cases provided for by section 20 of this chapter), be received as evidence unless the following rules are complied with —

(1) That execution of such instrument shall be proved by one attesting witness at the least, if there be an attesting witness alive and subject to the process of the Court by which the cause is tried and capable of bearing testimony

(2) If no attesting witness is alive and subject to such process as aforesaid, ...

is alleged to have done so

13 I ... or seal a genuine any signatu ... this faction of t

14 ... years old and is produced from the proper custody, it shall be admissible in evidence without proof of its execution or attention

PROOF OF THE CONTENTS OF DOCUMENTS BY SECONDARY EVIDENCE

15 Evidence of the contents or purport of any written or printed document or of letters figures, or other mark not produced to the Court shall not be admissible except as provided by the rules next following —

(1) A copy of or extract from any proclamation, order or regulation issued by Her Majesty or by the Privy Council or any department of Her Majesty s Governm ... that such copy of extra ...

to be printed under the authority of possession or to be certified to be true

proper officer

(2) A copy of a record of any Court or of an entry in any public book or register which is proved to be a correct copy, or which purports to be under the seal of such Court or to be certified by the proper officer, shall be admissible as evidence of the existence and the contents of any such record or entry

(3) to have being er able character

(4) Evidence of the contents of a admissible, when it has been proved that th lost or when the person in whose custod the Court by which the cause is tried or is document, or refuses, after due notice, to produce it, or when ... otherwise satisfactorily accounted for

EVIDENCE OF TERMS OF CONTRACT

16 Where a contract or grant or other disposition of property is in writing no evidence of the terms of such contract, grant, or disposition shall be received except the writing itself, or such evidence of its contents as may be admissible under the provisions of the last preceding section

Explanation The statement of a fact in any such document does not preclude the admission of oral evidence relating to the same fact, and where a suit is instituted for the purpose of setting aside or varying a document on the ground of a mistake in the writing thereof evidence may be received for the purpose of proving such mistake

PAPERS OF WHICH PROOF IS NOT REQUIRED

17 No pr ... ting to be the London ... of any Presidency ... ony or possession of the British Crown, nor of any paper purporting to be a news paper or journal, or a copy of a private Act of Parliament printed by the King's printer.

18 No proof shall b ... paper purporting to be a certificate certified ... by law made evi dence of any particular ... ubstantially in the form and purports to be executed in the manner directed by the law in that behalf

19 No proof shall be required of the official position of any person certi fying to the truth of any such paper as is mentioned in the last preceding rule

... and to have been exec ... Court Judge Magi ... Majesty or of the G ...

21 An impression of any document made by a copying machine, or a representation of anything made by means of photography or of any other process which affords a reasonable assurance of correctnes shall be admissible in evidence, wherever under these rules the production of the original may be dispensed with

PERSONS WHO MAY TESTIFY

22 Those persons only shall be incompetent to testify who from tender years or for unsoundness of mind or from any other cause appear to the Judge to be incapable of understanding the questions addressed to them

PRIVILEGE

23 *A witness is not at liberty to disclose a communication*— ... sclosure

... e to the ... te in a ... made it ... ot been

... erpreter ... ommu ... of his professional employment or consists of any advice given or conveyed by the witness professionally to his client or principal or of the contents of any docu ment of his client or principal, the knowledge of which the witness has acquired in the course of his professional employment, and where the client or principal or his representative in interest has not consented to the disclosure of such communication

(4) Where the disclosure demanded of the witness consisted in the pro duction of documents belonging to another person who would not be bound to produce them if in his possession and who has not consented to their production

24 A witness is not compellable to disclose to the Court any confidential communication which may have taken place between him and his legal pro fessional adviser

25 No communication made in furtherance of criminal purpose is protected from disclosure

26 A witness ... in his c... ind- ing a ... tion or to its being read, or being put in as evidence or to the disclosure of its contents

The validity of any such objection made by the person bringing the document shall be determined by the Court · and for the better determination thereof it shall be lawful for the Court to receive any admissible evidence which such person ... s the ... y any ... e its ... ment is to be given in evidence.

27 No question shall be put to a married person which substantially amounts to inquiring whether that person has had sexual intercourse forbidden him or her by the law to which he or she ...

28 ... a husband ... tians, whe... bodily inc... where the knowledge of the fact inquired after is necessary to the determination of some question between the husband and wife according to the law to which hey are subject

EXAMINATION OF WITNESSES.

29 The p... with the permission of th... in the same manner as ... may be allowed to show that the witness has varied from a previous statement made by him

30 In order to repel an attack on the testimony of a witness, any former statement made b... when the fact took ... the fact shall be ... deposition or stater... dence that such deposition or statement was made, and that it was made at the time and place, and under the circumstances, if any, which shall be stated in the certificate or on the face of the deposition or statement

31 It shall not be lawful to ask a witness, in order to test his credit, any question the answer to which might criminate or might tend directly or indirectly, to criminate him, or might expose or tend, directly or indirectly to expose him to a penalty or forfeiture of any kind But a witness shall not be excu... ssue in any caus... night crimi- nate, ... or tend to expo... h a witness shall ... ishing him for ... nce against him ... party or a ... upon any witne... f a witness quest... cause is incor... not excluded by this rule

Illustrations

... the ground of fraud The ... he had not made a part... ble to show that he frau... had made such fraudulent claim

(*b*) In a suit by A against B, a witness for A is asked whether he had not been dismissed from B's service for misconduct He denies it. Evidence is tendered to contradict the witness's statement as to such dismissal. The evidence is not admissible.

A. (c) In an action against A for goods sold to him by B, a witness for B deposes that he saw the goods sold and delivered He is asked whether he had given a different account of the transaction He denies it Evidence is tendered to show that he had given such different account This evidence is admissible He is asked whether . . . alleged sale, dealt with B as the owner of the go . tendered to show that he had so dealt with B is asked whether he h . transaction not in issue in the cause . to show that he had given such false ac

(d) The witness is asked whether he had not received money or a promise of some favour from B to induce him to give his evidence He denies it Evidence is tendered to show that he had received such money or promise This evidence is admissible

33 A witness may be cross examined as to previous statements made by him in writing . to the subject matter of the cause without su . but if it is intended to contradict such witness st, before such contradicting proof can be given, be called to those parts of the writing which are to be used . Court may, however, at any time . iting for its inspection; and may the trials as may seem fit

34 A witness may while under examination refer to any writing mac by himse . questione or so soo actio was fresl in n made by insu tion, or insu tion, was fresh in his memory In such case the writing shall be produced an may be given by the adverse party, who may, if he choose, cross examine the witness upon it.

NUMBER OF WITNESSES

35 A Cour . act of such evidence, alt

This rule . that th testimony is give r offence against the sta

THINGS . TAKEN.

36 The

(1) All A law in any part of British .

(2) All public Acts of the Parliament of the United Kingdom of Great Britain and Ireland, and all local and personal Acts directed by Parliament to be judicially noticed;

(3) The names, titles, and functions of the persons filling for the time being any police office in any part of India,

(4) All divisions of time, the geographical divisions of the world, th territories under the dominion of th . ment conti nuation, and termination of hostili . y other state and the . le recog

. own members and o . of their deputies and subordinate officers, or assistants, and also of all officers acting in execution of its process, and of all Advocates Attorneys, Proctors, Vakeels, Pleaders, and other persons authorized by law to act before it

SOURCES OF INFORMATION TO WHICH COURTS MAY REFER

38 A Court may, in order to inform itself in respect of any of the matters mentioned in sections 36 and 37 of these Rules, and also on matters of Publ History, Literature, Science, or Art refer, for the purposes of evidence, to such

Books, Maps, Almanacks, or Charts as the Court shall consider to be of authority on the subject to which they relate

39 The foregoing Rules are to take effect subject to the provisions of the law for the time being in force regarding the registration of any document

We humbly submit this our Fifth Report to your Majesty's Royal consideration

(Sd) ROMILLY (L S)
(Sd) EDWARD RYAN (L S)
(Sd) ROBERT LOWE (L S)
(Sd) ROBERT LUSH (L S)
(Sd) JOHN M MACLEOD (L S)
(Sd.) W. M JAMES (L S)

Dated this 3rd day of August 1868

ABSTRACTS of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict Cap 67

The Council met at Simla on Wednesday, the 28th October, 1868

PRESENT

His Excellency the Viceroy and Governor General of India, presiding,
His Excellency the Commander in Chief, G C S I, K C B

The Hon'ble G N Taylor
The Hon'ble H S Maine
The Hon'ble John Strachey
The Hon'ble Sir Richard Temple, K C S I
The Hon'ble Col H W Norman, C B
The Hon'ble F R Cockerell
The Hon'ble Sir George Couper *Bart* C B

EVIDENCE BILL

The Hon'ble [illegible] and amend the Law of E[illegible] state that the Bill embo[illegible] missioners had recently [illegible] ably no subject in which a [illegible] India and the Commissioners had fully stated [illegible] circulated to Hon'ble Members the reasons [illegible] proposed to introduce If he got leave to introduce the Bill he propo[illegible] His Excellency the President to suspend the rules for the conduct of business and on their suspension, to introduce the Bill with a view to its publication in the Gazette There was no use in now dilating to any length on the technical subjects comprised in the Bill

The [illegible] the President to suspend the Rules for the [illegible]

[illegible] President declared the Rules suspended

The Hon'ble Mr Maine then introduced the Bill

(Sd) WHITLEY STOKES

Asst Secy to the Govt of India

Home Department (Legislative)

SIMLA,
The 28th October, 1868

ABSTRACT of Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament, 24 & 25 Vict. Cap 67

The Council met at Government House on Friday, the 4th December, 1868

PRESENT

His Excellency the Viceroy and Governor General of India, *presiding*

The Hon'ble G Noble Taylor
The Hon'ble H Summer Maine.
The Hon'ble John Strachey
The Hon'ble Colonel H W. Norman C B
The Hon'ble F R Cockerell
The Hon'ble Sir George Couper, *Bart* C B.
The Hon'ble Maharaja Sir Dig Bijoy Singh Bahadur, K C S I of Balrampur
The Hon'ble Gordon S Forbes
The Hon'ble D Cowie.
The Hon'ble M J Shaw Stewart

The Hon'ble Shaw Stewart took the oath of allegiance, and the oath that he would faithfully discharge the duties of his office

EVIDENCE BILL

The Hon'ble Mr. ... law of Evidence be referr... two months He said ... Bill to a Select Committee, what was affirmed was the principle of the me... or the expediency of legislation within the general principles of the measure This being undestood, Mr Maine did not suppose that the council would ever seriously think of refusing to refer to a Select Committee a Bill prepared by the Indian Law Commissioners and therefore he should say very little in commending it to the council The consideration of the measure was essentially a consideration of its detail and to that detail the Select Committee would doubtless give the most careful attention not, as Mr Maine hoped, for the purpose of ... n matters which ... isio experience, ... quired in any way restriction or extension with regard to the special circumstances and facts of this country.

...

India where English law was not administered 'This customary law ... added

"Has not assumed any definite form, the Mahomedan Law, since the enactment of the new Code of Criminal Procedure has ceased to have any validity in the country Courts even ... have in fact no fixed rules of evidence ... 1855 ... e not ...

... uld seem ... modified ... st ten or ... in force ... h, and the habit ... ind No doubt ... English Courts ... ould appeal to members of Council who had more experience in the Mofussil than he had, his honourable friends, Sir George Couper and Mr Cockerell, whether the Judges of

those Courts did not, as a matter of fact, believe that it was their duty to ad- **A**
minister the English law of evidence as modified by the Evidence Acts In
particular, Mr. M...
before a Mof...

the E
much
the

without fixed rules to go
capricious administration o
equal, or perhaps even a gre
be enforced as practically to leave the Court without the material for a decision
Mr Maine would venture to state his impression that the fault of substance
ordinarily committed l
evidence, than in avertir
and in conjecturing the
deration of what the
circumstances Anothe
Judges were thus plac
were excellent text book
consisted more in refreshing knowledge which had been gained by forensic experience than in teaching knowledge The commissioners would appear to be right in supposing that what was wanted for the greatest part of India was a liberalized version of the English law of evidence, enacted with authority and thus excluding caprice and superseding the use of text books by compactness and precision

Another ...
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acts an
could be ascertained by the processes in use among men of science. There were certain continental systems of evidence which did make a pretension to include a process of the kind And perhaps some such theory did pervade the rules of the English law with regard to presumptions which he was happy to see the Commissioners had discarded But the English law of evidence as a whole made no claim to be such a system It was justly regarded by English lawyers as a mod... l probably have never come into existence
ba... sh judicial administration,—the separation
of ... fact, of the Judge from the Jury It
consisted mainly of rules of exclusion that is, of rules for keeping certain kinds of evidence out of sight of the Judge of fact Such a system, Mr Maine apprehended could only be justified on two grounds First of all, some evidence must be excluded If all evidence were admitted nay, even if all relevant evidence were admitted, if everything were let in which tended to throw *light* on the matt... Even in England they
would b
their fur
ing to
remotest bearing on it It being then, assumed that, ... must necessarily be shut out,
tions of judicial enquiry, some sorts of evidence which were found
the English law excluded those descriptions of evidence which ...
practical
judgmen
the case
not at a
Maine co
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reject as absolutely inadmissible But taking men, as you found them, and taking the average of judicial ability, it was really true that some kind of

mind far deeper than was consistent
which the English law laid claim was
own for distinguishing those kinds of
would be presumptuous in Mr Maine
to praise the Commissioners' proposals, but he ventured to say that, in his humble opinion, they had wisely availed themselves of the results of English experience but had wisely modified those results upon two considerations, which

a great degree by our social
nd much of it is admitted
different forms of property

In a country like India where the task of judicial investigation is attended with peculiar difficulties, and where it is the duty of the Judge in all civil and in some criminal cases to decide without a jury, there is greater danger of miscarriage from the mind of the Court being uninformed than from its being unduly influenced by the information laid before it"

Mr Maine had said that he would not comment on the details of the measure, but there was one point of detail which it was necessary to notice,

The omission in the Bill ... Stamp
Bill now in hands of Mr ... of the
Governor General before ... passed
last, it would control the present measure. But another reason must probably

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Now from the Commissioners' point of view, which was the purely judicial

inference from those papers If effect were given to the Commissioners' suggestion either there would be an enormous evasion of the law, or that evasion would be prevented by recourse to the Criminal Courts for the enforcement of penalties to an extent which would itself be a greater evil than the sacrifice of any branch of revenue Under these circumstances, the point has been considered by the Executive Government and Mr Maine had to state that, having regard to the fact that the stamp duties on commercial instruments were easily levied, and did not press hardly on the people, the Government was not prepared to give up that portion of the public receipts

...nce—The Hon'ble Mr Cockerell, the Hon'ble Sir George Couper, and the Hon'ble Messrs Gordon Forbes Shaw Stewart and the Mover

The council adjourned till the 11th December, 1868.

CALCUTTA, WHITLEY STOKES

The 4th December, 1868. *Asst. Secy to the Govt of India.*

Home Department (Legislative)

ABSTRACT of the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict Cap 67.

The council met at Simla on Tuesday, the 6th September, 1870

PRESENT

His Excellency the Viceroy and Governor-General of India, K P G C S I *Presiding*

His Excellency the Commander in Chief G C B G. C. S I

The Hon'ble John Strachey
The Hon'ble Sir Richard Temple K C S I
The Hon'ble J Fitzjames Stephen, Q C
The Hon'ble B H Ellis
Major General the Hon'ble H W Norman, C B
The Hon'ble F R Cockerell.

His Highness the Hon'ble Surmad Rajaha Hindustan Raja Rajendra Sri Maharaja Dhiraj Sivi Ram Singh Bahadur of Jaypur G C S I

EVIDENCE BILL

... the Hon'ble Mr Strachey be added ... and amend the Law of Evidence ... n opportunity of saying a few words on a measure of the very highest importance The Evidence Act was drafted by the Ind ... two years ago It was introd ... of the members of which ... had in the Gazette for general information Objections of ... taken to it by many of the most distinguished lawyers in India, and no doubt, the subject was one which required the most careful handling It was impossible to exaggerate the practical importance of the Bill, as it would regulate the most important part of the procedure of every Court of Justice throughout the Empire Such a measure would of course require most careful consideration ...

upon the ... doubts ... be ac ... in a ... nglish state ... the law ... As consequence was that the subject caused ... in Messrs Cowell and a proof of this he (the mover) might observe that in about Woodman's Indian Digest, which contained notes of cases decided in about eight years, the title "Evidence" filled no less than twenty three royal octavo pages in ... There were probably from four to five hun... which th... which in... continue...

The motion was put and agreed to

The Council then adjourned to the 20th September, 1870

WHITLEY STOKES

Secretary to the Council of the Governor General for making Laws and Regulations

SIMLA,
The 6th September, 1870

ABSTRACT of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict Cap 67.

The Council met at Government House on Friday, the 18th November, 1870

PRESENT.

His Excellency the Viceroy and Governor General of India, K P G, C S I, *presiding*

The Hon'ble John Strachey.
The Hon'ble Sir Richard Temple K C S I
The Hon'ble J Fitzjames Stephen, Q C
The Hon'ble B H Ellis
Major General, the Hon'ble H W Norman, C B
The Hon'ble D Cowie
The Hon'ble Francis Stewart Chapman
The Hon'ble F R Cockerell

EVIDENCE AND INSOLVENCY BILLS

... n'ble Mr Inglis be added to the ...

The Council adjourned to Friday, the 9th December, 1870

WHITLEY STOKES,
Secretary to the Government of India

CALCUTTA,
The 2nd December, 1870

ABSTRACT of the Proceedings of the Council of the Governor General of India, assembled for the purposes of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict Cap 67.

The Council met at Government House on Friday, the 9th December, 1870

PRESENT

His Excellency the Viceroy and Governor General of India, K P G, C S I, *presiding.*

The Hon'ble John Strachey
The Hon'ble Sir Richard Temple, K C S I
The Hon'ble J Fitzjames Stephen, Q C
The Hon ble B H. Ellis
Major Genl the Hon'ble W H Norman, C B
The Hon'ble Francis Stewart Chapman

SUNDRY BILLS

... Hon'ble Mr Robinson be added ...

For the Limitation of Suits
The motion was put and agreed to
The Council adjourned to Friday, the 16th December, 1870

WHITLEY STOKES,
Secretary to the Govt of India

CALCUTTA,
The 9th December, 1870

APPENDIX B.

DRAFT REPORT OF THE SELECT COMMITTEE

The Gazette of India, July 1, 1871, Part V, p 273

The following Draft Report of a Select Committee together with the Bill as settled by them, was presented to the Council of the Governor General of

India for the purpose of making Laws and Regulations on the 31st March, 1871 — A

From Officiating Under Secretary, Home Department, No 423, dated 23rd October 1868, and enclosures.

From Assistant Secretary, Foreign Department, No 333, dated 12th December 1868, and enclosures

Remarks by the Hon'ble the Chief Justice of Bombay (no date)

Remarks by Hon'ble Justice Phear, dated 8th December, 1868

From Secretary to Chief Commissioner British Burma, No 525—1, dated 1st December 1868

From Assistant Secretary to Government of Bengal Legislative Department, No 37, dated 9th January 1869, and enclosure

From Deputy Judge Advocate General of the Army, dated 26th January, 1869, and enclosures

From Officiating under Secretary Home Department, No. 258 dated 17th February, 1869, forwarding memorial from Muktars and Revenue Agents, Howrah, dated 4th February 1869

From Secretary to Indian Law Commissioners, dated 6th February, 1869.

From Chief Secretary to Government Fort St George, No 120, dated 18th March 1869, and enclosures

From Secretary to Government of Bombay, No 2971, dated 7th September 1869, and encloures

From Secretary to Government of Bombay, No 3188 dated 24th September 1869, and enclosures

Fifth Report of Her Majesty's Law Commissioners on the Bill

From Officiating Inspector-General of Police, Punjab, No 2657, dated the 28th September, 1870

From Secretary to Government of India Home Department, No 1892, dated 18th October 1870 forwarding letter from Chief Commissioner, British Burma, No 61, dated 15th August 1870, and enclosures

We the members of the Select Committee to which the Evidence Bill has been referred, have the honour to report that we have considered the Bill and the papers noted in the margin

After a very careful consideration of the draft prepared by the Indian Law Commissioners we have arrived at the conclusion that it is not suited to the wants of this country

We have recorded in a separate report the grounds on which this conclusion is based They are in a few words that the Commissioners' draft is not sufficiently elementary for the officers for whose use it is designed, and that it assumes an acquaintance on their part with the law of England, which can scarcely be expected from them Our draft, however, though arranged on a different principle from theirs, embodies most of its provisions In general, it has been our object to reproduce the English Law of Evidence with certain modifications most of which have been suggested by the Commissioners though with some this is not the case

The English Law of Evidence appears to us to be totally destitute of arrangement This arises partly from the circumstance that its leading terms are continually used in different sense, and partly from the circumstance that the Law of Evidence was formed by degrees out of various elements, and in particular out of the English system of pleading and the habitual practice of the Courts of Common Law For instance, the rule that evidence must be confined to point in issue is founded on the system of pleading The rule that hearsay is no evidence is part of the practice of the Courts but the two sets of rules run into each other in such an irregular way as to produce between them a result which no one can possibly understand systematically unless he is both acquainted with the principles of a system of pleading which is being rapidly abolished, and with the everyday practice of the Common Laws of Courts, which can be acquired and understood only by those who habitually take part in it This knowledge, moreover, must be qualified by study of text books which are seldom systematically arranged

Many other circumstances, to which we need not refer, have contributed largely to the general results, but we may illustrate the extreme intricacy of the law, and the total absence of anything like system which pervades every part of it, by a single instance. In Mr. Pitt Taylor's work on evidence it is stated that "ancient documents" when tendered in support of ancient possession, form the third exception to the rule which excludes hearsay. The question is whether A is entitled to a fishery. He produces a royal grant of the fishery to his ancestor. This fact the law describes as a peculiar kind of hearsay admissible by special exception. Surely this is using language in a most uninstructive manner.

This being the case, we have discarded altogether the phraseology in which the English text writers usually express themselves, and have attempted first to ascertain, and then to arrange in their natural order, the principles which underlie the numerous cases and fragmentary rules which they have collected together. The result [illegible] follows:—

Every judicial proceedin [illegible] of some right or liability. If [illegible] the liability to punishment of [illegible] the object is to ascertain some right of property or of status, or [illegible] one party, and the liability of the other, to some form of relief.

[illegible] are dependent upon and arise out of facts, and [illegible] which can, and those which cannot be perceived [illegible] an be perceived by the senses, it is superfluous to give examples. Of facts which cannot be perceived by the sense, intention, [illegible] may be given as examples. But each class [illegible] n to the name of facts— [illegible] it the intervention of the [illegible] time, he had a certain [illegible] e can testify that, at a certain time and place, he saw a particular [illegible] e has, in each case, a present recollection of a past direct perception. Moreover it is equally necessary to ascertain facts of each class in judicial proceedings, and they must in [illegible] way [illegible] different ways [illegible] onstitute [illegible] liability [illegible] would be a lega [illegible] dest son of B, there ar [illegible] England the heir-at law [illegible] From the fact that A [illegible] id with a [illegible] that A [illegible] knowledge there arises of necessity the [illegible] iment provided by the law for murder [illegible] g may be called facts in issue unless [illegible] es in issue in the sense above explained [illegible] nce of facts in issue and these may be [illegible] with which it [illegible] themselves, so [illegible] relation to the [illegible] ther an alleged [illegible] inference from [illegible] t the belief of [illegible] l upon grounds altogether independent of the relation [illegible] nature of the proceedings in which its existence is to be determined. The question is whether A wrote a letter. The letter may have contained the terms of a contract. It may have been a libel. It may have constituted the motive for the commission of a crime by B. It may supply proof of an *alibi* in favour of A. It may be an admission or a confession of a crime, but whatever may be the relation of the [illegible] unless it believes that A did [illegible] red, in each of the cases [illegible] ce, the Court required

the production of the original when the *writing of the letter* is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. *In short*, the way in which a fact should be proved depends on the *nature* of the fact, and not on the relation of the fact to the proceedings

Court is convinced of a fact is evidence It is or circumstantial We have *not adopted*

e establishes a fact in issue whereas teral fact, evidence is classified not ith reference to the use to which it reference to its component elements but as being used for writing or for printing We have shown that the mode in which a fact must be proved depends on its nature and not on the use to be made of it Evidence, therefore, should be defined, *not with reference to the* reference to its own nature

rect evidence is a statement of ntial evidence is something phrase is thus used, the word nd circumstantial "evidence" s In the first, it means testimony, in the second, it means a fact which is to serve as the *foundation for an inference* It would indeed be quite correct, if this view is taken to say 'circumstantial evidence must be proved by direct evidence' This would be a most clumsy mode of expression, but it shows the ambiguity of the word 'evidence' which means either

(1) Words spoken or things produced in order to convince the Court of the existence of facts, or

(2) facts of which the Court is so convinced and which suggest some inference as to other facts

We use the word 'evidence' in the first of these senses only, and so used it may be reduced to three heads—(1) oral evidence, (2) documentary evidence, (3) material evidence

Finally the evidence by which facts are to be proved must be brought to the notice of the Court and submitted to its judgment and the Court must form its judgm

to us to supply the ground work for a e subject as follows —

II Preliminary

e issue

to their nature by oral documentary or

IV The production of evidence

V Procedure

We have accordingly distributed the subject under these heads, in the manner which we now proceed to describe somewhat more fully

I—PRELIMINARY

Under this head we have defined 'fact' facts in issue', 'collateral facts' a documen 'proved' 'necessary inference' and 'presume'

Of ou and 'evidence', with the principles already stated We may ffect of the definition of evidence

It will make perfectly clear several matters over which the ambiguity of the words as used in English law has thrown much confusion The subject of circumstantial evidence will be distributed into its elements and will be dealt with thus The facts are—that he had a motive e one of the crime shows fo was in possession of property he wrote a letter indicating his guilt he found that all these are relevant facts, either as motive, incident of facts in issue, effects

of facts in issue or conduct influenced by facts in issue On turning to Chapter III it will be [illegible] the statements displayin [illegible] says he heard them, the [illegible] says he saw them the possession of the property by the production of the property in Court, and by the direct oral evidence of some one who had seen it in th [illegible] he letter itself or sec [illegible] rs observe is used [illegible] nner, finds no place in our draft, and we hope [illegible] any confusion in connection with it. Chapter [illegible] manner which corresponds on the whole (though with some modifications) with the English law in [illegible] of third persons as to relevant facts [illegible] not be themselves relevant and Chapt [illegible] shall in all cases be direct on whatev [illegible] y be relevant to the issue t [illegible] en, it must be established by a [illegible] by a [illegible]

So our definition does away with a confusion which arises out of the double meaning of the word evidence in the phrases "primary and secondary evidence Primary evidence sometimes means a relevant fact, and at other [illegible] of by a copy [illegible] and confined [illegible] was spoken or [illegible]

[illegible] vidence" the [illegible] is not open to objection on the ground of obscurity or ambiguity but the word 'evidence in it means not what we understood by evidence but a fact established by evidence from which a particular inference necessarily follows Our phrase, therefore, harmonises with the rest of our draft whereas 'conclusive evidence' would not.

The definitions of proof proved and 'moral certainty require some comment The definition of proof is subordinate to that of 'proved which is that a fact is said to be proved in two cases that is to say, when the Court after hearing the evidence respecting it—

(1) believes in its existence, or

(2) thinks its existence so probable that a reasonable man ought under the circumstances of the particular case to act upon the supposition that it exists

This degree of probability we describe as moral certainty', and we provide that no fact shall be regarded as morally certain unless the evidence is such [illegible] an approach as we [illegible] doubt", [illegible] fact to [illegible] be completely answered, for at bottom it is a question not of science but of prudence and our definition of the word proved' is meant to make this plain We have however attached to it the negative condition that a reasonable man ought [illegible] other [illegible]

which must have been committed either by him or by B unless [illegible] exist which make it improbable that the offence was committed by B We have not attempted to carry the matter further We believe that in all countries and in this country more than in any other it is absolutely necessary to leave to judges a wide discretion as to the risk of error which they choose to incur in

coming to a decision, and that this is a matter of prudence and practice as to which rules ought to be laid down, rather with a view of guiding, than with a view of fettering discretion

The last provision, in the preliminary part, to which we would call attention, defines in very general terms the duty of the Court in deciding questions of fact Its generality appeared to us to render the preliminary rather than the concluding chapter, the proper place for it This section declares that the duty of the Court is to determine question of fact by drawing inferences—

(1) *from the evidence given to the facts alleged to exist,*
(2) *from facts proved to facts not proved,*
(3) *from the absence of evidence which might have been given,*
(4) *from the ad...*

the ... nd generally from

dra... rences are to be
of p... lly to the subject
fact ... upon record the
... to infer, and not merely to accept or register evidence is in all cases
the duty of the Court One of the many fallacies which owe their origin to the
amb...
co... ich it is used is the
in... inference whereas
on ... whatever is useful
... the ground work for inferences of which the inference that the facts which the witness alleges to exist, do or did actually exist, is very often the most difficult to draw The truth is, that to infer in one or other of the different shapes which we have stated is the great duty of the Judge in every case whatever and we have thought it desirable to point this out in the plainest and broadest way

We have added two qualifications only to this general rule (1) that when the law declares an inference to be necessary the Court shall draw it, and shall not allow its truth to be contradicted, (2) that when the law directs the Court to presume a fact it shall infer its existence till the contrary appears We have treated in detail of necessary inference and presumptions in other parts of the Bill

II THE RELEVANCY OF FACTS

We have already pointed out the place which in our opinion belongs to this subject in the law of evidence The question what facts you may prove obviously lies at the root of the whole matter and unless a plain and full answer is given to the question it is impossible to state the law systematically The answer to the question is we think to be found in several of the wide exceptions which are made by English text writers to the wide exclusive rules— that evidence must be confined to the point in issue that hearsay is no evidence and that the best evidence must be given, though other parts of the same exceptions are to be found in different branches of the law We think however that by a comparison and collection of these exceptions we have succeeded in forming a collection of positive rules as to the relevancy of facts to the issue which w... nal man could wish to have before him

(1) ... facts in issue
(2) all collateral facts which
(a) form part of the same transaction,
(b) are the immediate occasion cause or effect of fact in issue,
(c) show motive, preparation or conduct affected by a fact in issue
(d) are necessary to be known in order to introduce or explain relevant facts,
(e) ...
(f) ...
except u... ir
its existe... of
moral certainty given above,
(g) affect the amount of damages in cases where damages are claimed,
(h) show the origin or existence of a disputed right or custom,

(i) show the existence of a relevant state of mind and body,
(j) show the existence of a series of which a relevant fact forms a part or
(k) show (in certain cases) the existence of a given course of business

The remainder of the chapter throws into a positive shape what in English law forms the exceptions of the rule, excluding the various matters described as hearsay They relate to—

the conduct of the parties on previous occasions,
the statement of the parties on previous occasions,
previous judgments,
statements of third persons,
opinions of third persons

1 In reference to the conduct of the parties on previous occasions we embody in three sections the existing law of England as to evidence of character, with some modifications We include, under the word character both reputation and disposition, and we permit evidence to be given of previous convictions against a prisoner for the purpose of prejudicing him We do not see why he should not be prejudiced by such evidence, if it is true

2 Under the head of the statement of the parties on other occasions we deal with the question of admissions, as to which we have not materially altered the existing law

We have not thought it necessary to transfer from their present position ... Police ... the

3 Previous judgments appear to follow naturally upon previous statements Under this head we deal with the question of *res judicata*

We have not attempted to deal with the question of the bar of suits by previous judgments between the same parties This is a question of procedure rather than of evidence and will be properly dealt with whenever the Code of Civil and Criminal Procedure are re enacted We have on the other hand dealt is substantial accordance with the principles of the law of England with the question of the relevancy of judgment between strangers For the sake of simplicity and in order to avoid the difficulty of defining or enumerating judgments in ... of *Sir Barnes Peacock* in *Kunya*

4 ... made one considerable alteration in the ... made by third persons about ... truth or if they refer ... making them appears to the Court to have special means of knowledge We have given several illustrations of this the strongest of which is suggested by Mr Pitt Taylor A Captain about to sail on a voyage carefully examines the ship declares his belief that she is seaworthy, and embarks on her with his family and property uninsured Statements of this sort are surely most unlikely to be false Evidence of such statements will be admissible under this section whether the person who makes them is living or dead, producible or not Some of them would probably be admissible under the English rule which admits statements explanatory of conduct, but as the conduct explained must be relevant and as no clear definition of relevancy is given by the law of England it is very difficult to say how far his rule extends

The next exception refers to statements made by a person who is dead or cannot be found or produced without unreasonable delay or expense We ... cause of the person's ... r express an opinion ... of any relationship ... when they are made ... restrictions placed by the law of England on the admission of dying declarations and statements about relationship, and as to the necessity that statements should be opposed to the pecuniary interest of the party making them, on the ground that they ... ibility of what is, at best to ...

statements in public or official ... previous judicial proceedings

5 The cases in which the opinion of third persons are relevant are dealt with in sections forty four to fifty

They declare to be relevant, the opinions of experts, opinion as to handwriting, opinion as to usages, and opinions as to relationship and the grounds of such opinions

This completes that part of the Bill which relates to the relevancy of fa... minor importance, which ...odifies the law of England, ... part of the law which is ... the exceptions to the rules ... that the best evidence must ... these rules include other matters which we treat of under other heads

III—PROOF.

The second Chapter having decided what facts are relevant we proceed to show how a relevant fact is to be proved

In the first place, the fact to be proved may be one of so much notoriety that the Courts will take judicial notice of it, or it may be admitted by the parties In either of these cases no evidence of its existence need be given Chapter III which relates to judicial notice, disposes of this subject It is taken in part from Act II of 1855, in part from the commissioners' draft bill and in part from the law of England

If evidence has to be given of any fact that evidence must be either oral, documentary, or material, and we proceed in the following chapters to deal with the peculiarities of each of these three kinds of evidence There is however, one topic which applies to all of them, of which we treat in Chapter IV This is the distinction between primary and secondary evidence As we have already shown, ... of recognizing the obvi... of a document is t... and secondary evid... the document or t... scription is secondar...

We next ... proof by the various kinds of evidence successively, namely oral, documentary and material With regard to oral evidence, we provide, that it must in all cases whatever, whether it is primary or secondary, and whether the fact to be proved is a fact in issue or collateral, be direct That is to say, if the fact to be proved is one that could be seen, it must be proved by some one who says he saw it If it could be heard by some one who says he heard it and so with the other senses We also provide that, if the fact to be proved is the opinion of a living and producible person, or the grounds on which such opinion is held, it must be proved by the person who holds that opinion on those grounds

We have, however, provided that if the fact to be proved is the opinion of an expert who cannot be called (which is the case in the majority of cases in this country) and if such opinion has been expressed in any published treatise, it may be pro...

Th... provisions of relevancy contained, ... whole doctrine of hearsay in a perfectly ...

(1) the sayings and doings of third persons are, as a rule, irrelevant, so that no proof of them can be admitted,

(2) in some excepted cases they are relevant;

(3) every act done or words spoken which is relevant on any ground, must (if proved by oral evidence) be proved by some one who saw it with his own eyes or heard it with his own ears

With regard to the Chapters which relate to the proof of facts by documentary evidence, and in cases in which secondary evidence may be admitted, we have followed, with few alterations the existing law We may observe that Chapter VII contains most of the presumptions which we have thought it right to introduce into the Bill They are presumptions which in almost every

...nces of certified copies, gazettes, books
copies of depositions, etc
... evidence
... this
upon

it are, so ... contract etc, ... duced
On ... the law of England and
to writing ...
the Commissioners' draft

IV THE PRODUCTION OF PROOF.

From the question of proof of facts, we pass to the question of the manner in which the proof is to be produced, and this we treat under the following heads —

The burden of proof (Chapter X)
Witness (Chapter XI)
... oaths (Chapter XII)
... XIII)

... f, we lay down the broad rules the general burden of proof is on the party who, if no evidence at all were given, would fail, and that the burden of proving any particular fact is on the party who affirms it These are the well established English rules, and appear to us reasonable in themselves We have not followed the precedent of the New York Code in laying down a long list of presumptions, agreeing with the Indian Law Commissioners in the opinion that it is better not to fetter the discretion of the Judges We have, ... or two such presumptions to a place in the code, as, ... the Judges might feel embarrassed These ... from seven years' disappearance, and the presumption of partnership from the ... t of acting as partners.

We may observe th ... of a matter in which the laws of sev ... mewhat arbitrary, provisions to ... s in a common catastrophe ... burden of proof The persor ... t This ... nference ... rules of

... ation of witnesses, we have been careful ... existing practice of the Courts, which ... il Procedure, is of necessity in the ... we have put into propositions very ... on and cross examination of the witnesses

We have also considered it necessary, having regard to the peculiar ... of this country, to put into the hands of the Judge an amount ... evidence which if it exists by law, is at ... in England We expressly empower him to ... relevant or irrelevant, at any period of the ... if he thinks ... upon ... utmost ... The object of these provisions is to ... into the truth of the matter before him' define simply and clearly the duties and the position of the Judges and those who practice before them The English system under which the Bench and the Bar act together and play their respective parts independently, and the professional organisation on which it rests, have no doubt great advantages; but in this country such a system does not as yet exist, and will not for a very ... In mofussil, generally speaking, the great ... Bar and when a ... and have to appear ... training as English

whose technical knowledge
tremely intricate system of
ower over the Judges unlike
we have thought it necessary
the hands of the Judges and to enable them to act efficiently and
lic interest

may refer to some provisions which we
of the power of cross examination
we believe the existence of that power to be essential to the administration of justice, and we believe it to be liable to great abuses The need for the power and danger of its abuse are proved by English experience, but in this country
are t in particular,
here t more necessary
preve motives and to
use of the power of exposure as a means of gratifying malice We have accordingly provided as follows

Such questions may relate either to matters relevant to the case, or to matters not relevant to the case If they relate to matters relevant to the case, we think that the witness ought to be compellable to answer, but that his answer should not afterwards be used against him

If they relate to matters not relevant to the case, except in so far as they affect the credit of the witness we think that the witness ought not to be compelled to answer His refusal to do so would, in most cases, serve the purpose of discrediting him, as well as an express admission that the imputation conveyed by the question was true

In order to protect witness against needless questions of this kind, we enact that any advocate who asks such questions without written instructions (which the Court may call upon him to produce, and may impound when produced) shall be guilty of a contempt of
any such question, if asked by a party to th
the question of the written instructions are to
publication of
affected, and
tions, or as fall
ninety nine of the India Penal Code, merely because they were made in the manner stated Upon a trial for defamation it would of course be open to the person accused to show, either that the imputation was true or that it was for the public good that imputation should be made (Ex I, section 499, I P C), or that it was made in good faith for the protection of the interest of the person making it or of any other person (Ex 9) This is the only method which occurs to us of providing at once for the interests of a *bona fide* questioner and an innocent witness

In the same spirit, we have empowered the Court, in general terms, to forbid indecent and scandalous inquiries unless they relate to facts in issue as defined above, or to matters absolutely necessary to be known in order to determine whether the facts in issue existed, and also to forbid questions intended to insult or annoy

We prefer this general power to the sections drawn by the Commissioners, which forbid questions to marr amount to
inquiring whether that person to him or
her by the law to which he or sh rding the
occurrence of sexual the case
of Christians, where ground
of bodily incapacity *It is*
possible to imagine ortant to
show that a married person was living with some one who was not *her husband* or his wife A woman brings a false accusation against her servant The motive *is* revenge for the discovery by the servant of *an intrigue by the* mistress A married man comes to prove an *alibi* on behalf of his mistress A woman sues a married man on a bond *He pleads* that consideration was adultery In all these cases, and so in many others which might be suggested, it appears to us that it would be absolutely necessary to admit such evidence as is referred to As to questions relating to sexual intercourse between husband and wife, we think it better to forbid indecent and scandalous inquiries in

3. general terms, than to lay down a positive rule which in possible cases m produce hardship

fa ts and deliver final judgment, or to remand the case

Finally, we recommend that the Draft Bill, together with the report sho be circulated for the opinion of the Local Governments.

J F STEPHEN
J STRACHEY
F S CHAPMAN
F. R COCKERELL
J F D INGLIS
W ROBINSON

The 31st March, 1871

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vict Cap 67.

The Council met at Government House on Friday, the 31st March, 1871

PRESENT:

His Excellency the Viceroy and Governor General of India, K P G M S I *Presiding*
His Honour the Lieutenant Governor of Bengal
His Excellency the Commander in-chief, G C P, C C S I

The Hon'ble John Strachey
The Hon'ble Sir Richard Temple K C S I
The Hon'ble J Fitzjames Stephen Q C
The Hon'ble B H Ellis
Major General The Hon'ble H W Norman C B
Colonel the Hon'ble R Strachey, C S
The Hon'ble F S Chapman
The Hon'ble J R Bullen Smith
The Hon'ble F R Cockerell
The Hon'ble J F D Inglis,
The Hon'ble W Robinson C S I

INDIAN EVIDENCE BILL

The Honble Mr Stephen in presenting the Report of the Select Committee on the *Bill* to define and amend the Law of Evidence said —

"My Lord,—I feel that I owe an apology to Your Lordship and the Council for requesting their attention to a second speech upon a purely legal subject after the one which I delivered a week ago, upon the Limitation Act On this occasion, however, I have to explain the position of a measure perhaps as important as any that has been ... ite years by the Indian Legislature in as muc ... affect the daily administration of both Civil and ... the whole country Moreover, the subject ... is one of deep and wide general interest for a law of Evidence properly constructed would be nothing less than an ... w, to the probl ... however, imp ... the Bill which ... w to describe in a general way to your L ...

"I will state, ... ures down to the present time So far ... Commissioners

drew a draft Evidence Act which was sent out to this country and introduced and referred to a Select Committee by my friend and predecessor Mr Maine. The Bill was circulated for opinion to the Local Governments and was pronounced by every legal authority to which it was submitted to be unsuitable to the wants of this country. In this view the committee concur for reasons which I need not state in detail on the present occasion as they are fully stated in the *report* which I present to-day. I may observe in general however that the principal reasons were, that the bill was not sufficiently elementary, that it was in several respects incomplete, and that if it became law it would not supersede the necessity under which judicial officers in this country are at present placed of acquainting themselves by means of English Law books with the English Law upon this subject.

"The Commissioners' Draft, indeed, would hardly be intelligible to a person who did not enter upon the study of it with a considerable knowledge of the English Law. Under these circumstances a new draft was framed, which we now propose to *print and circulate*, and on which I hope to receive the opinions of the Local Governments and High Courts, in the course of the summer, say, by next September, so that their criticisms may be deliberately weighed, and the measure may be finally disposed of by this time next year.

"The *report* of the committee explains very fully the scheme of the Bill, which [illegible] and enters fully [illegible] I will not [illegible] occasion. I will confine myself to saying that I trust that those who will have to criticise the Bill will begin *by studying* the report, which has been drawn up with great care, and which, as well as the Bill itself, forms a connected and systematic whole. The *general* object kept in view in framing the Bill has been to produce something *from* which a student might derive a clear, comprehensive, and distinct knowledge of the subject, without unnecessary labour, but not of course, without that degree of careful and sustained attention which is necessary in order to master any important and intricate matter. It is by this standard that the committee in general, and I in particular, as the member in charge of the Bill, desire that it may be tried.

"With this reference to the Bill and the report of the committee, I proceed to discuss the general questions connected with the subject, and to mention a few of the leading features of the measure.

"I sup[illegible] necessity which exists for l[illegible] dia. It would be exceedingly [illegible] at, the law upon the subject certainly is. To some extent—it is far from being clear to what extent—and in some parts of the country—the English Law of Evidence appears to be in force in British In[illegible] will contin[illegible] been [illegible] they [illegible] good [illegible] re than [illegible] ditions [illegible] s satis[illegible] aborate [illegible] may be sa[illegible] unaided mother wit and natural shrewdness, but [illegible] system in which a vast body of half understood law, totally destitute of arrangement and of uncertain authority maintains a dead alive existence, is a state of things which it is by no means easy to praise.

"Legislation being thus necessary, in what direction is legislation to proceed? A gentleman, for whose o[illegible] upon all subjects connected with Indian Law and Legislation, I [illegible] respect, said to me the other day [illegible] Bill would be very short one [illegible] rules of evidence are hereby abolished. I believe [illegible] vigorously expressed is really held by a large number of persons who would not avow it so plainly. There is, *in short*, in the lay world, including in the expression the majority of Indian Civilians an impression that rules of evidence are technicalities invented by lawyers principally, for what Bentham called fee

gathering puposes and of no real value in the investigation of truth I canni admit that this impression is in any degree correct I believe that rules c evidence are of very great value in all enquiries into matters of fact, and i it is practically impossibl

rule because the necessity fo that and fact any

combats When people began to obtain glimpses of the true methods of investigation they seem to have considered as almost supernatural skill what in our days fall within the scope of average police officers or attorney's clerks The delighted wonder which was displayed by the Jews according to the aprocryphal story of Susannah and the to call that very feeble cross examinatio instance of this At a later period, formed Such a fa four, such another ther by such rules were in f which introduced in their never tel or rather which grew up by degrees was of a very mixed and exceedingly singular character Part of it consisted of rules declaring large classes of witnesses to be *incompetent* Part was intimately connected with the English system of special pleading, which was so contrived as to define with extreme precision the facts upon which the parties differed or were, as the phrase goes, at issue Parts were the result of the practical experience of the Courts and these were by far th English law of evidence Most of t which st experienc

(1)
(2)
(3,
(4) rules as to confessions and admissions,
(5) rules as to documentary evidence

"I have two general remarks to make upon them The first is that they that when properly to all who have

pon any important subject were ever expressed so loosely, in such an intricate manner, or at such intolerable length

It is necessary to prove the first of these propositions in order to justify the recommendations of the committee that the substance of the rules in question should be introduced in the form of express law into this country It is necessary to prove the second proposition in order to justify the attempt made in the Bill to reduce the rules to order and system First then as to the proposition that the rules in question are substantially sound and do far more proof of this I nglish Courts between the iose in which they are not understood and acted upon As a preliminary remark, I think I ought to observe that the knowledge of these rules possessed by English lawyers is derived far more from the daily practice in the Courts, than from theoretical study Many English lawyers know by habit almost instinctively although therefore, fact the by which sagacious the prac-

tical effect of these rules? I may perhaps be permitted to answer this by referring to a book which I published in 1863 on the Criminal Laws of England, and which contains, amongst other things an analysis of several celebrated trials, English and French One object of that analysis was to contrast the effect of the presence and absence of rules of evidence, and I think that any one who would take the trouble to compare those trials together carefully, would agree with me in the conclusion, that the practical effect of the English rules of evidence in those cases, was to shorten the proceedings enormously and at the same time to consolidate and strengthen them keeping out nothing that a reasonable person would have wished to have before him as material for his judgment The French system, on the other hand, which dispenses with all rules of evidence, got, at least in those cases, no other result from the want of them than floods of irrelevant gossip and collateral questions enough to confuse and bewilder the strongest head Again, compare the proceedings of an ordinary Court of Criminal Justice with the proceedings of [illegible] evidence are far less strictly enforced, and I [illegible] Criminal Court never gets very far from the [illegible] wanders into questions far remote from [illegible] Nothing [illegible] nge places, as it [illegible] Court finds itsel [illegible] ry offence but [illegible] In a case whic [illegible] state [illegible] affirmed, a [illegible] letters of th [illegible] nature, to k [illegible] he does not, an incalculable waste of time and energy, and a great weakening of the authority of his Court, is sure to follow Active and zealous Advocates, who have no rules of evidence to restrain their zeal, would have it in their power to pervert the administration of justice to the basest purposes, and to inflict immense injury on every class connected with it, directly or remotely, that might [illegible] for tearing open old [illegible] nus to scandals [illegible] lost sight of, [illegible] be excused for [illegible] f this Appeals [illegible] int of perjury [illegible] exceed in any country In certa n parts of the country, it was a point of honour for the friends o [illegible] to swear f [illegible] such case [illegible] into whic [illegible] imputatio [illegible] and fema [illegible] the popul [illegible] evidence kept matters to a po [illegible] the [illegible] appeared to me to [illegible] [illegible] till the very last rag of character had been [illegible] man, and child, whose name was in any [illegible] he French Courts display this evil, in an aggravated from In the work to which I have already referred, will be found an account of the trial of a monk named Leotade for murder If disposed of un [illegible] it could hardly have taken more than a [illegible] irrelevant explanation

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of getting rid of the law of
tion of justice by lawyers, and returning to the system of mere personal discretion

"It may be that some persons would like this policy, but I suppose it is one which I need not discuss.

'So far, I have considered the rules of evidence merely as they conduce to the important practical objects of keeping proceedings to the point, and of protecting and supporting the Judges I must now say a few words on their value, as furnishing the Judge with solid tests of truth I fully admit that their value in ...d, but I think
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those problems are by far the most important of any, which a Judge has to

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that persons who are absolutely ignorant of these rules, may give a much better answer to each of these questions, than men to whom every rule of evidence is perfectly familiar I think, that a more or less distinct perception of this, coupled with impatience of the exaggerated pretensions which have sometimes been made on behalf of the rules of evidence, are the principal reasons for the distrust and dislike, with which they are ... I think,
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nor will the best glass make him see, and in just the same way, the best rules of evidence will not supply the place of natural sagacity, or of a taste for, and training in logic, but it no more follows that rules of evidence are useless as guides to truth than that shoes or glasses are useless as assistances to the feet and to the eyes The real use of rules of evidence in ascertaining the truth, consists in the fact that they supply tests warranted by very long and varied experience, as to two great facts, the relevancy of facts to the question to be decided by the Court, and the sort of evidence by which particular facts ought to be proved They may in the broadest and most popular form be stated thus '—If you want to arrive at the truth as to any matter of fact of serious importance, observe the following maxims;—"First, if your belief in the principal fact which you wish to ascertain is to be, after all, an inference from the other facts, let those facts, at all events, be closely connected with the principal fact in some one of certain specific modes Secondly, never believe

in any fact whatever, whether it is the fact which you principally wish to determine, or whether it is a fact from which you propose to infer the existence of the principal fact, until you have before you the best evidence that is to be had, that is to say, if the fact is a thing done have before you some one who saw it done with his own eyes; if it was a thing said have before you some one who heard it said with his own ears; if it was a written paper, have the paper before you and read it for yourself

"This exception—qualifications and explanations apart—is the true essence of the rules of evidence, and I think that no one will deny either that these rules are in themselves eminently wise, or that they are by no means so obvious and self-evident that the mere unassisted natural sagacity of judicial officers of every grade can be trusted to grasp their full meaning, and to apply them to the practical questions which arise in the administration of justice, with no assistance from any express law I do not wish to exaggerate, but I must add that I attach considerable moral and speculative value to these rules. If they are firmly grasped by Courts of Justice, and rigidly insisted upon in all practical matters which come before the Courts they will gradually work their way amongst the people at large, and furnish them with tests by which to distinguish between credulity and rational belief, upon a great variety of matters which will be of vast importance I ought to add that the good which they are calculated to effect, can be obtained only by erecting them into laws and rigorously enforcing them When this is done I feel confident that experience will be continually adding to the proper proof of their value

So far, I have tried to prove the proposition that the English rules of evidence are of real solid value and that they are not a mere collection of arbitrary subtleties which shackle, instead of guiding natural sagacity I pass now to the next proposition, which is that these rules are expressed in a form so confused, intricate, and lengthy, that it is hardly possible for any one to learn their true meaning otherwise than by practice, an inconvenience which may be altogether avoided by a careful and systematic distribution For the proof of this proposition, if indeed it is disputed I can only refer in general to the English text books on the subject They form a mass of confusion which no one can understand until, by the aid of long practice he learns the intention of the different rules of which they heap together innumerable and often incoherent illustrations I am f
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they should be arranged rather with reference to vague catch words, with
the ears of lawyers are familiar, than with reference to theoretical principles which it has never been worth any lawyer's while to investigate

"The condition of the law of evidence, as well as the condition of many other branches of the law of England, affords continual illustrations of the extraordinary intricacy and difficulty which arises from the combination of the very greatest practical sagacity with an absence of sound theory, or what is still worse, with the presence of unsound theory No one who has not seen it could possibly imagine how obscure the meaning of a clever man may become when he is forced to squeeze it into the terms of a theory which does not fit it, and is not true I will give one or two illustrations of my meaning The expression 'he ... currency in the
English Cour ... at is
more is true, ... ruth,
from which ... and
obscure to the last degree The objections to ... and
'evidence' are words of the most uncertain kind, each of which may mean several different ... 'hearsay' may mean what you have
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"The word "evidence' is also exceedingly ambiguous It may mean that which a witness says in Court It may mean, the fact to which he testifies, regarded as a ground work for further inference Notwithstanding this, the phrase 'hearsay is no evidence,' being emphatic and easy to recollect stuck in the ears and in the minds of lawyers, and has been taken by many text-writers as the principle on which their statement of the most important branch of the law should be arranged They accordingly took to describing as hearsay, every fact of which evidence was by law excluded, in short, they turned "hearsay is no evidence' into, 'that which is not evidence is

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the land to D and D conveyed it to C Now, as D and E are not parties to the suit between A and B, and as A cannot of his own knowledge, know anything of the transaction between them, English text writers call the deeds between D and E 'hearsay' and according to Mr Pitt Taylor, the rule which permits such deeds to be given in evidence is the third exception to the rule which excludes hearsay One of the Judges, if I am not mistaken, called such evidence 'written hearsay', and so indifferent are English lawyers in general, to the abuse of language for the sake of momentary convenience, that it probably never struck him, that this was a contradiction in terms I think however, that it is hard to expect people to understand, bear in mind, and follow out in

language in such a peculiar manner,
To talk of hearing a document, is

"I now turn to the ambiguity of the word 'evidence', to which I have already referred As I have

suggests an inference For
of stolen goods is evidence of
the inference of theft At
means what a witness actually says in Court or that which he produces for instance we say 'the evidence which he gave was true' I might occupy, I will not say the attention, but the time, of Your Lordship and the Council for hours, if I were to attempt to describe the amount of confusion and obscurity which the neglect of this simple and obvious distinction has thrown over the whole subject I will content myself with observing that it produces the effect of giving a double meaning to every expression into which the word 'evidence', is introduced Circumstantial evidence', 'hearsay evidence,' 'direct evidence', 'primary evidence,' 'best evidence,' have each two sets of meanings, and the result is, that it is almost impossible to arrive at a clear and comprehensive knowledge of the whole subject, or to see how its various parts are related to each other without an amount of study, thought, and practical acquaintance with the actual working of the rules of evidence, which few people are in a position to bestow upon the subject

"I may appear to be detaining the Council unduly upon merely verbal questions but I think that it is a common fault to under-rate the importance of accurate language particularly in regard to the fundamental terms of any particular branch of knowledge In regard to law, I have not the least doubt that a very large proportion of the intricacy and difficulty which attach to it is due to the fact, that proper pains have never been bestowed on the definition of its fundamental terms What could be made of Euclid, if we were not quite sure of our meaning when we spoke of a point, a line, a circle, parallels, and perpendiculars? Such a defect would render geometry impossible, and the defect

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easy, and in many cases attractive for its own sake; that its bulk might be diminished to a degree of which people in general have hardly any conception; that the expense of its administration, might be greatly diminished and that

comparative certainty might do away with a very large amount of needless and harassing litigation App

"I shall now proceel to des ri e shortly, the principles on which the draft Bill of the committee has been frame l In the first place we thought it necessary to fx the sense in which th fund imental terms of the subject should be under tool and for that purpose w define, 'fact', 'evil nce', 'proof', 'proved' and some other words as to which I will content myself with a reference to the report. It seme l to us that the remainder of the subject would fall under the following generil hea ls —

1 The relevancy of fact to the issues to be proved

2 The proof of facts, according to their nature by oral, documentary, or material evilence

3 The production of evidence in Court

4 The duties of the Court, and the effect of mistal en admission or rejection of evilence

"These hea ls woul l we think be found to embrace and to arrange in their natural order all the subjects treated of by English text writers and Judges, under the general hea l of the law of evidence I will say a few words on their relation to each other, an l on each of them in turn

'The main feature of the Bill consists in the distinction drawn by it between the relevancy of facts and the mode of proving relevant facts The neglect of this distinction by English text writers, no doubt, arises from the ambiguity in the word evidence' to which I have already referred and is the main cause of the extreme difficulty of understanding the English Law of Evidence systematically I will shortly illustrate my meaning A says 'Z committe l murder' First of all this is a fact—something which could be directly perceived by the sense of hearing and distinctly remembered afterwards Now, whether this fact is or is not relevant in a particular case, depends upon a variety of circumstances If the question is whether A was guilty of defaming Z by accusing him of murder? Or where Z had a motive for assaulting A because A said that he had committe l murder or if Z is accused of murder and the object is to show that, when A charged him with it he behaved as if he were guilty and in many other instances which might be put, the fact that A spoke those words is clearly relevant But if the question is whether Z actually did commit murder the fact that A thought so or said so, generally speaking is not relevant Supposing, however that the fact is relevant on some one of the grounds just mentioned or on any other ground what ever be the ground on which the words are relevant to the matter under inquiry, it is obvious that the words themselves ought to be satisfactorily proved, and the rule of English law—and we think it is a wise rule—is that they must be proved by the assertion of some witness, that he heard them said with his own ears English text writers throw together with these two classes of rules under the head of Hearsay' They lay down the general rule that hearsay is no evidence, me ... of facts called hearsay are to be treated as necessary to loo whether, in a find that it can be proved ... estion is now ... that he heard A say propose to prove it by ... this expression so Again you are told ... ly by which it is means not that the fac ... nce of this is, proposed to prove the fact is improper One ext ... English Law of Evidence is thrown into that the most important part of the English Law of Evidence is thrown into the most intricate and inconvenient of all possible forms that of a very wide negative, of most uncertain meaning qualified by a long string of exceedingly intricate exceptions

'No one who has not gone through the process of learning the law by mere rule of ... the degree of needless obscurity and difficulty up ... of which he becomes gradually conscious ... to almost any English text-writers, 'you tell me at enormous length, what is not evidence, but you no where tell

"The word 'evidence' is also exceedingly ambiguous. It may mean that which a witness says in Court. It may mean, the fact to which he testifies regarded as a ground work for further inference. Notwithstanding this, the phrase 'hearsay is no evidence,' being emphatic and easy to recollect, stuck in the ears and in the minds of lawyers, and has been taken by many text writers as the principle on which their statement of the most important branch of the law should be arranged. They accordingly took to describing as hearsay, every fact of which evidence was by law excluded, in short, they turned 'hearsay is no evidence' into 'that which is *not evidence* is hearsay'. They did not however, do this expressly. They did it by describing as exceptions to the rule excluding hearsay, all cases in which evidence was admitted of anything, which would have been excluded, but for such exceptions. This is so intricate a state[illegible] feel to follow me

[illegible]nd he produces the deeds by which E conveyed the land to D and D conveyed it to C. Now as D and E are not parties to the suit between A and B, and as A cannot of his own knowledge, know anything of the transaction between them, English text writers call the deeds between D and E 'hearsay' and according to Mr Pitt Taylor, the rule which permits such deeds to be given in evidence is the third exception to the rule which excludes hearsay. One of the Judges, if I am not mistaken, called such evidence 'written hearsay', and so indifferent are English lawyers in general, to the abuse of language for the sake of momentary convenience, that it probably never struck him, that this was a contradiction in terms. I think, however that it is hard to expect people to understand, bear in mind, and follow out in [illegible] language in such a peculiar manner, [illegible] To talk of hearing a document, is

'I now turn to the ambiguity of the word 'evidence', to which I have already referred. As I have just said, 'evidence' sometimes means a fact which suggests an inference. For instance, it is common to say,—'Recent possession of stolen goods is evidence of theft', that is, the fact of such possession suggests the inference of theft. At other times and I think more frequently, 'evidence' means what a witness actually says in Court, or that which he produces. For instance we say 'the evidence which he gave was true'. I might occupy I will not say the attention, but the time, of Your Lordship and the Council for hours if I were to attempt to describe the amount of confusion and obscurity which the neglect of this simple and obvious distinction has thrown over the whole subject. I will content myself with observing that it produces the effect of giving a double meaning to every expression into which the word 'evidence' is introduced. 'Circumstantial evidence', 'hearsay evidence,' 'direct evidence,' 'primary evidence', 'best evidence,' have each two sets of meanings, and the result is, that it is almost impossible to arrive at a clear and comprehensive knowledge of the whole subject or to see how its various parts are related to each other without an amount of study, thought, and practical acquaintance with the actual working of the rules of evidence, which few people are in a position to bestow upon the subject.

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report. It seemed to us that [illegible]
following general heads —

1 The relevancy of fact to the issues to be proved.

2 The proof of facts, according to their nature by oral, documentary, or material evidence

3 The production of evidence in Court

4 The duties of the Court, and the effect of mistaken admission or rejection of evidence

"These heads would we think be found to embrace and to arrange in their natural order all the subjects treated of by English text writers and Judges, under the general head of the law of evidence I will say a few words on their relation to each other, and on each of them in turn

"The main feature of the Bill consists in the distinction drawn by it between the relevancy of facts and the mode of proving relevant facts The neglect of this distinction by English text writers, no doubt, arises from the ambiguity in the word 'evidence' to which I have already referred and is the main cause of the extreme difficulty of understanding the English Law of Evidence systematically I will shortly illustrate my meaning A says 'Z committed murder' First of all this is a fact—something which could be directly perceived by the sense of hearing and distinctly remembered afterwards Now, whether this fact is or is not relevant in a particular case, depends upon a variety of circumstances If the question is whether A was guilty of defaming Z by accusing him of murder? Or where Z had a motive for assaulting A because A said that he had committed murder or if Z is accused of murder, and the object is to show that, when A charged him with it, he behaved as if he were guilty, and in many other instances which might be put, the fact that A spoke those words is clearly relevant But if the question is, whether Z actually did commit murder the fact that A thought so or said so, generally speaking is not relevant Supposing, however that the fact is relevant on some one of the grounds just mentioned or on any other ground, whatever be the ground on which the words are relevant to the matter under inquiry, it is obvious that the words themselves ought to be satisfactorily proved, and the rule of English law—and we think it is a wise rule—is that they must be proved [illegible] said with his own ears [illegible] sses of rules under the [illegible] at hearsay is no evidence, [illegible] classes of facts [illegible] arsay are to be treated a[illegible] it is necessary to [illegible] see whether, in a particular case, a statement [illegible] you find that it can be prove[illegible] how can it be proved [illegible] you propose to prove it by [illegible] say so Again, you are told, [illegible] sion means not that the fac[illegible] it is proposed to prove the fact is improper [illegible] that the most important part of the English Law of Evidence is thrown into the most intricate and inconvenient of all possible forms that of a very wide negative, of most uncertain meaning qualified by a long string of exceedingly intricate exceptions

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me what is evidence, except indeed in large compilations, which point out what has to be proved upon particular issues, and which it is as impossible to read or remember, as it is to read or remember any other mere works of reference".

"I hope that we have been able to avoid this, and that the second chapter of the Bill will be found to state specifically, and in a positive form, what sorts of facts are re[illegible] with the facts in issue to afford grounds f[illegible] non-existence I will not weary the [illegible] will content myself by referring to the [illegible] tly illustrate them by [illegible] an, which will relieve the dullness of [illegible] ich I refer is a short summary, by Mr [illegible] elieves that Mary, Queen of Scots, murdered her husband

"As Mr Froude was not a lawyer he certainly wrote, what I am about to read, without reference to the rules of evidence I think the fact that he did, in fact, unconsciously observe them, illustrate very strongly the truth of my assertion, that they are nothing more than the result of experience and practical sagacity, thrown into a categorical shape I need hardly say that I use the passage merely as an illustration, and without any notion of adopting Mr Froude's opinions or asserting the truth of his facts I am concerned merely with their relevance

"She (Mary) was known to have been weary of her husband, and anxious to get rid of him.

"(By our draft, facts which show motive are relevant)

'The difficulty and the means of disposing of him had been discussed in her presence, and she had herself suggested to Sir James Balfour to kill him

"(Facts which show preparation for a fact in issue, are relevant)"

"She brought him to the house where he was destroyed, she was with him two hours before his death

"(Facts so connected with the facts in issue as to form part of the same transaction, are relevant).

"And afterwards threw every difficulty in the way of any examination into the circumstances of his end"

"(Subsequent conduct, influenced by any fact in issue, is relevant)"

"The Earl of Bothwell was publicly accused of the murder

('Facts necessary to be known in order to introduce relevant facts, are relevant)

'She kept him close at her side; she would not allow him to be arrested; she went openly to Seton with him, before her widowhood was a fortnight old [illegible] nsented to his trial Edinburgh was occupied [illegible] himself at the Tolbooth surrounded by the [illegible] to the ground, because the Crown did not [illegible] had been prevented from appearing"

"(Subsequent conduct influenced by any fact in issue is relevant)"

"A few weeks later, she married Bothwell, though he had a wife already, and when her subjects rose in arms against her and took her prisoner, she refused to allow herself to be divorced from him"

"(Subsequent conduct Motive)"

[illegible] letters which the Queen [illegible] read, [illegible] d to [illegible] uent

'Finally Mr Froude observes 'In her own correspondence, though she denies the crime, there is nowhere the clear ring of innocence which makes its weight felt even when the evidence is weak which supports the words.'

"The letters would be evi lence under the section relating to admissions and Mr Froude's remark is in the nature of a criticism on them by a prosecuting counsel

"In English text books, so far as my
of the same sort, are nowhere presented in
come in for the most part, as exceptions to t
to the points in issue In fact they can b l arned only by the practice of the Courts though they are as natural and lax as any rules need be, if they are properly stated

"From the rules which state what facts may be prove l we pass to those which prescribe the manner in which a relevant fact must be prove l Passing over technical matters—such as the law relating to judicial notice, questions relating to public documents and the like—these rules may be said to be three in number, though, of course, numerous introductory rules are required to adopt for practice They are these

"1 If a fact is proved by oral evidence, the oral evi lence must be direct, that is to say, things seen must be deposed to by some one who says he saw them with his own eyes, things heard by some one who says he heard them with his own ears

"2 Original documents must be produced or accounted for, before any other evidence can be given of their contents

"3 When a contract has been reduced to writing it must not be varied by oral evidence

"These rules as I have said are subject to certain exceptions and require certain practical adjustments, but I do not think that any one who has had practical experience of the working of Courts of Justice will deny their substantial soundness or indeed the absolute practical necessity for enforcing them

Passing over certain matters which are explained at length in the Bill and report, I come to two points to which the committee attach the greatest importance as having peculiar reference to the administration of justice in India The first of these rules refers to the part taken by the Judge in the examination of witnesses, the second to the effect of the improper admission or rejection of evidence upon the proceedings in case of appeal

That part
which witnesses a
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duty than that of deciding questions which may arise between their
hardly say that the state of things does not exist in India and that it would be a great mistake to legislate as if it did In a great number of cases—probably the vast numerical majority—the Judge has to conduct the whole trial himself In all cases he
than he does
it as he can,
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questions upon any facts, of any witnesses at any stage of the proceedings irrespectively of the rules of evidence binding on the parties and their agents and we ha
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With respect to the question of appeals, we have drawn a series of provisions, the object of which is to prevent mere mistakes in procedure from destroying the value of work properly done, as far as it goes We have gone

through the various cases in which, as appears to us, the question of the improper admission or rejection or omission of evidence can arise; and have provided that, whenever any Appellate Court discovers the occurrence of any mistake, it shall not reverse the decision of the inferior Court, but shall either strike out what is redundant, or supply what is defective, as the case may be and give judgment accordingly

I have addressed Your Lordship and the Council at great length, but not I think at greater length than the importance of the matter requires I have only to add, that I propose to proceed with the Bill when the Government returns to Calcutta, and that I hope before that time, to receive the criticisms of the Local Governments upon the measure'

The council adjourned to Thursday, the 6th April, 1871

CALCUTTA, WHITLEY STOKES

The 31st March 1871 *Secy to the Govt of India*

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vict Cap 67.

PRESENT

His Excellency the Viceroy and Governor General of India K B C M S I *presiding*

Q C | The Hon'ble J F D Inglish
The Hon'ble W Robinson C S I
The Hon'ble F S Chapman
The Hon'ble R Stewart

The Hon'ble J R Bullen Smith

SUNDRY BILLS

The Hon'ble Mr Stephen also moves that the Hon'ble Messrs Chapman Stewart and Bullen Smith, be added to Select Committees on the following Bills —

The next Bill, to which Mr Stephen had to refer, was the Evidence Bill He need not say anything more about it than that it was under the consideration of the Committee He however wished to make one or two remarks In the first place, although the Bill had been sent for the opinion of the Local Governments some time in June last with a request that their opinion on the subject might be forwarded in the course of the autumn, many of the Local Governments had not yet sent in any opinions whatever on the subject He ... they might ... bject from ... t wish to ... n of some ... ilar, were ... nfounded ... President, ... any other of Mr ... st the Civil ... r any wish to ... d been sent ... attention in a perfectly fair and friendly spirit, without the slightest notion of making any attack upon the independence or position generally of the honourable profession in question

The Council adjourned to Friday, the 15th December, 1871.

CALCUTTA, H S CUNNINGHAM,

The 8th December, 1871 *Offg Secretary to the Council of the Governor General for making Laws and Regulations*

SECOND REPORT OF THE SELECT COMMITTEE

App.

Vide the Gazette of India, February 17th, 1872, Part V p 91

The following R . . . C . . . ll as settled by them was prese . . . . ndia for the purpose of making L . . .

Petition from certain Barristers and Advocates of Bombay, dated the 8th August, 1871.
From Officiating Secretary to Chief Commissioner of Coorg No. 3 6/4, dated 4th October 1871, and enclosures
From certain pleaders of the High Court, Bombay, dated 4th October, 1871
From officiating Secretary to Chief Commissioner of Coorg, No 403/6, dated 9th October 1871, and enclosures
From the Chief Secretary to Government of Fort Saint George No 166, dated 21st November 1871, and enclosures
From F J Ferguson Esq Barrister High Court, Calcutta, dated 8th December, 1871 forwarding memorial from Barristers and Advocates High Court, Calcutta
From Secretary to Chief Commissioner, Central Provinces, No 2640/229, dated 6th December 1871 and enclosures
From Officiating Secretary to Government of Bengal No 6326 I dated 13th December, 1871, and enclosures
Memorial from certain members of the Madras Bar, dated 16th December, 1871

We the undersigned, the members of the select committee of the Council of the Governor General of India for the purpose of making Laws and Regulations, to which the Indian Evidence Bill was referred, have the honour to report that we have considered the Bill and the papers noted in the margin

1 We have made some alterations in the arrangement of the Bill

2 We have omitted the definitions of "proof" and "moral certainty" and the sections relating to inferences to be drawn by the Court as being suitable rather for a treatise than an Act

3 We have omitted the provisions relating to material evidence, and have given a new and simpler definition of the difference between primary and secondary evidence

4 We have provided that the Act shall apply to all judicial proceedings but not to affidavits presented to any Court or officer, nor to proceedings in arbitration

5 As to the effect of an admission by one of several persons jointly tried for an offence, we have omitted sections 120 and 121 of the original Bill Instead of these we have provid . . . on the . . . time, . . . of the . . . besides himself, it may be taken . . . deration by the Court against all the persons whom it affects

6 We have redrawn chapter VI, as to the exclusion of oral by documentary evidence so as to make the sections more distinct and complete We believe that they now represent the English law on the subject, freed from certain refinements which would not be suitable for this country

. . . . . . ters on the ground that it . . . is We have reconsi- de . . . follows —

Some presumptions have the effect of laying the burden of proof on particular persons, in particular cases These we have dealt with in sections 103 to 111 of the new Bill

A conclusive presumption is a direction by law that the existence of one fact shall in all cases be inferred from proof of another This we have provided for in sections 112 and 113

We have substituted the term "conclusive proof" in these instances for that of "necessary inference," which was employed for the same purpose in the first draft of the Bill

through the various cases in which, as appears to us, the question of the improper admission or rejection or omission of evidence can arise; and have provided that, whenever any Appellate Court discovers the occurrence of any mistake, it shall not reverse the decision of the inferior Court, but shall either strike out what is redundant, or supply what is defective, as the case may be, and give judgment accordingly

I have addressed Your Lordship and the Council at great length, but not, I think at greater length than the importance of the matter requires I have only to add, that I propose to proceed with the Bill when the Government returns to Calcutta, and that I hope before that time, to receive the criticisms of the Local Governments upon the measure'

The council adjourned to Thursday, the 6th April, 1871.

CALCUTTA, WHITLEY STOKES

The 31st March, 1871. *Secy. to the Govt of India*

ABSTRACT of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict Cap 67.

PRESENT

His Excellency the Viceroy and Governor General of India K P G M S I *presiding*

The Hon'ble John Strachey.
The Hon'ble J Fitzjames Stephen, Q C
The Hon'ble B H Ellis
The Hon'ble F R Cockerell
The Hon'ble J. F D Inglish
The Hon'ble W Robinson, C S I
The Hon'ble F. S Chapman
The Hon'ble R Stewart
The Hon'ble J R Bullen Smith

SUNDRY BILLS

The Hon'ble Mr Stephen also moves that the Hon'ble Messrs Chapman Stewart and Bullen Smith, be added to Select Committees on the following Bills —

The next Bill, to which Mr Stephen had to refer, was the Evidence Bill He need not say anything more about it than that it was under the consideration of the Committee He however wished to make one or two remarks In the first place, although the Bill had been sent for the opinion of the Local Governments some time in June last, with a request that their opinion on the subject might be forwarded in the course of the autumn, many of the Local Governments had not yet sent in any opinions whatever on the subject He earnestly hoped that these opinions might be received in order that they might be fully considered Some memorial had been received on the subject from individuals, specially from certain members of the Bar He did not wish to discuss them But he wished to say that he thought that the opinion of some persons, that the Council in General, and Mr Stephen in particular, were [illegible] perfectly unfounded, [illegible] lent [illegible] of Mr [illegible] Civil [illegible]

make an attack upon the members of the Bar Everything that [illegible] in a [illegible] any [illegible]

in question

The Council adjourned to Friday, the 15th December, 1871,

CALCUTTA, H S CUNNINGHAM,

The 6th December, 1871 *Offg. Secretary to the Council of the Governor General for making Laws and Regulations*

SECOND REPORT OF THE SELECT COMMITTEE

Ap

Vide *the Gazette of India, February 17th, 1872, Part V p 91*

The following Report of a Select Committee together with the Bill as settled by them was presented to the Council of the Governor General of India for the purpo e of making Laws and Regulations on the 30th January, 1872 —

Petition from certain Barristers and Advocates of Bombay, dated the 8th August, 1871.
From Officiating Secretary to Chief Commissioner of Coorg No 3-6/4, dated 4th October 1871, and enclosures
From certain pleaders of the High Court Bombay, dated 4th October, 1871
From officiating Secretary to Chief Commissioner of Coorg, No 403/6, dated 9th October 1871, and enclosures
From the Chief Secretary to Government of Fort Saint George No 166 dated 21st November 1871, and enclosures
From F J Ferguson Esq Barrister High Court Calcutta dated 8th December, 1871 forwarding memorial from Barristers and Advocates High Court, Calcutta
From Secretary to Chief Commissioner, Central Provinces, No 2640/299, dated 6th December 1871 and enclosures
From Officiating Secretary to Government of Bengal No 6326 J dated 13th December, 1871, and enclosures
Memorial from certain members *of the* Madras Bar, dated 16th December, 1871

We the undersigned, the members of the select comm ttee of the Council of the Governor General of India for the purpose of making [illegible] the Indian [illegible] the honour [illegible] the Bill and the papers noted in the margin

1 We have made some alterations in the arrangement of the Bill

2 We have omitted the definitions of "proof and 'moral certainty" and the sections relating to inferences to be drawn by the Court as being suitable rather for a treatise than an Act

3 We have omitted the provisions relating to material evidence, and have given a new and simpler definition of the difference between primary and secondary evidence

4 We have provided that the Act shall [illegible] not to [illegible] officer,

5 As to the effect of an admission by one of several persons *jointly tried for an* offence, we have omitted sections 120 and 121 *of t* [illegible] pro [illegible] whom it affects

6 We have redrawn chapter VI, as to the exclusion of oral by documentary evidence, so as to make the sections *more* distinct and complete We believe that they now represent the English law on the subject, freed from certain refinements which would not be suitable for this country

7 Ex [illegible] *matters* on the ground that it did not [illegible] ns We have reconsidered this su [illegible] s follows —

Some presumptions have the effect of laying the burden of proof on particular persons, in particular cases These we have dealt with in sections 103 to 111 *of the* new Bill

A conclusive presumption is a direction by law that the existence of one fact shall in all cases be inferred from proof of another This we have provided for in sections 112 and 113

We have substituted the term "conclusive proof" in these instances for that of "necessary inference," which was employed for the same purpose in the first draft of the Bill

Other presumptions are in substance mere maxims by which the Court oug' ' ' Theoretically they are regarded in say, as artificial rules which the · be drawn from facts Practically, however so many exceptions are made that the difference between a presumption of law and a *presumption of fact* is hardly traceable The distinction apppears to us altogether unsuitable for this country and likely to produce great inconvenience if it were introduced We have accordingly, by section 114 put all such presumptions in the position of mere presumptions of fact with which the Court can deal at its discretion

We have provided in the Chapter on the Burden of Proof that a Notification in the Gazette that a territory has been ceded to a Native State shall be conclusive proof of a valid cession at the date mentioned in the notification The object of this section is to set at rest questions which as we are informed have arisen on this subject

The subject of presumptions as to documents is a very special matter and appears to us to belong to the subject of documentary evidence under which head we have placed it in chapter V

Lastly many subjects are treated by English writers under the head of presumptions which appear to us to belong rather to different branches of the substantial law, e g the presumption that every one knows the law, is in reality a branch of substantive criminal law We have omitted such presumptions as these *from the law of evidence, because they do not belong to* the subject and because many of them are fictitious

8 The chapter on oaths has been omitted as they form the subject of a separate Bill now under discussion

9 We also recommend the omission of sections 141 to 145 of the old draft, as to qestions to credit asked by barristers or pleaders and the substitution of provisions showing the principles by which the asking of such questions, should be regulated, and empowering the Court if any such question is improperly asked to report the circumstance to the authority to which the person asking it is subject

10 We have amended the wordir ... r ... power to ask questions The section as or ... authorize him to found his judgment rumours The intention of the section of inquiry tor the discovery of relever ... makes this clear

11 We have omitted the chapter as to the duties of Judges, and Juries which will, we think b ... Code of Criminal Procedure We have also omitted t ... and have substituted for them ... the cases in which the improper ... nd for a new trial or a reversal of a decision

12 Subject to these amendments we recommend that the Bill be passed ... the Gazette, and ... nth from the date of

J F STEPHEN
J STRACHEY
J F D INGLIS
W ROBINSON
I S CHAPMAN
R STEWART
J R. BULLEN SMITH
F R COCKERELL

The 30th January, 1872

(1) When the fact that a thing was spoken, stated or otherwise intimated is a question in issue

Illustration.

A says that he has been told by B that he saw C pick D's pocket This is admissible in an action against B for slandering C

(2) Where the fact that a person by or to whom the thing was spoken, written, stated or otherwise intimated was acquainted with such thing is a question in issue.

Illustration.

A writes to B "I have just heard that C has failed" The letter is received by B. The letter is not admissible as evidence that C had failed, but when it is proved that C had then failed, the letter is admissible as evidence that the failure was known to A at the place and time at which the letter was written and also that B was apprised of it

(3) Where the thing spoken written, stated or otherwise intimated tends to explain any act or conduct which is a question in issue

Illustrations

(a) A says on a trial of C for robbing D's house that he heard B say to C "D's house has been robbed," and that thereupon C fled This evidence is admissible

(b) On a trial of B for robbing C's house it is proved that B fled immediately after the robbery A witness is produced who says that he heard A tell B before B fled that a warrant had been issued for his arrest under a decree of Civil Court

(intent to kill him It is alleged on A' Evidence of what A said at the time [illegible] against him

(d) A sues B for compensation for maliciously causing him to be apprehended on a charge of theft Evidence that a theft had been committed in B's house, and that C told B that he saw A running away immediately after, is admissible

(e) A says that he has heard B say to C "Pay me the 1,000 rupees which you owe me" This is no evidence that C owed B 1,000 rupees, but it is evidence that B claimed 1 000 rupees, and it is admissible in order to introduce evidence of what C said or did with respect to the claim

(f) A is charged with sedition, and is proved to have combined with B for seditious purposes Evidence of words spoken by B, while taking part in a riot in furtherance of those purposes, is admissible against A

(4) Where the thing was spoken, written or stated or otherwise intimated by a party to the suit, or some one whom he represents in interest, and it is sought to be used against him

Illustrations.

(a) A brings a suit against B to establish a right of way across B's field Evidence that C from whom B derives his title to the land, had, while owner, admitted A's right of way is admissible

(b) A writes [illegible] you will ship for him 100 bales of co[illegible] and received such direction from C [illegible] the direction

(c) In a [illegible] was made between B and C, strangers to A, it is stated that A had become insolvent This deed is as against B or C admissible in evidence to show that A had become insolvent, but it is not admissible against A for that purpose

(5) In the cases provided for by ss 368, 369, 370 and 371 of the Code of Criminal Procedure

(6) Where the evidence tendered consists in a statement which was received in evidence in a former judicial proceeding relating to the same subject and between the same parties, or those whom they represent in interest, and where the person who made such statement has since died or become incapable of giving evidence, or where his presence cannot be procured, provided that if such person were present his evidence would be admissible

have affixed the same character in India, in all other cases we have provided that the judgment of a Court of competent jurisdiction upon a matter directly in issue shall be admissible as evidence between the same parties upon the same matter directly in issue in another cause, but that it shall not be conclusive [illegible] d that it shall be admissible merely as

[illegible]

of presumption, which are in our [illegible] universally applicable. It may perhaps be made a question how far the subject of evidence falls under the head of substantive law and some of the sections of the draft now submitted certainly border closely on Procedure Those sections, however, have not found a place in either of the Codes of Procedure We have therefore inserted them (with some modifications), as it appears to us that the law of evidence ought not to be left to be gleaned from many different enactments but that so much of it as it not to be found in the Codes of Procedure should be, as far as possible comprised in the rules of law now submitted by us and that the enactments which will thus be rendered unnecessary should be repealed

We recommend the repeal of so much of Acts II of 1855 and XIX of 1853 as remains unrepealed, except section 26 of the latter enactment, which does not form part of the law of evidence

EVIDENCE.

MEANING OF WORDS

1 In the following rules the word "Court" shall be taken to comprise all Courts of justice, civil or criminal, and all persons having by law or consent of parties authority to take evidence; and the word "cause" shall be taken to comprise all judicial proceedings, civil or criminal

Admissibility

2 Whenever any evidence is said to be admissible it is not meant that it [illegible] only that the weight, if any, which the deci[illegible] be allowed to it, [illegible] pon any question in issue in a cause, the [illegible] material to the decision of the cause, is admissible, unless it is excluded by the rules contained in this chapter

3 No statement by a witness of anything, or founded upon anything spoken or written, or otherwise intimated by another person, and no statement contained in any document, is admissible in evidence, except in the cases specified in the rules hereafter contained

Illustrations

(*a*) [illegible] that D told him that he saw B ro[illegible]

(*b*) [illegible] that D, a deaf and dumb person, [illegible] B rob C The evidence is inadmissible

(*c*) A gives evidence that B robbed C Being asked how he knows it he says that he knows it only because D told him so The evidence which has been admitted must be struck out

(*d*) A says that B was alive on the 1st January 1860 It appears that A does not speak to this fact of his own knowledge; but that he learnt it from a letter written to him by C, or from a newspaper or from a printed book, or a picture. In each of these cases A's statement is not admissible as evidence that [illegible]

[illegible] 1860 Being asked how [illegible] rom B, whose handwriting [illegible] was alive on that day

of any religious or charitable foundation, or the meaning of any technical or conventional words of terms or of any words or terms used in particular districts, or to any matter or public or general interest, and was spoken, written, stated, or otherwise intimated by a person who has since died or become incapable of giving evidence, or whose presence cannot be procured

App

Illustrations.

(a) A, in order to show the religious tenets of a certain sect, tenders in evidence a manuscript treatise, proved to have been written by a deceased member of the sect The treatise is admissible

(b) It is a disputed fact in a suit whether a certain spot is or is not a public landing place Statements made on the subject by A and B, now deceased

lence

otherwise intimated has

and was spoken, written,

stated, or otherwise intimated by a person who has since died or become incapable of giving evidence or whose presence cannot be procured, provided that such person was a member of the family or had otherwise special means of knowledge

Illustrations

(a) It is a disputed fact in a suit whether A is the son of B A statement made on the subject by C, who was a nurse in B s family about the time of A s birth, is admissible in evidence

(b) A alleging that he is the son of B deceased, produces the following

B

book stating A s birth

brothers since deceased

3 A deed executed by B

A also produced witnesses who state that B told them that A was his son The contents of the documents and the testimony of the witnesses are admissible in evidence

(11) Where the th ... by a recital contained in a ... or after the passing of ... n of the Government appea ... ing to be the G ... ship of Br ... of the British Crown

(1 ... there has been a public meeting or pub ... is contained in a report thereof published in any newspaper or journal

Explanation Such report is not admissible in evidence of any fact reported to have occurred or of any statement reported to have been made at the meeting or proceeding

EVIDENCE OF LAW OF FOREIGN COUNTRY

(13) Where the thing intimated purports to be the law of a foreign country, and appears to be contained in books or documents purporting to be printed on published under the authority of the Government of that country, or in reports of decisions of the Courts of such country

MAPS

5 Maps made under the authority of Government shall be admissible

RES JUDICATA

6 A ... revoked shall have effect as provid

7 ... the parties never were husbar ... dissolved is proof that the parties ... were such

8 ... of war is proof that the sh

9 The judgment of a Court of competent jurisdiction upon a matter directly in issue is admissible as evidence between the same parties, and those who represent them in interest upon the same matter, directly in issue in another cause, but not between any other parties, except as provided for in the next following section of the chapter

Illustrations

(*a*) A sues B for a horse, alleging that it was stolen from himself and that B brought it, knowing it to be stolen Judgment is given in B's favour B afterwards loses the horse A finds it and B sues A for it A in defence makes the same allegations as in the former suit The judgment pronounced in the former suit is admissible as evidence in B's favour

(*b*) A sues B for rent in the Court of the Collector, which has cognizance of such suits B sets up in defence a mortgage under which he is entitled to retain the rent in satisfaction of the interest of his mortgage A disputes the genuineness of the mortgage, but the Court pronounces it genuine and dismisses A's suit Afterwards B sues A in the Zillah Court to recover the amount due to him upon the mortgage A disputes the genuineness of the mortgage The judgment of the Collector is admissible in evidence

10 A decree of a Court of competent jurisdiction is admissible as evidence that such judgment was pronounced between the parties, but is not, as against any person other than the parties thereto and those who represent them in interest, evidence of any other fact thereby appearing

Illustrations

(*a*) A sues B for compensation for injury sustained through the negligence of C who is B's agent A obtains judgment In a suit brought by B against C for compensation for loss sustained by B through C's negligence the judgment is admissible as evidence of the amount which A has been adjudged to pay, but not as evidence of B's negligence

(*b*) A sues B for compensation, because B yielded up to C certain lands which B held as guardian of A who was then a minor A decree passed in a prior suit whereby B was directed to yield up possession to C as owner is admissible in evidence

(*c*) A is tried on the charge of having forged a deed of gift from B He is acquitted Afterwards C alleging the deed to gift of be forgery institutes a suit against A for certain lands, of which A has obtained possession under it The record of A's acquittal is not admissible in evidence

(*d*) A one of the three Hindu brothers, undivided in estate, dies and his brothers, B and C alleging that they are his heirs sell to D a portion of the land which they possessed jointly with A

E, claiming as the adopted son and heir of A, sues for A's share of the land sold to D and obtains a decree in his favour He afterwards claiming as such adopted son of A, sues B and C for A's share of the land which remains in their possession The decree in the former suit is not admissible in evidence

(*e*) A alleging that he is the only brother and the heir of B deceased, sues C for possession of B's land The Court declares A's title established and decrees that C shall yield up the land to him

Afterwards B claims to be the son and heir of B, and sues A for possession of the lands The decree in the former suit is admissible in evidence that A had obtained such a decree but not admissible as evidence that he was entitled to the land as the only brother and heir of B

(*f*) Two ships come into collision whereby A, a passenger in one of them is maimed and B's goods are destroyed A obtains a decree for compensation from the owners of the other ship on the ground that the injuries were sustained by him through the negligence of their captain B sues the owners of the same ship for compensation for the loss of his goods The judgment is not admissible in B's suit as evidence of the captains' negligence

(*g*) A sues B for maintenance of C a minor, whom A alleges to be B's son B denies that C is his son The Court decides that C is B's son and decrees payment by B of A's claims.

B dies, C alleging that he is B's son, sues the executor of D for a legacy of A 10,000 rupees, D having by his will bequeathed that sum to every child of B. The judgment is not admissible in evidence that C is a son of B.

App

PROOF OF WRITINGS WHICH CONSTITUTE PRIMARY EVIDENCE.

11 A wr t ng 1 1 1 not ~ ~ ~ 1 1 law to be attested, but which is
to have been written wholly
the cases provided for by
ceived as evidence, unless the
signature attached thereto, or so much of the same writing as is sought to verify, be proved to be in the handwriting of the person by whom it is alleged to have been written or signed

12 A written instrument which is required by law to be attested shall not (except in the cases provided for by section 20 of this chapter), be received as evidence unless the following rules are complied with —

(1) That execution of such instrument shall be proved by one attesting witness at the least, if there be an attesting witness alive and subject to the process of the Court by which the cause is tried and capable of bearing testimony

and (2) If no attesting witness is alive and subject to such process as aforesaid

is alleged to have done so

13 In order to ascertain, whether a signature writing or seal is genuine any signatu this faction of t

14 years old, and is produced from the proper custody, it shall be admissible in evidence without proof of its execution or attention

PROOF OF THE CONTENTS OF DOCUMENTS BY SECONDARY EVIDENCE

r 15 Evidence of the contents or purport of any written or printed docu-
C hall not b

be printed by the Government printer or to be printed under the authority of the Legislature of any British Colony or possession or to be certified to be true by the proper officer

(2) A copy of a record of any Court or of an entry in any public book or register, which is proved to be a correct copy, or which purports to be under the seal of
r officer, shall be admissible as
such record or entry
tions or marks which are proved
have been destroyed or lost, or which cannot be produced by reason of their being engraved on or affixed to trees, buildings, or other things of an immoveable character

(4) Evidence of the contents of a written or printed document shall be admissible, when it has been proved that the document had been destroyed or lost or when the person in whose custody
the Court by which the cause is tried or is r
document, or refuses, after due notice, to
otherwise satisfactorily accounted for

EVIDENCE OF TERMS OF CONTRACT

rty is in writing
hall be received
ay be admissible
under the provisions of the last preceding section.

9 The judgment of a Court of competent jurisdiction upon a matter directly in issue is admissible as evidence between the same parties, and those who represent them in interest upon the same matter, directly in issue in another cause; but not between any other parties, except as provided for in the next following section of the chapter.

Illustrations.

(a) A sues B for a horse, alleging that it was stolen from himself and that B brought it, knowing it to be stolen. Judgment is given in B's favour [illegible] for it A in defence judgment pronounced

[illegible] which has cognizance of such suits B sets up in defence a mortgage under which he is entitled to retain the rent in satisfaction of the interest of his mortgage A disputes the genuineness of the mortgage, but the Court pronounces it genuine and dismisses A's suit Afterwards B sues A in the Zillah Court to recover the amount due [illegible] the mortgage The

[illegible] dmissible as evidence that such judgment was pronounced between the parties, but is not, as against any person other than the parties thereto and those who represent them in interest, evidence of any other fact thereby appearing

Illustrations

(a) A sues B for compensation for injury sustained through the neglig nce of C, who is B's agent A obtains judgment In a suit brought by B against C for compensation for loss sustained by B through C's negligence, the [illegible] ount which A has been adjudged

[illegible] use B yielded up to C certain lands [illegible] a minor A decree passed in a [illegible] eld up possession to C as owner, is admissible in evidence

[illegible]

is maimed and B's [illegible] r compensation [illegible]

[illegible] nor, whom A alleges to be B's son [illegible] that C is B's son and decrees [illegible] for a legacy [illegible]

Ar

PROOF OF WRITINGS WHICH CONSTITUTE PRIMARY EVIDENCE

11 A writing which is not required by law to be attested, but which is alleged to have been signed by a specified person or to have been written wholly or in part by a specified person, shall not, except in the cases provided for by sections 17 ... signa... be pr... been written or signed

12 A wr... required by law to be attested shall ... of this chapter), be received ... with — ... ll be proved by one attesting ... ss alive and subject to the ... ed, and capable of bearing testimony

... process as aforesaid, ... ttestation of one ... must be adduced to show that the person who executed the instrument was the same person who is alleged to have done so

13 In order to ascertain, whether a signature writing or seal is genuine any signat... proved to the satis faction of t...

14 ... years old and is produced from the proper custody, it shall be admissible in evidence without proof of its execution or attestation

PROOF OF THE CONTENTS OF DOCUMENTS BY SECONDARY EVIDENCE

15 Evidence of the contents or purport of any written or printed document, or of letters, figures or other mark not produced to the Court shall not be admissible, except as provided by the rules next following —

(1) A copy of, or extract from any proclamation, order, or regulation issued by Her Majesty or by the Privy Council or any department of Her Majesty's G... ovided that such copy of ext... other Gazette or paper as is n... provided it purports to be printed by the Government printer or to be printed under the authority of the Legislature of any British Colony or possession or to be certified to be true by the proper officer

(2) A copy of a record of any Court or of an entry in any public book or register, which is proved to be a correct copy or which purports to be under the seal of such Court or to be certified by the proper officer shall be admissible as evidence of the existenc... record or entry

... dings of ... able character

(4) Evidence of the con... admissible, when it has been p... lost or when the person in ... the Court by which the cause is tried or is not legally bound to produce the document, or refuses after due notice to produce it or when its absence is otherwise satisfactorily accounted for

EVIDENCE OF TERMS OF CONTRACT

... property is in writing ... be received ... be admissible

Explanation The statement of a fact in any such document does not preclude the admission of oral evidence relating to the same fact, and where a suit is instituted for the purpose of setting aside or varying a document on the ground of a *mistake in the writing thereof evidence may be received* for the purpose of proving such mistake

PAPERS OF WHICH PROOF IS NOT REQUIRED

17 No proof shall be required of ... -ting to be the London Gazette or the Gazette ... of any Presidency or Lieutenant Governor ... ony or possession of the British Crown, nor of any paper purporting to be a news paper or journal, or a copy of a private Act of Parliament printed by the Kings printer.

18 No proof shall b ... aper purporting to be a certificate, certified ... law made evi dence of any particular ... stantially in the form and purports to b ... the law in that behalf

19 No proof shall be required of the official position of any person certi fying to the truth of any such paper as is mentioned in the last preceding rule

exec Mag the

21 An impression of any document made by a copying machine, or a representation of anything made by means of photography or of any *other* process which affords a reasonable assurance of correctnes shall be admissible in evidence, wherever under these rules the production of the original may be dispensed with

PERSONS WHO MAY TESTIFY

22 Those persons only shall be incompetent to testify who from tender years or for unsoundness of mind or from any other cause appear to the Judge to be incapable of understanding the questions addressed to them

PRIVILEGE

23 A witness is not at liberty to disclose a communication—

(1) When such communication relates to affairs of State and its disclosure

ried couple to the in dispute in a n who made it est, has not been obtained for such disclosure

(3) Where the witness is a barrister, attorney, or vakil, or an interpreter or intermediate agent between the client and his legal adviser, and the commu nication was made by the client or principal to the witness in the course of his professional employment or consists of any advice given or conveyed by the ... the contents of any docu ... h the witness has acquired ... e the client or principal to the disclosure of such communication

(4) Where the disclosure demanded of the witness consisted in the pro duction of documents belonging to another person who would not be bound to produce them if in his possession and who has not consented to their *production*

24 A witness is not compellable to disclose to the Court any confidential communication which may have taken place between him and his legal pro fessional adviser

25 No communication made in furtherance of criminal purpose is protected from disclosure.

26 A witness summoned to produce a document shall, if the same be in his custody possession of power be bound to bring it into Court, notwithstanding any objection to the right of the party calling for it to compel its production or to its being read, or being put in as evidence or to the disclosure of its contents

The validity of any such objection made by the person bringing the document shall be determined by the Court and for the better determination thereof it shall be lawful for the Court to receive any admissible evidence which such person may give respecting it and it shall also be lawful for the Court unless the document relates to affairs of State, to inspect it and, if necessary to employ any person to interpret it under the obligation of an oath, and not to disclose its contents except to the Court, unless the Court shall decide that the document is to be given in evidence

27 No question shall be put to a married person which substantially amounts to ...

... the knowledge of the fact inquired after is necessary to the determination of some question between the husband and wife according to the law to which they are subject

EXAMINATION OF WITNESSES.

29 The party at whose instance a witness is examined may, with the permission of the Court, cross examine such witness to test his veracity, in the same manner as if the witness had not been called at his instance, and may be allowed to show that the witness has varied from a previous statement made by him

30 In order to repel an attack on the testimony of a witness, any former statement made by such ... when the fact took place ... the fact shall be admis... deposition or stat... ... that it was made at the ... ch shall be stated in

31 It shall not be lawful to ask a witness, in order to test his credit, any question the answer to which might criminate or might tend directly or indirectly to criminate him or might expose or tend, directly or indirectly to expose him to a penalty or forfeiture of any kind But a witness shall not be excused from answering any question relevant to the matter in issue in any cause upon the ground that the answer to such question would or might criminate or tend to criminate him, or that it would or might expose, or tend to expose him to a penalty or forfeiture Provided that no answer which a witness shall be compelled to give shall, except for the purpose of punishing him for wilfully giving false evidence in such cause, be used as evidence against him in any criminal proceeding

32 No evidence is admissible to contradict the answers of a party or a witness as to matters affecting his character, but not otherwise bearing upon any question in issue in the cause Evidence of statements or conduct of a witness inconsistent with his evidence as to a question directly in issue in a cause is not excluded by this rule

Illustrations

(a) A claim against an underwriter is resisted on the ground of fraud The party claimant is asked whether in a former transaction he had not made a fraudulent claim He denies it Evidence is not admissible to show that he had made such fraudulent claim

(b) In a suit by A against B, a witness for A is asked whether he had not been dismissed from B's service for misconduct He denies it. Evidence is tendered to contradict the witness's statement as to such dismissal. The evidence is not admissible

Explanation The statement of a fact in any such document does not preclude the admission of oral evidence relating to the same fact, and where a suit is instituted for the purpose of setting aside or varying a document on the ground of a mistake in the writing thereof evidence may be received for the purpose of proving such mistake

PAPERS OF WHICH PROOF IS NOT REQUIRED

17 No proof shall be required of ... ting to be the London Gazette or the Gazette of any Presidency or Lieutenant Governor ... ony or possession of the British Crown, nor of any paper purporting to be a newspaper or journal, or a copy of a private Act of Parliament printed by the King's printer

18 No ... ss of any paper purporting to be a certifier ... hich is by law made evidence of any ... paper is substantially in the form and purports to be executed in the manner directed by the law in that behalf

19 *No proof shall be required of the official position of any person certi fying to the truth of any such paper as is mentioned in the last preceding rule* ... to have been ... Judge ... or of

..., or a representation of anything made by means of photography or ... other ... in ... be

PERSONS WHO MAY TESTIFY

22 Those persons only ... who from tender years or for unsoundness of mind ... e to be incapable of understanding th

PRIVILEGE

23 A witness is not at liberty to disclose a communication—

... to a matter ... ho made it ... has not been

... interpreter ... the commu ... urse of his ... veyed by the ... any docu ... has acquired ... or principal or his representative in interest has not consented to the disclosure of such communication

... of the witness consisted in the pro ... ld not be bound to ... o their production ... any confidential ... and his legal professional adviser

25 No communication made in furtherance of criminal purpose is protected from disclosure.

26 A witness summoned to produce a document shall, if the same be in his custody possession of power, be bound to bring it into Court, notwithstanding any objection to the right of the party calling for it to compel its production or to its being read, or being put in as evidence or to the disclosure of its contents

The validity of any such objection made by the person bringing the document shall be determined by the Court and for the better determination thereof it shall ... ly admissible evidence which such ... be lawful for the Court unless ... pect it and, if necessary, to employ any person to interpret it under the obligation of an oath, and not to disclose its contents except to the Court, unless the Court shall decide that the document is to be given in evidence

27 No question shall be put to a married person which substantially amounts to ... him or her ...

28. ... a husband ... tians, whe ... bodily inc ... where the knowledge of the fact inquired after is necessary to the determination of some question between the husband and wife according to the law to which hey are subject

EXAMINATION OF WITNESSES.

29 The party at whose instance a witness is examined, may, with the permission of the Court, cross examine such witness to test his veracity, in the same manner as if the witness had not been called at his instance, and may be allowed to show that the witness has varied from a previous statement made by him

30 In order to repel an attack on the testimony of a witness, any former statement made by ... when the fact took plac ... the fact shall be ad ... deposition or statemen ... dence that such deposition or statement was made, and that it was made at the time and place, and under the circumstances, if any, which shall be stated in the certificate or on the face of the deposition or statement

31 It shall not be lawful to ask a witness, in order to test his credit, any question the answer to which might criminate, or might tend directly or indirectly, to criminate him, or might expose or tend, directly or indirectly to expose him to a penalty or forfeiture of any kind But a witness shall not be excused from answering any question relevant to the matter in issue in any cause upon the ground that the answer to such question would or might criminate, or tend to criminate him, or that it would or might expose, or tend to expose him to a penalty or forfeiture Provided that no an wer which a witness shall be compelled to give shall, except for the purpose of punishing him for wilfully giving false evidence in such cause, be used as evidence against him in any ...

32 ... witness ... of a party or a question ... bearing upon any inconsis ... duct of a witness ... e in a cause is not excluded by this rule

Illustrations.

(a) A claim against an underwriter is resisted on the ground of fraud The party claimant is asked whether in a former transaction he had not made a fraudulent claim He denies it. Evidence is not admissible to show that he had made such fraudulent claim

(b) In a suit by A against B, a witness for A is asked whether he had not been dismissed from B's service for misconduct He denies it. Evidence is tendered to contradict the witness's statement as to such dismissal. The evidence is not admissible

(c) In an action against A for goods sold to him by B, a witness for B deposes that he saw the goods sold and delivered He is asked whether he had given a different account of the transaction He denies it Evidence is tendered to show that he had given such different account This evidence is admissible He is asked whether ... alleged sale dealt with B as the owner of the go... is tendered to show that he had so dealt with B ... He is asked whether he had not given a false account of another transaction not in issue in the cause He denies it Evidence is tendered to show that he had given such false account This evidence is not admissible

(d) The witness is asked whether he had not received money or a promise of some favour from B to induce him to give his evidence He denies it Evidence is tendered to show that he had received such money or promise This evidence is admissible

33 A witness may be cross examined as to previous statements made by him in ... to the subject matter of the cause wit... but if it is intended to contradict such ... st, before such contradicting proof can be given ... be called to those parts of the writing which are to be used for the purpose of so contradicting him The Court may however, at any time during the trial, require the production of the writing for its inspection, and may thereupon make such use of it for the purpose of the trials as may seem fit

34 A witness may while under examination refer to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that it may be reasonably presumed that the transaction was fresh in his memory, and he may for the like purpose refer to a writing made by any other person and r... of such transaction, or so soon afterwards that ... ansaction, was fresh in his memory ... d and may be given by the adverse ... ne the witness upon it

NUMBER OF WITNESSES

35 A Court if satisfied by the evidence given may in any case act on such evidence although there may be only the testimony of one witness

This rule is not rendered inapplicable by the circumstance that the testimony is given in a trial for giving false evidence, or for any other offence against th...

THI... TAKEN

36

(1) ... law in any part of Br... ...

(2) All public Acts of the Parliament of the United Kingdom of Great Britain and Ireland, and all local and personal Acts directed by Parliament to be judicially noticed;

(3) The names, titles and functions of the persons filling for the time being any police office in any part of India

(4) All divisions of time, the geographical divisions of the world the territories under the dominion of the British Crown the commencement continuation, and termination of hostilities between the British Crown and any other state and the existence, title and national flag of every sovereign or state

... es of its own members ... rs, or assistants and ... and of all Advocate ... is authorized by law to act before it

SOURCES OF INFORMATION TO WHICH COURTS MAY REFER

38 A Court may, in order to inform itself in respect of any of the matters mentioned in sections 36 and 37 of these Rules and also on matters of Public History, Literature, Science, or Art refer, for the purposes of evidence, to such

consideration.

(Sd) ROMILLY (L. S.)
(Sd.) EDWARD RYAN (L. S.)
(Sd) ROBERT LOWE (L. S.)
(Sd) ROBERT LUSH (L. S.)
(Sd) JOHN M. MACLEOD (L. S.)
(Sd.) W. M. JAMES (L. S.)

Dated this 3rd day of August 1868

ABSTRACTS of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict Cap 67

The Council met at Simla on Wednesday, the 28th October, 1868

PRESENT

His Excellency the Viceroy and Governor General of India, presiding,
His Excellency the Commander-in-Chief, G. C. S. I., K. C. B.

The Hon'ble G. N. Taylor
The Hon'ble H. S. Maine.
The Hon'ble John Strachey

The Hon'ble Sir George Couper, *Bart*, C. B.

EVIDENCE BILL

The Hon'ble Mr. Maine moved for leave to introduce a Bill to define and amend the Law of Evidence. He said it would probably be sufficient to state that the Bill e [illegible] Law Commissioners had rece [illegible] re was probably no subject in [illegible] and the Commissioners had fully stated in the report which had been circulated to Hon'ble Members, the reasons for all the changes which the Bill proposed to introduce. If he got leave to introduce the Bill, he proposed to ask His Excellency the President to suspend the rules for the conduct of business, and on their suspension, to introduce the Bill with a view to its publication in the *Gazette*. There was no use in now dilating to any length on the technical subjects comprised in the Bill.

The motion was put and agreed to.

The Hon'ble Mr. Maine then asked the President to suspend the Rules for the Conduct of Business.

The President declared the Rules suspended.

The Hon'ble Mr. Maine then introduced the Bill.

(Sd.) WHITLEY STOKES,

Asst. Secy. to the Govt. of India,

Home Department (Legislative)

SIMLA,
The 28th October, 1868

ABSTRACT of Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament, 24 & 25 Vict Cap 67.

The Council met at Government House on Friday, the 4th December, 1868

PRESENT

His Excellency the Viceroy and Governor General of India, *presiding*

The Hon'ble G Noble Taylor
The Hon'ble H Summer Maine.
The Hon'ble John Strachey
The Hon'ble Colonel H W. Norman, C B.
The Hon'ble F R Cockerell

Balrampur

The Hon'ble Gordon S Forbes
The Hon'ble D Cowie

The Hon'ble M J Shaw Stewart.

The Hon'ble Shaw Stewart took the oath of allegiance and the oath that he would faithfu

those Courts did not, as a matter of fact, believe that it was their duty to administer the English law of evidence as modified by the Evidence Acts. In ... argued by a barrister ... ence were pressed on ... or reject evidence

... eminently un- ... were parts of ... They heard ... al Courts, but ... le. The evil, it appeared to Mr. Maine, lay less in admitting evidence which under strict rul... idence wit... like a cap... be an equ... should ... cision ... substance ... dmission of evidence, than in avertin... and in conjecturing the ... deration of what the ... circumstances. Another objection lay in the necessity which the Mofussil Judges were thus placed under of depending upon English text-books. They were excellent text books of the English law of evidence, but their usefulness consisted more in refreshing knowledge which had been gained by forensic experience than in teaching knowledge. The commissioners would appear to be right in supposing that what was wanted for the greatest part of India was a liberalized version of the English law of evidence, enacted with authority and thus excluding caprice and superseding the use of text books by compactness and precision.

... the ... ent ... nent ... tion ... s to ... the co... cer... pr... of the kind. And perhaps some ... the Engl... ... one which he was happy to see the ... law of evidence as a whole ... regarded by English lawyers ... ave never come into existence ... dministration,—the separation ... e Judge from the Jury. It consisted mainly of rules of exclusion, that is, of rules for keeping certain kinds of evidence out of sight of the Judge of fact. Such a system, Mr. Maine apprehended, could only be justified on two grounds. First of all some evidence mus... ...f all relevant evid... the... wou... ther... ing... rem... tion... the... pra... jud... the ... out of all proportion to ... lawyers as nearly ... It was not ... valuable, and Mr. Ma... ...l in an emergency to...

reject as absolutely inadmissible But taking men, as you found them and taking the average of judicial ability, it was really true that some kind of evidence did produce an impression on the mind far deeper than was consistent with their real weight The good sense to which the English law laid claim was evidenced by the tests which it laid down for distinguishing those kinds of evidence from those which remained It would be presumptuous in Mr Maine to praise the Commissioners' proposals, but he ventured to say that in his humble opinion, they had wisely availed themselves of the results of English experience but had wisely modified those results upon two considerations, which they stated as follows —

'The English practice has been moulded in a great degree by our social and legal institutions and our forms of procedure; and much of it is admitted

in some criminal cases to decide without a jury, there is greater danger of miscarriage from the mind of the Court being uninformed than from its being unduly influenced by the information laid before it"

Mr Maine had said that he would not comment on the details of the measure, but there was one point of detail which it was necessary to notice

But another reason must probably

appeared to be

Third Report on

stamp duty in

lers instruments

penalty in case of infringement would be more conducive to the public interest For the present we have thought it our best course to frame our rules irrespectively of the stamp law'

Now from the judicial point of view, there he course proposed But wh riend Mr Cockerell had had a vast mass of papers before him relating to the operation of the Stamp law Mr Maine appealed to him whether the following was not a fair inference from those papers If effect were given to the Commissioners sugges

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Executive Government and Mr Maine had to state that having regard to the fact that the stamp duties on commercial instruments were easily levied, and did not press hardly on the people, the Government was not prepared to give up that portion of the public receipts

lence—The Hon ble Mr

on ble Messrs Gordon

CALCUTTA,
The 4th December, 1868

WHITLEY STOKES
Asst Secy to the Govt of India
Home Department (Legislative)

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict Cap 67

The council met at Simla on Tuesday, the 6th September, 1870

PRESENT

His Excellency the Viceroy and Governor-General of India, K P G C S I *Presiding*

His Excellency the Commander in Chief G C B G C S I

The Hon'ble John Strachey	The Hon'ble B H Ellis
The Hon'ble Sir Richard Temple K C S I	Major General the Hon'ble H W Norman, C B
The Hon'ble J Fitzjames Stephen, Q C	The Hon'ble F R Cockerell

His Highness the Hon'ble Sarimad Rajaha Hindustan Raja Rajendra Sri Maharaja Dhiraj Sivai Ram Singh Bahadur of Jaypur G C S I

EVIDENCE BILL

... the Hon'ble Mr Strachey ... and amend the Law of Evidence ... an opportunity of saying a few words on a measure of the very highest importance The Evidence Act was drafted by the Indian Law Commissioners, and sent out to this country two years ago It was introduced by Mr Maine, referred to a Committee several of the members of which had now ceased to belong to the Council and published in the Gazette for general information Objections of great weight had been taken to it by many of the most distinguished lawyers in India and no doubt, the subject was one which required the most careful handling It was impossible to exaggerate the practical importance of the Bill as it would regulate the most important part of the procedure of every Court of Justice throughout the Empire Such a measure would of course require most careful consideration ir ...

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state of great uncertainty No on... he law of Evidence did, and how far t... As consequence was that the subject ... nd a proof of this he (the mover) m... ...ecided in about Woodman's Indian Digest, which contained notes of cases ... eight years the title Evidence filled no less than twenty three royal octavo pages ... There were probably from four to five ... s was the state of things for whic... ...vide a remedy It was one whic... ought not to be permitted to continue

The motion was put and agreed to

The Council then adjourned to the 20th September, 1870

WHITLEY STOKES

Secretary to the Council of the Governor General for making Laws and Regulations

SIMLA,
The 6th September, 1870

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict Cap 67

The Council met at Government House on Friday, the 18th November, 1870

PRESENT

His Excellency the Viceroy and Governor General of India, K P G, C S I, *presiding*

The Hon'ble John Strachey
The Hon'ble Sir Richard Temple K C S I
The Hon'ble J Fitzjames Stephen, Q C
The Hon'ble B H Ellis
Major General, the Hon'ble H W Norman, C B
The Hon'ble D Cowie
The Hon'ble Francis Stewart Chapman
The Hon'ble F R Cockerell

EVIDENCE AND INSOLVENCY BILLS

The Hon'ble Mr Stephen moved that the Hon'ble Mr Inglis be added to the Selec C

The Council adjourned to Friday, the 9th December, 1870

WHITLEY STOKES,
Secretary to the Government of India

CALCUTTA,
The 2nd December, 1870

ABSTRACT of the Proceedings of the Council of the Governor General of India, assembled for the purposes of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict Cap 67

The Council met at Government House on Friday, the 9th December, 1870

PRESENT

His Excellency the Viceroy and Governor General of India, K P G, C S I, *presiding*

The Hon'ble John Strachey
The Hon'ble Sir Richard Temple, K C S I
The Hon'ble J Fitzjames Stephen, Q C
The Hon'ble B H Ellis
Major Genl the Hon'ble W H Norman, C B
The Hon'ble Francis Stewart Chapman

SUNDRY BILLS

Hon'ble Mr Robinson be added

The motion was put and agreed to
The Council adjourned to Friday, the 16th December, 1870

WHITLEY STOKES
Secretary to the Govt of India

CALCUTTA,
The 9th December, 1870

APPENDIX B

DRAFT REPORT OF THE SELECT COMMITTEE

The Gazette of India, July 1, 1871, Part V, p 273

The following Draft Report of a Select Committee together with the Bill as settled by them, was presented to the Council of the Governor General of

India for the purpose of making Laws and Regulations on the 31st March, 1871 — Ap

From Officiating Under Secretary, Home Department, No 423, dated 23rd October 1868, and enclosures

From Assistant Secretary, Foreign Department, No 333 dated 12th December 1868, and enclosures

Remarks by the Hon'ble the Chief Justice of Bombay (no date)

Remarks by Hon'ble Justice Phear, dated 8th December, 1868

From Secretary to Chief Commissioner British Burma, No 525—1, dated 1st December 1868

From Assistant Secretary to Government of Bengal Legislative Department, No 37, dated 9th January 1869, and enclosure

From Deputy Judge Advocate General of the Army dated 26th January, 1869, and enclosures

From Officiating under Secretary Home Department, No 258 dated 17th February 1869, forwarding memorial from Muktars and Revenue Agents, Howrah, dated 4th February 1869

From Secretary to Indian Law Commissioners, dated 6th February, 1869

From Chief Secretary to Government Fort St George, No 120 dated 18th March 1869 and enclosures

From Secretary to Government of Bombay No 2971 dated 7th September 1869 and enclosures

From Secretary to Government of Bombay, No 3188 dated 24th September 1869 and enclosures

Fifth Report of Her Majesty's Law Commissioners on the Bill.

From Officiating Inspector General of Police Punjab No 2637 dated the 28th September, 1870

From Secretary to Government of India Home Department, No 1892, dated 18th October 1870 forwarding letter from Chief Commissioner, British Burma, No 61, dated 10th August 1870, and enclosures

We the members of the Select Committee to which the Evidence Bill has been referred, have the honour to report that we have considered the Bill and the papers noted in the margin

After a very careful consideration of the draft prepared by the Indian Law Commissioners we have arrived at the conclusion that it is not suited to the wants of this country

We have recorded in a separate report the grounds on which this conclusion is based They are in a few words that the Commissioners' draft is not sufficiently elementary for the officers for whose use it is designed, and that it assumes an acquaintance on their part with the law of England, which can scarcely be expected from them Our draft, however, though arranged on a different principle from theirs, embodies most of its provisions In general it has been our object to reproduce the English Law of Evidence with certain modifications most of which have been suggested by the Commissioners though with some this is not the case

The English Law of Evidence appears to us to be totally destitute of arrangement

particular out of the [illegible] pleading and the habitual practice of the Courts of Common Law For instance, the rule that evidence must be confined to point in issue is founded on the system of pleading The rule that hearsay is no evidence is part of the practice of the Courts but the two sets of rules run into each other in such an irregular way as to produce between them a result which no one can possibly understand systematically unless he is both acquainted with the principles of a system of pleading which is being rapidly abolished, and with the everyday practice of the Common Laws of Courts, which can be acquired and understood only by those who habitually take part in it This knowledge moreover, must be qualified by study of text books which are seldom systematically arranged

Many other circumstances, to which we need not refer, have contributed largely to the general results, but we may ... the law, and the total absence of anything lik... part of it, by a single instance In Mr P... stated that "ancient documents" when tendered in support of ancient possession, form the third exception to the rule which excludes hearsay The question is whether A is entitled to a fishery. He produces a royal grant of the fishery to his ancestor This fact the law describes as a peculiar kind of hearsay admissible by special exception Surely this is using language in a most uninstructive manner

This being the case, we have discarded altogether the phraseology in which the English text writers usually express themselves, and have attempted first to ascertain, and then to arrange in their natural order the principles which underlie the numerous cases and fragmentary rules which they have collected together The result is as follows —

Every judicial proceeding whatever ha... some right or liability If the proceeding... the liability to punishment of the person... the object is to ascertain some right of property or of status, or the right or ... ome form of relief ... upon and arise out of facts, and ... and those which cannot be perceived ... ived by the senses, it is superfluous to give e... sense, intention, fraud, goo... each class of facts ... of facts— they can be ... ition of the senses A man can testify to the fact that, at a certain time, he had a certain intention, on the same grounds as that on which he can testify that at a certain time and place, he saw a particular man He has, in each case, a present recollection of a past direct perception Moreover it is equally necessary to ascertain facts of each class in judicial proceedings, and they must in ... way ... ies in one of two different ways ... tion with other facts, constitute ... of the disputed right or liability would be a legal inference from them From the fact that A is the eldest son of B, there arises of necessity the inference that A is by the law of England the heir-at law of B, and that he has such rights as that status involves From the fact that A caused the death of B under certain circumstances and with a ... knowledge there arises of necessity the inference that A ... by the law for murder ... lled facts in issue unless ... he sense above explained ... issue and these may be called ... with which it can ... themselves, so that t... elation to the proceeding in which they are to be proved

This introduces the question of proof It is obvious that, whether an alleged ... the Court can draw no inference from ... also obvious that the belief of ... ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceedings in which its existence is to be determined The question is whether A wrote a letter The letter may have contained the terms of a contract It may have been a libel It may have constituted the motive for the commission of a crime by B It may supply proof of an *alibi* in favour of A It may be an a... confession of a crime but whatever may be the relation of the f... that A did w... d

the production of the original when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short, the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceedings

The instrument by which the Court is convinced of a fact is evidence It is often classed as being either direct or circumstantial We have not adopted this classification

[illegible] evidence establishes a fact in issue whereas [illegible] fact, evidence is classified, not [illegible]

but as being used for writing or for p[illegible] which a fact must be proved depends on [illegible] made of it Evidence, therefore, should be defined, not with refer nce to the nature of the fact which it is to prove, but [illegible]

[illegible] the phrase is thus used, the word [illegible]

clumsy mode of expression, which means either

(1) Words spoken or things produced in order to convince the Court of the existence of facts, or

(2) facts of which the Court is so convinced and which suggest some inference as to other facts

We use the word 'evidence' in the first of these senses only and so used it may be reduced to three heads—(1) oral evidence, (2) documentary evidence; (3) material evidence

Finally the evidence by which facts are to be proved must be brought to the notice of the Court and submitted to its judgment and the Court must form its [illegible] to us to supply the ground work for a [illegible] the subject as follows —

[illegible] issue [illegible] to their nature by oral, documentary or [illegible]

IV The production of evidence

V Procedure

We have accordingly distributed the subject under these heads, in the manner which we now proceed to describe somewhat more fully

I—PRELIMINARY

Under this head we have defined "fact" 'facts in issue", "collateral facts", a document" "evidence" "proof" and "proved', "necessary inference" and 'presume" We have also laid down in general terms the duty of the Court [illegible] 'collateral facts', and

Of our definitions of fact' 'facts in issue" are reframed in accordance with 'evidence", we need say no more than that they are reframed in accordance with the principles already stated We may however, shortly illustrate the effect of the definition of evidence

It will make perfect[illegible] the words as used in Engl[illegible] of circumstantial evidence with thus The question [illegible] he had a motive displayed by statement of his [illegible] his feet, that he [illegible] crime shows foot marks which correspond with his feet, that he [illegible] sion of property which might have been procured by it and that he wrote a letter indicating his guilt On turning to Chapter II, it will be found that all these are relevant facts, either as motive, incident of facts in issue, effects

3. Many other circumstances to which we need not refer, have contributed largely to the general results but we may illustrate the extreme intricacy of the law and the total absence of anything like system which pervades every part of it by a single instance In Mr Pitt Taylor's work on evidence it is stated that ancient documents when tendered in support of ancient possession form the third exception to the rule which excludes hearsay The question is whether A is entitled to a fishery He produces a royal grant of the fishery to his ancestor This fact the law describes as a peculiar kind of hearsay admissible by special exception Surely this is using language in a most uninstructive manner

This being the case, we have discarded altogether the phraseology in which the English text writers usually express themselves and have attempted first to ascertain, and then to arrange in their natural order the principles which underlie the numerous cases and fragmentary rules which they have collected toge[illegible]

Every [illegible] certaining of some right [illegible] s to ascertain the liability [illegible] ling is civil the object is to ascertain some right of property or of status or the right of [illegible] ome form of relief [illegible] upon and arise out of facts and [illegible] and those which cannot be perceived [illegible] ived by the senses it is superfluous [illegible] be perceived by the sense intention fraud good faith and knowledge may be given as examples But each class of facts has in common one element which entitles them to the name of fac[illegible] they can be directly perceived either with or without the intervention of t[illegible] senses A man can testify to the fact that at a certain time he had a certa[illegible] intention on the same grounds as that on which he can testify that at certain time and place, he saw a particular man He has in each case, present recollection of a past direct perception Moreover it is equally neces sary to ascertain facts of each class in judicial proceedings, and they must in most cases be ascertained in precisely the same way

Facts may be related to rights and liabilities in one of two different ways

1 They may by themselves or in connection with other facts constit[illegible] such a state of things that the existence of the disputed right or liabili[illegible] would be a legal inference from them From the fact that A is the eldest so[illegible] of B, there arises of necessity the inference that A is by the law of Engl[illegible] the heir at law of B, and that he has such rights as that status involves From the fact that A caused the death of B under certain circumstances and with [illegible] certain intention or knowledge there arises of necessity the inference that A murdered B and is liable to the punishment provided by the law for murder

Facts thus related to a proceeding may be called facts in issue unle[illegible] indeed their existence is undisputed

2 Facts which are not themselves in issue in the sense above *explained* may affect the probability of the existence of facts in issue and these *may* b[illegible] called collateral facts.

It appears to us that these two classes comprised all the *facts with wh ch* it can in any event be necessary for Courts of justice to concern themselves so that this classification exhausts all facts considered in their relation to the proceeding in which they are to be proved

This introduces the question of proof It is obvious that whether an *alleged* fact is a fact in issue, or a collateral fact the Court can draw no inference from its existence till it believes it to exist, and it is also obvious that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceedings in which its existence is to be determined The question is whether A wrote a letter The letter may have contained the terms of a contract It may have been a libel It may have constituted the motive for the commission of a crime by B It may supply proof of an *alibi* in favour of A It may be an admission or a confession of a crime, but whatever may be the relation of the fact to the proceeding the Court cannot act upon it unless it believes that A did write the letter and that belief must obviously be produced, in each of the cases mentioned by the same or similar means If for instance, the Court required

the production of the original when the writing of the letter is a crime there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime In short, the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceedings

The instrument by which the Court is convinced of a fact is evidence It is often classified as being either direct or circumstantial We have not adopted this classification

in issue whereas e is classified not use to which it is put, as if paper were to be defined not by reference to its component elements but as being used for writing or for printing We have shown that the mode in which a fact must be proved depends on its nature and not on the use to be made of it Evidence, therefore, should be defined not with reference to the e to its own nature vidence is a statement of evidence is something from which facts in issue are to be inferred If the phrase is thus used the word evidence, in the two phrases (direct 'evidence' and circumstantial evidence opposed to each other) has two different meanings In the first, it means testimony serve as the foundation for an circum a most clumsy mode of expression, but it shows the ambiguity of the word 'evidence which means either

(1) Words spoken or things produced in order to convince the Court of the existence of facts, or

(2) facts of which the Court is so convinced and which suggest some inference as to other facts

We use the word evidence' in the first of these senses only and so used it may be reduced to three heads—(1) oral evidence, (2) documentary evidence, (3) material evidence

Finally the evidence by which facts are to be proved must be brought to the notice of the Court and submitted to its judgment and the Court must form its judgment respecting them

These general considerations appear to us to supply the ground work for a systematic and complete distribution of the subject as follows —

I Preliminary

II The relevancy of facts to the issue

III The proof of facts according to their nature by oral documentary or material evidence

IV The production of evidence

V Procedure

We have accordingly distributed the subject under these heads in the manner which we now proceed to describe somewhat more fully

I—PRELIMINARY

Under facts in issue, collateral facts" a docume inference' and presume' f the Court

Of o ral facts' and "evidence' ccordance with the princip strate the effect of the definition of evidence

It will make perfect the words as used in Engli of circumstantial evidence with thus The question be had a motive displayed by statement of his own that he was in possession and that he wrote a letter it will be found that all th facts in issue, effects

of facts in issue, or conduct influenced by facts in issue On turning to Chapter III, it will be seen how each of these facts must be proved, namely, the statements displaying motive by the direct oral evidence of some one who says he heard them; the foot marks, by the direct oral evidence of some one who says he saw them, the possession of the property by the production of the property in Court, and by the direct oral evidence of some one who had seen it in the prisoner's possession and the letter, by the production of the letter itself, or secondary evidence of it, if the case allows secondary evidence

So the phrase "hearsay" evidence", which, as the commissioners observe is used by English writers in so vague and unsatisfactory a manner, finds no place in our draft, and f any confusion in connection with it. manner which *corresponds on the w* *with the English* law in what cases the s as to relevant facts shall and in what cases they shall not be themselves relevant, and Chapter V on proof by oral evidence, provides that oral evidence, shall in all cases be direct, on whatever ground the fact which it is to establish may be relevant to the issue, that is to say, if the fact is one which could be seen, it must be established by a witness who says he saw it, if it could be heard by a witness who says he heard i

the other provisions

So our definition does away with a confusion which arises out of the double meaning of the word evidence in the phrases "primary" and "secondary" *evidence "Primary evidence" sometimes means a relevant fact, and at other* times the proof of a document by its production as opposed to proof by a copy In our draft "primary", and "secondary' are distinctly defined, and confined idence" in each case means words spoken or the Court

for the words "conclusive evidence" the phrase "necessary inference" The phrase "conclusive evidence" is not open to objection on the ground of obscurity or ambiguity, but the word "evidence" in it means not what we understood by evidence, but a fact established by evidence from which a particular inference necessarily follows Our phrase, therefore, harmonises with the rest of our draft whereas "conclusive evidence' would not

and 'moral certainty" require some oordinate to that of "prov d' which is that is to say, when the Court after

that a reasonable man ought, under the circumstances of the particular case, to act upon the supposition that it exists

This degree of probability we describe as ' moral certainty", and we provide such we bt', to

state, without a prolonged abstract discussion, which would be out of place illustrations in offence umstances We have ntries, and in this country more than in any other it is absolutely necessary to leave to judges a wide discretion as to the risk of error which they choose to incur in

coming to a decision, and that this is a matter of prudence and practice, as to which rules ought to be laid down, rather with a view of guiding, than with a view of fettering discretion

The last provision, in the preliminary part, to which we would call attention, defines in very general terms the duty of the Court in deciding questions of fact. Its generality appeared to us to render the preliminary rather than the concluding chapter, the proper place for it This section declares that the duty of the Court is to determine question of fact by drawing inferences—

(1) from the evidence given to the facts alleged to exist,
(2) from facts proved to facts not proved,
(3) from the absence of evidence which might have been given,
(4) from the admissions and conduct of the parties, and generally from

the [illegible]

dra[illegible] o to be of p[illegible] subject fact[illegible] cord the the [illegible] all cases [illegible] to the [illegible] which it is used, is the [illegible] for inference, whereas [illegible] lence whatever is useful [illegible] ference that the facts [illegible], is very often the most [illegible] or other of the different shapes which we have stated is the great duty of the Judge in every case whatever, and we have thought it desirable to point this out in the plainest and broadest way

We have added two qualifications only to this general rule (1) that, when the law declares an inference to be necessary, the Court shall draw it, and shall not allow its truth to be contradicted, (2) that, when the law directs the Court to presume a fact, it shall infer its existence till the contrary appears We have treated in detail of necessary inference and presumptions in other parts of the Bill

II THE RELEVANCY OF FACTS

We have already pointed out the place which in our opinion, belongs to this subject in the law of evidence The question, what facts you may prove obviously lies at [illegible] answer is given to [illegible] The answer to th[illegible] exceptions which are made by English text writers to the [illegible] that evidence [illegible] is no evidence and that the b[illegible] he same excep tions are to [illegible] k however, that by a compar[illegible] e succeeded in forming a collection of positive rules as to the relevancy of facts to the issue, which will admit every fact which a rational man could wish to have before him in investigating any question of fact

These rules declare to be relevant—

(1) all facts in issue,
(2) all collateral facts, which
(a) form part of the same transaction,
(b) are the immediate occasion, cause or effect of fact in issue,
(c) show motive, preparation, or conduct affected by a fact in issue,
(d) are necessary to be known in order to introduce or explain relevant facts;
(e) are [illegible] of a common design,
(f) [illegible], or inconsistent with it, except u[illegible] the other side, or render its existe[illegible] ording to the definition of moral certainty given above,
(g) affect the amount of damages in cases where damages are claimed,
(h) show the origin or existence of a disputed right or custom,

(i) show the existence of a relevant state of mind and body,
(j) show the existence of a series of which a relevant fact forms a part, or
(l) show (in certain cases) the existence of a given course of business

The remainder of the chapter throws into a positive shape what in English law forms the exceptions of the rule, excluding the various matters described as hearsay They relate to—

the conduct of the parties on previous occasions,
the statement of the parties on previous occasions,
previous judgments,
statements of third persons,
opinions of third persons

1 In reference to the conduct of the parties on previous occasions we embody in three sections the existing law of England as to evidence of character, with some modifications We include, under the word 'character, both *reputation and disposition, and we permit evidence to be given* of previous convictions against a prisoner for the purpose of prejudicing him We do not see why he should not be prejudiced by such evidence, if it is true

2 Under the head of the statement of the parties on other occasions we deal with the question of admissions, as to which we have not materially altered the existing law

... position ... olice ... the

3 Previous judgments appear to follow naturally upon previous statements Under this head we deal with the question of *res judicata*

We have not attempted to deal with the question of the bar of suits by previous ju... ion of procedure rather tha... never the Code of Civil and ... other hand dealt is substantial accordance with the principles of the law of England with the question of the relevancy of judgment between strangers For the sake of simplicity, and in order to avoid the difficulty of defining or enumerating judgments in ... he law of *Sir Barnes Peacock* in *Kunya* ... 39

4 ... have made one considerable alteration ... third *persons a*... truth or if they ... making ... of knowledge We have given ... which is suggested by Mr *Pitt* ... o carefully examines the ship ... *family and* ... likely to be ... his section ... not Some ... hich a limits statements explanatory of conduct, but as the conduct explained must be relevant and as no clear definition of relevancy is given by the law of England it is very difficult to say how far his rule extends

The next exception refers to statements made by a person who *is dead* or cannot be found or produced without unreasonable delay or expense We declare such statements to be relevant if they relate to the cause of the *person's* death or are made in the ordinary course of business or express an opinion as to the existence of the public right, or state the existence of any *relationship* as to which the party had special means of knowledge, or when they are made ... ties ... We have omitted the restrictions *placed* ... statements ... be *opposed* ... id that they ... than the admissibility of what is, at best to

statements in public or *official* ... previous judicial *proceedings*

5 The cases in which the opinion of third persons are relevant are dealt with in sections forty four to fifty

They declare to be relevant the opinions of experts, opinion as to hand writing, opinion as to usage, and opinions as to relationship and the grounds of such opinions

This completes that part of the Bill which relates to the relevancy of facts In the particulars stated and in some others of minor importance, which for the sake of brevity we have not noticed it modifies the law of England, but we believe that substantially, it represents that part of the law which is contained in (amongst others) the rules, together with the exceptions to the rules that evidence must be confined to points in issue, that the best evidence must be given, and that hearsay is no evidence, though these rules include other matters which we treat of under other heads

III—PROOF

The second Chapter having decided what facts are relevant we proceed to show how a relevant fact is to be proved

In the first place, the fact to be proved may be one of so much notoriety that the Courts will take judicial notice of it or it may be admitted by the parties In either of these cases no evidence of its existence need be given Chapter III which relates to judicial notice, disposes of this subject It is taken in part from Act II of 1855, in part from the commissioners draft bill and in part from the law of England

If evidence has to be given of any fact that evidence must be either oral documentary, or material, and we proceed in the following chapters to deal with the peculiarities of each of these three kinds of evidence There is however, one topic which applies to all of them of which we treat in Chapter IV This is the distinction between primary and secondary evidence As we have already shown ... as a legal way of recognizing the ob[illegible] of a document is [illegible] and secondary evi[illegible] the document or [illegible] crip tion is second[illegible]

We nex[illegible] proof by the various kinds of evidence successively namely oral documentary and material With regard to oral evidence, we provide, that it must in all cases whatever, whether it is primary or secondary and whether the fact to be proved is a fact in issue or collateral be direct That is to say, if the fact to be proved is one that could be seen it must be proved by some one who says he saw it If it could be heard by some one who says he heard it and so with the other senses We also provide that if the fact to be proved is the opinion of a living and producible person, or the grounds on which such opinion is held it must be proved by the person who holds that opinion on those grounds

We have however, provided that if the fact to be proved is the opinion of an expert who cannot be called (which is the case in the majority of cases in this country) and if such opinion has been expressed in any published treatise it may be proved by the production of the treatise

This provision taken in connection with the provisions of relevancy contained, in Chapter II will we hope set the whole doctrine of hearsay in a perfectly plain light, for their joint effect is this—

(1) the sayings and doings of third persons are, as a rule irrelevant, so that no proof of them can be admitted,

(2) in some excepted cases they are relevant,

(3) every act done or words spoken which is relevant on any ground must (if proved by oral evidence) be proved by some one who saw it with his own eyes or [illegible]

[illegible] of facts by document ary e[illegible] may be admitted, we have[illegible] We may observe that Chap[illegible] have thought it right to u[illegible] ch in almost every

3. ... of certified copies, gazettes, books ... nos of depositions, etc ... evidence ... this ... upon ... it are, so ...
On ... contract, etc, reduced to writing ... law of England and the Commissioners' draft

IV THE PRODUCTION OF PROOF.

From the question of proof of facts, we pass to the question of the manner in which the proof is to be produced, and this we treat under the following heads —

... of proof (Chapter X)

... XII)

... II)

... we lay down the broad rules that the general burden of proof is on the party who, if no evidence at all were given, would fail, and that the burden of proving any particular fact is on the party who affirms it ... h rules, and appear to us reasonable in thems ... e precedent of the New York Code in laying ... agreeing with the Indian Law Commissioners in the opinion that it is better not to fetter the discretion of the Judges We have, however, admitted one or two such presumptions ... Judges might ... seven years' ... acting as partners, ... an illustration, of a matter ... and we think somewha ... several persons in ... ule as to the burden ... *B must prove it* Th ...

... legitimacy being a necessary inference ... e adopt one or two of the rules of ...

... of witnesses, we have been careful ... e existing practice of the Courts, which ... e of Civil Procedure, is of necessity very loose and much guided by circumstances, but we have put into propositions the rules of English law as to the examination and cross examination of witnesses

We have also considered it necessary, having regard to the peculiar circumstances of this country, to put into the hands of the Judge an amount of discretion as to the admission of evidence which, if it exists by law, is at all events rarely or never exercised in England We expressly empower him to ask any questions upon any facts, relevant or irrelevant, at any period of the ... if he thinks ... upon ... utmost ... into the truth of the matter before him ... is to define simply and clearly the duties and the position of the Judges and those who practice before them The English system under which the Bench and the Bar act together and play their respective parts independently, and the professional organisation on which it rests, have no doubt great advantages, ... and will not for a very ... speaking, the great ..., and when advocates ..., and have to appear ... training as English

Judges, and are liable to be intimidated by advocates whose technical knowledge of law is greater than their own, and to whom the extremely intricate system of appeal which prevails in his country gives a power over the Judges unlike

In connection with this subject, we may refer to some provisions which we have inserted in order to prevent the abuse of the power of cross examination to credit. We believe the existence of that power to be essential to the administration of justice, and we believe it to be liable to great abuses. The need for the power and danger
this country litigation c
are the great engines
here than in England,
prevent the use of the power of exposure as a means of gratifying malice. We have accordingly provided as follows

Such questions may relate either to matters relevant to the case, or to matters not ... to the case,
we think tl ... r, but that his
answer shou

If they relate to matters not relevant to the case, except in so far as they affect the credit of the witness we think that the witness ought not to be compelled to answer. His refusal to do so would in most cases, serve the purpose of discrediting him as well as an express admission that the imputation conveyed by the question was true

In order to protect witness against needless questions of this kind, we enact that any advocate who asks such questions without written instructions (which the Court may call upon him to produce, and may impound when produced) shall l
any such question
the question of
publication of an imputation intended to harm the reputation of the person
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manner stated. Upon a trial for defamation it would of course be open to the person accused to show, either that the imputation was true or that it was for the public good that imputation should be made (Ex I, section 499, I P C), or that it was made in good faith for the protection of the interest of the person making it or of any other person (Ex 9). This is the only method which occurs to us of providing at once for the interests of a *bona fide* questioner and an innocent witness

In the same spirit we have empowered the Court, in general terms, to forbid indecent and scandalous ... to
defined above, or to matters a ... ıd-
determine whether the facts in
ed to insult or annoy

We prefer this general power to the sections drawn by the Commissioners, which forbid questions to married persons "which substantially amount to inquiring whether that person has had sexual intercourse forbidden to him or her by the law to which ... subject" and "questions regarding the
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show that a married person
or his wife. A woman
motive is revenge for the discovery by ... an *alibi* on behalf of his m ... mistress. A married man comes to prove an *alibi* ... He pleads that consideration was
woman sues a m
adultery. In all
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and wife, we think

B. general terms, than to lay down a positive rule which in possible cases might produce hardship

Finally we ... (Chapter XV) with the question of the improper admission

at in regular appeals each Court successively ... fence it will have regard As for special appeals we provide that if evidence is said to be improperly admitted, the objection must be taken before ... called upon to say what its decisions ... ected If evidence is improperly rejec ... to look into the fa ts and deliver final judgment, or to remand the case

Finally, we recommend that the Draft Bill, together with the report, should be circulated for the opinion of the Local Governments

J F STEPHEN
J STRACHEY
F S CHAPMAN
F R COCKEREIL
J. F D INGLIS
W ROBINSON

The 31st March, 1871

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vict Cap 67

The Council met at Government House on Friday, the 31st March 1871

PRESENT

His Excellency the Viceroy and Governor General of India, K P G M S I *Presiding*
His Honour the Lieutenant Governor of Bengal
His Excellency the Commander in chief, G C B, G C S I

The Hon'ble John Strachey — Colonel the Hon'ble R Strachey, C S
The Hon'ble Sir Richard Temple, K C S I — The Hon'ble F S Chapman

... Norman C B

INDIAN EVIDENCE BILL

The Honble Mr Stephen in presenting the Report of the Select Committee ... aid — ... Lordship and the Council ... on a purely legal subject ... imitation Act On this occasion, however, I have to explain the position of a measure perhaps as important as any that has been passed of late years by the Indian Legislature in as much as, if it becomes law, it will affect the daily administration of both ... Moreover, the general interest ... less than an ... to the problem ... owever, impor- ... the Bill which the committee appended to their report, and which I am now to describe in a general way to your Lordship and the Council

"I will state, in the first place, the history of the measures down to the present time So far back as the year 1868, the Indian Law Commissioners

drew a draft Evidence Act, which was sent out to this country . . .

stated in the report
ever that the principal
that it was in several
. . . incomplete, and that, if it became law it would not supersede the necessity under which judicial officers in this country are at present placed of requainting themselves by means of English Law books with the English Law upon this subject

"The Comm . . .
hardly be intelligible to a
considerable knowledge of
draft was framed, which
propose to print and circulate, and on which I hope to receive the opinions of the Local Governments and High Courts in the course of the summer, say, by next Septe . . .
weighed, and the measure may
'The report of the com . . .

the present occasion
. . . confine myself to saying that I trust that those who will have to criticise the Bill will begin by studying the report, which has been drawn up with great care, and which, as well as the Bill itself, forms a connected and systematic whole. The general object kept in view in framing the Bill has been to produce something from which a student might derive a clear, comprehensive, and distinct knowledge of the subject without unnecessary labour, but not of course, without that degree of careful and sustained attention which is necessary in order to master any important and intricate matter. It is by this standard that the committee in general and I in particular, as the member in charge of the Bill, desire that it may be tried.

'With this reference to the Bill and the report of the committee, I proceed to discuss the general questions connected with the subject and to mention a few of . . .

exis . . . mitted the necessity which
exceedingly difficult to say precisely what at the present moment the law upon the subject certainly is . . . British India. It would be To some extent—it is far from being clear to what extent—and in some parts of . . . pears to be in force in British Indi . . . will continue to be so in practice, . . . been introduced . . .
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said for unaided mother wit and natural shrewdness, but a half and half system in which a vast body of half understood law, totally destitute of arrangement and of uncertain authority maintains a dead alive existence is a state of things which it is by no means easy to praise.

"Legislation being thus necessary, in what direction is legislation to proceed? A gentleman, for whose opinion upon all subjects connected with Indian Law and Legislation, I, in con . . .
respect, said to me the other day . . .
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Finally, we recommend that the Draft Bill, together with the report, should be circulated for the opinion of the Local Governments

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The Hon'ble B H Ellis
Major General The Hon'ble H W Norman C B

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'This is the object which has been kept in view in framing the Bill which the committee appended to their report, and which I am now to describe in a general way to your Lordship and the Council

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tical effect of these rules? I may perhaps be permitted to answer this by referring to a book which I published in 1863 on the Criminal Laws of England, and which contains, amongst other things, an analysis of several celebrated trials, English and French. One object of that analysis was to contrast the effect of the presence and absence of rules of evidence; and I think that any one who would take the trouble to compare those trials together carefully, would agree with me in the conclusion, that the practical effect of the English rules of evidence in the

floods of ... he want of them than the strong ... confuse and bewilder Criminal ... n ordinary Court of ... in which the rules of evidence are far less strictly enforced, and less clearly understood. An ordinary Criminal Court never gets very far from the point, but a Court martial continually wanders into questions far remote from those which it was assembled to try. Nothing for ...

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he does not ... ning of the authority ... vocates, who have r ... power to pervert the administration of justice to the basest purposes, and to inflict immense injury on every class connected with it, directly or remotely, that might, or often would, in such hands, be made the excuse for tearing open old quarrels and ...
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country. In certain parts of the country, it was a point of honour for the friends of the putative father and of the mother respectively, to go to session to swear for him or her, as they used to say. No one who did not take part in such cases could imagine the strange ramifications of falsehood and contradiction, into which a hotly contested case of this kind would spread, or the number of imputations thrown on the honesty and chastity of the different witnesses, male and female. If it had not been for the rules of evidence the reputations of half the population of the village would have been torn in pieces. The rules of evidence kept matters to a point, and so minimized the evil, but the parties, the witnesses and the attorneys, all appeared to me to be one more anxious than another, to fight the matter ... stripped off the back of every man, ... way brought into the discussion ... aggravated from ... In the work to which I have already referred, will be found an account of ... for murder. If disposed of under th... ve taken more than a day or ... for, I think, about three weeks, a ... witness, in particular, was discovered, to have seduced a girl seven years before, and letters from her to him were read to throw light on his character. He naturally wished to give his own account of the transactions but was stopped on the ground that a line must be drawn some where, and that the Court chose to draw it between the point at which an irrelevant slur had been thrown on his character, and the point at which, had he been permitted to do so, he might have given an equally irrelevant explanation.

gathering puposes, and of no real value in the investigation of truth I cannot admit that this impression is in any degree correct I believe that rules of evidence are of very great value in all enquiries into matters of fact, and in

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fact was regarded as so helpless and difficult, that rude arbitrary substitutes for any sort of rational procedure were provided, in the shape of ordeals and judicial combats When people began to obtain glimpses of the true methods of investigation they seem to have

in our days fall within the scope of

The delighted wonder which was

aprocryphal story of Susannah and the wonders, at what a friend of mine used to call that very feeble cross examination of Daniel's about the trees' is a good instance of this At a later period, arbitrary rules of evidence began to be formed Such a fact must be proved by two eye-witnesses, such another by four, such another by seven To say nothing of European systems in which such rules were in force the Hedaya is full of them These rules were never introduced in their full force into E

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"The second is that I believe that no body of rules upon any important subject were ever expressed so loosely, in such an intricate manner, or at such intolerable length

It is necessary to prove the first of these propositions in order to justify the recommendations of the committee that the substance of the rules in question should be introduced in the form of express law into this country It is necessary to prove the second proposition in order to justify the attempt made in the Bill to reduce the rules to order and system First then, as to the proposition that the rules in question are substantially sound and do far more

they are not, understood and acted upon As a preliminary remark, I ought to observe that the knowledge of these rules possessed by English lawyers, is derived far more from the daily practice in the Courts, than from theoretical study Many English l

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heal effect of these rules? I may perhaps be permitted to answer this by referring to a book which I published in 1863 on the Criminal Laws of England, and which contair
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affirmed, and made
letters of the alphabe
nature, to know how
he does not, an incalculable waste of time and energy, and a great weakening of the authority of his Court, is sure to follow Active and zealous Advocates, who have no rules of evidence to restrain their zeal, would have it in their power to pervert the administration of justice to the basest purposes, and to inflict immense injury on every class connected with it, directly or remotely, that might, or often would, in such hands, be made the excuse for tearing open old quarrels and reviving questions laid at rest and giving fresh animus to scandals long ... would frequently be lost sight of,
... ssues I may be excused for
... n illustration of this Appeals
... luce an amount of perjury
... d be difficult to exceed in any
country In certain parts of the country, it was a point of honour for the friends of the putative father and of the mother respectively to go to session to swear for ... No one who did not take part in

and female If it
the population of the
evidence kept matters to a point, and so minimized ... one more anxious the witnesses and the attorneys, all appeared to me to be one more anxious than another, to fight the matter out till the very last rag of character had been stripped off the back of every man, woman, and child, whose name was in any way brought into the discussion The French Courts display this evil, in an aggravated from In the work to which I have already referred will be found an account of the trial of a monk named *Leotade* for murder If disposed of under the English rules of evidence, it could hardly have taken more than a day or two at the most In the French Court, it lasted for, I think, about three weeks, and branched ... of subjects One witness, in particular,
was discovered to l
to him were read to tl
his own account of
must be drawn some
at which an irrelevant
at which, had he been permitted to go
irrelevant explanation

"It is not however merely for the purpose of confining judicial proceedings within reasonable limits that rules of evidence are useful They are also of pre eminent importance for the purpose of protecting and guiding the Judge in the discharge of his duty There is a sense in which it may be said with perfect truth that even legislative power is *unequal to the task of abolishing* rules of

discretion

"It may be that some persons would like this policy, but I suppose it is one which I need not discuss

'So far I have considered the rules of evidence merely as they conduce to the important practical objects of keeping proceedings to the point and of protecting and supporting the Judges I must now say a few words on *their* value, as furnishing the Judge with solid tests of truth I fully admit that their
-ceived, but I think
that
they have a real
thoug
There are two
great problems on which the rules of evidence *throw no light at all and* on which they are not intended to throw any light, and it must be admitted that those problems are by far the most important of any, which a Judge has to solve No rule of evidence that ever was framed, will assist a Judge in the very smallest degree in determining the master question of the whole subject—*whether and how far, he ought to believe what the witnesses say?* Again rules of evidence are not, and do not profess to be rules of logic They throw no light at all on a further question of equal importance to the one just stated

from the facts in which, after *considering*

In every judicial proceeding whatever

if it is true, what then—ought to be

both that

hem and

ch better

evidence

of this,

is perfectly familiar I think that

coupled with impatience of the exaggerated pretensions which have *sometimes* been made on behalf of the rules of evidence, are the principal reasons for the distrust and dislike with which they *are at times regarded* This dislike I think is merely a particular instance of the vulgar error, which in so many instances leads people to deprecate art in comparison with nature as if there were an opposition between the two, and as if art in all cases did not *presuppose* and depend *upon nature The best shoes in the world will not make* a man walk, nor will the best glass make him see, and in just the same way, the best rules of evidence will not supply the place of natural sagacity, or of a taste *for and* training in logic, but it no
-eless as
guides to truth than that shoes o
-e feet
and to the eyes The real us
truth
consists in the fact that they sup
varied
experience *as to two great facts the relevancy of facts to the* question to be decided by the Court and the sort of evidence by which particular facts ought to be proved They may in the broadest and most popular form be stated thus '—If you want to arrive at the truth as to any matter of fact *of serious* importance observe the following maxims —'First, if your belief in the principal fact which you wish to ascertain is to be, after all, an inference from the other facts let those facts at all events, be closely connected *with the* principal fact in some one of certain specific modes Secondly, never believe

in any fact whatever, whether it is the fact which you principally wish to determine, or whether it is a fact from which you propose to infer the existence of the principal fact, until you have before you the best evidence that is to be had; that is to say, if the fact is a thing done, have before you some one who saw it done with his own eyes; if it was a thing said, have before you some one who heard it said with his own ears; if it was a written paper, have the paper before you and read it for yourself

"This exception—qualifications and explanations apart—is the true essence of the rules of evidence, and I think that no one will deny, either that these rules are in themselves eminently wise, or that they are by no means so obvious and self-evident that the mere unassisted natural sagacity of judicial officers of every grade can be trusted to grasp their full meaning, and to apply them to the practical questions which arise in the administration of justice, with no assistance from any express law I do not wish to exaggerate, but I must add that I attach considerable moral and speculative value to these rules If they are firmly grasped by Courts of Justice, and rigidly insisted upon in all practical matters which come before the Courts, they will gradually work their way amongst the people at large, and furnish them with tests by which to distinguish between credulity and rational belief, upon a great variety of matters which will be of vast ir [illegible]
they are calculated to effect, c [illegible]
and rigorously enforcing them [illegible]
perience will be continually adding to the proper proof of their value

So far, I have tried to prove the proposition that the English rules of evidence are of real solid value and that they are not a mere collection of arbitrary subtleties which shackle, inst[illegible] I pass
now to the next proposition, which [illegible]
so confused, intricate, and lengthy, th[illegible]
learn their true meaning otherwise [illegible]
may be altogether avoided by a careful and systematic distribution [illegible]
proof of this proposition, if indeed it is disputed, I can only refer in general to the English text books on the subject They form a mass of confusion which no one can understand until, [illegible]
intention of the different rules of which [illegible]
often incoherent illustrations I am f[illegible]
to the industrious, and in many cases [illegible]
lations They, like all other hand boc[illegible]
purposes, and are mere collections of [illegible]
generally relating to some very minute p[illegible] generally relating to vague catch words, with which they should be arranged, rather with reference to vague catch words, with which the ears of lawyers are familiar, than with reference to theoretical principles which it has never been worth any lawyer's while to investigate

"The cc[illegible]
other branche[illegible]
extraordinary [illegible]
very greatest practical sagacity with an absence of [illegible]
still worse, with the presence of unsound theory No one who has not seen it could [illegible] of a clever man may become
when [illegible] which does not fit it,
and [illegible] is of my meaning The
expression 'hearsay is no evidence' early obtained considerable currency in the English Courts [illegible] its meaning is clear enough, and, but what is
mo[illegible] truth,
fro[illegible] lty and
obs[illegible] y' and
'ev[illegible] y mean
sev[illegible] u have
her[illegible] icult to
im[illegible] ore, in
a [illegible] again,
[illegible] his own
may be taken to mean that which a person [illegible] of the word, and it is organs of perception, but this is not the natural sense of the word, and it is almost impossible in practice to divest a word of its natural meaning.

'The word "evidence' is also exceedingly ambiguous It may mean that which a witness says in Court It may mean the fact to which he testifies regarded as a ground work for further inference Notwithstanding this the phrase 'hearsay is no evidence,' being emphatic and easy to recollect stuck in the ears and in the minds of lawyers and has been taken by many text writers as the principle on which their statement of the most important branch of the law should be arranged They accordingly took to describing as hearsay, every fact of which evidence was by law excluded, in short they turned 'hearsay is no evidence into 'that which is not evidence is hearsay' They did not however, do this expressly They did it by describing as exceptions to the rule excluding hearsay, all cases in which evidence was

and he

to C Now as D and E are not parties to the suit between A and B ... own knowledge, know anything of the transac... ...ers call the deeds between D and E the ... aylor, the rule which permits such deeds to ... ption to the rule which ex cludes hearsa... ...istaken, called such evidence written hears... lawyers in general, to the abuse of language for the sake of momentary convenience, that it probably never struck him that this was a contradiction in terms I think however that it is hard to expect people to understand bear in mind and follow out in ... language in such a peculiar manner, To talk of hearing a document, is

I now turn to the ambiguity of the word 'evidence', to which I have already referred As I have just said, evidence' sometimes means a fact which suggests an inference For instance, it is cor... of stolen goods is evidence of theft', that is, the ... the inference of theft At other times and I ... means what a witness actually says in Court, or that which he produces For instance we say the evidence which he gave was true I might occupy, I will not say the attention, but the time, of Your Lordship and the Council for hours if I were to attempt to describe the amount of confusion and obscurity which the neglect of this simple and obvious distinction has thrown over the whole subject I will content myself with observing that it produces the effect of giving a double meaning to every expression into which the word 'evidence', is introduced Circumstantial evidence hearsay evidence, direct evidence 'primary evidence best evidence, have each two sets of meanings, and the result is, that it is almost impossible to arrive at a clear and comprehensive knowledge of the whole subject or to see how its various parts are related to each other without an amount of study thought and practical acquaintance with the actual working of the rules of evidence which few people are in a position to bestow upon the subject

'I may appear to be detaining the Council unduly upon merely verbal questions but I think that it is a common fault to under rate the importance of accurate language particularly in regard to the fundamental terms of any particular branch of knowledge In regard to law I have not the least doubt that a very large proportion of the intricacy and difficulty which attach to it is due to the fact, that proper pains have never been bestowed on the definition of its fundamental terms What c... ...to sure of our meaning when we spe...

...iple I believe ...e term 'law was defined by the late Mr Austin, the study of law would become comparatively easy, and in many cases attractive for its own sake, that its bulk might be diminished to a degree of which people in general have hardly any conception, that the expense of its administration, might be greatly diminished and that

comparative certainty might do away with a very large amount of needless and harassing litigation

'I shall now proceed to describe shortly the principles on which the draft B [illegible] first place we thought it [illegible] terms of the subject should [illegible] 'evidence', 'proof', 'proved' report [illegible] content myself with a reference to the report It seemed to us that the remainder of the subject would fall under the following general heads —

1 The relevancy of fact to the issues to be proved

2 The *proof* of facts, according to their nature by oral, documentary, or material evidence

3 The production of evidence in Court

4 The duties of the Court, and the effect of mistaken admission or rejection of evidence

'These heads would we think be found to embrace and to arrange in their natural order all the subjects treated of by English text writers and Judges, under the general head of the law of evidence I will say a few words on their relation to each other, and on each of them in turn

'The main feature of the Bill consists in the distinction drawn by it between the relevancy of facts and the mode of proving relevant facts The neglect of this distinction by English text writers, no doubt arises from the ambiguity in the word 'evidence' to which I have already referred and is the main cause of the extreme difficulty of understanding the English Law of Evidence systematically I will shortly illustrate my meaning A says Z committed murder First of all this is a fact—something which could be directly perceived by the sense of hearing and distinctly remembered afterwards Now, whether this fact is or is not relevant in a particular case depends upon a variety of circumstances If the question is whether A was guilty of defaming Z by accusing him of murder? Or where Z had a motive for assaulting A because A said that he had committed murder or if Z is accused of murder and the object is to show that when A charged him with it he behaved as if he were guilty and in many other instances which might be put the fact that A spoke those words is clearly relevant But if the question is whether Z actually did commit murder the fact that A thought so or said so generally speaking is not relevant Supposing however that the fact is relevant on some one of the grounds just mentioned or on any other ground whatever be the ground on which the words are relevant to the matter under inquiry it is obvious that the words themselves ought to be satisfactorily proved and the rule of English law—and we think it is a wise rule—is that they must be proved [illegible] with his own ears [illegible] of rules under the [illegible] arsay is no evidence meaning by it that certain classes of facts called hearsay are to be treated as irrelevant to the determination of particular questions and it is necessary to look through a long list of exceptions to that rule in order to see whether, in a particular case a statement may or may not be proved If you find that it can be proved the question is how can it be proved? and you propose to prove *it by a witness who says* that B told him that he heard A say so Again you are told hearsay is no evidence, but this time this expression means not that the fact is irrelevant but that the *testimony by which it is* proposed *to* prove the fact is improper *One extreme inconvenience* of this is that the most important part of the English Law of Evidence is thrown into the most intricate and inconvenient of all *possible* forms that of a very wide negative of most uncertain meaning qualified by a long string of exceedingly intricate exceptions

'No one who has not gone through the process of learning the law by mere rule of thumb practice can imagine the *degree* of needless obscurity and difficulty upon this point, of the existence of which he becomes gradually conscious It would be perfectly *fair to say* to almost any English text-writer 'You tell me at enormous length, what is not evidence, but you no where tell

me what is evidence, except indeed in large compilations, which point out what has to be proved upon particular issues, and which it is as impossible to read or remember, as it is to read or remember any other mere works of reference".

"I hope that we have been able to avoid this, and that the second chapter of the Bill will be found to state specifically, and in a positive form, what sorts of facts are relevant as being sufficiently connected with the facts in issue to afford grounds for an inference as to their existence or non existence I will not weary the Council by specifying those rules, and I will content myself by referring to the Bill and to the report But I may shortly illustrate them by reference to a passage from a modern historian, which will relieve the dullness of a very technical speech The passage to which I refer is a short summary, by Mr Froude of the grounds on which he believes that Mary, Queen of Scots, murdered her husband

"As Mr Froude was not a lawyer he certainly wrote, what I am about to read, without reference to the rules of evidence I think the fact that he did, in fact, unconsciously observe them, illustrate very strongly the truth of my assertion, that they are nothing more than the result of experience and practical sagacity, thrown into a categorical shape I need hardly say that I use the passage merely as an illustration and without any notion of adopting Mr Froude's opinions or asserting the truth of his facts I am concerned merely with their relevance

"She (Mary) was known to have been weary of her husband, and anxious to get rid of him

"(By our draft, facts which show motive are relevant)

'The difficulty and the means of disposing of him had been discussed in her presence, and she had herself suggested to Sir James Balfour to kill him

"(Facts which show preparation for a fact in issue, are relevant)"

"She brought him to the house where he was destroyed , she was with him two hours before his death

"(Facts so connected with the facts in issue as to form part of the same transaction are relevant)

"And afterwards threw every difficulty in the way of any examination into the circumstances of his end'

"(Subsequent conduct, influenced by any fact in issue, is relevant)'

'The Earl of Bothwell was publicly accused of the murder

('Facts necessary to be known in order to introduce relevant facts, are relevant)

'She kept him close at her side, she would not allow him to be arrested, she went openly to Seton with him, before her widowhood was a fortnight old When at last unwillingly, she consented to his trial Edinburgh was occupied by his retainers He presented himself at the Tolbooth surrounded by the Royal Guard, and the charge fell to the ground, because the Crown did not prosecute, and the Earl of Lennox had been prevented from appearing"

"(Subsequent conduct influenced by any fact in issue is relevant)"

"A few weeks later, she married Bothwell, though he had a wife already, and when her subjects rose in arms against her and took her prisoner, she refused to allow herself to be divorced from him"

'(Subsequent conduct Motive)"

[illegible] which the Queen [illegible] I need not read [illegible] oduction, and to [illegible] to the subsequent conduct meets the case of a person who destroys or conceals evidence"

'Finally Mr Froude observes 'In her own correspondence, though she denies the crime, there is nowhere the clear ring of innocence which makes its weight felt even when the evidence is weak which supports the words.'

"The letters would be evidence under the section relating to admissions, and Mr Froude's remark is in the nature of a criticism on them by a prosecuting counsel.

"In English text books, so far as my experience goes, these rules and others of the same sort, are nowhere presented in a compact substantive form They come in for the most part, as exceptions to the rule that evidence must be confined to the points in issue In fact they can be learned only by the practice of the Courts though they are as natural and lax as any rules need be, if they are properly stated.

'From the rules which state what facts may be proved, we pass to those which pre[illegible]
technical [illegible]
to public d[illegible]
though, of course, numerous introductory rules are required to adopt for practice They are these

"1 If a fact is proved by oral evidence, the oral evidence must be direct, that is to say, things seen must be deposed to by some one who says he saw them with his own eyes, things heard by some one who says he heard them with his own ears

'2 Original documents must be produced or accounted for, before any other evidence can be given of their contents

"3 When a contract has been reduced to writing it must not be varied by oral evidence

"These rules, as I have said, are subject to certain exceptions, and require certain practical adjustments, but I do not think that any one who has had practical experience of the working of Courts of Justice will deny their substantial soundness, or indeed the absolute practical necessity for enforcing them

"Passing over certain matters which are explained at length in the Bill and report, I come to two points to which the committee attach the greatest importance as having peculiar reference to the administration of justice in India The first of these rules refers to the part taken by the Judge in the examination of witnesses; the second to the effect of the improper admission or rejection of evidence upon the proceedings in case of appeal

'Th[illegible] relates to the manner in which [illegible] e of a well educated, Bar [illegible] actically of every other duty [illegible] tween them I need hardly [illegible]
great r[illegible]
vast m[illegible]

[illegible] that it is the duty of the [illegible] n to the evidence put [illegible] th of the matter We do [illegible] interest in arriving [illegible] egarded mainly in [illegible] prisoner, are at all [illegible] than carelessness and apathy in England

"With respect to the question of appeals, we have drawn a series of provisions, the object of which is to prevent mere mistakes in procedure from destroying the value of work properly done, as far as it goes We have gone

through the various cases in which, as appears to us, the question of the improper admission or rejection or omission of evidence can arise, and have provided that, whenever any Appellate Court discovers the occurrence of any mistake, it shall not reverse the decision of the inferior Court, but shall either strike out what is redundant, or supply what is defective, as the case may be and give judgment accordingly

I have addressed Your Lordship and the Council at great length, but not I think at greater length than the importance of the matter requires I have only to add, that I propose to proceed with the Bill when the Government returns to Calcutta, and that I hope before that time, to receive the criticisms of the Local Governments upon the measure"

The council adjourned to Thursday, the 6th April, 1871

CALCUTTA, WHITELEY STOKES
The 31st March 1871 *Secy to the Govt of India*

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vict Cap 67

PRESENT

His Excellency the Viceroy and Governor General of India K B G M S I *presiding*

The Hon'ble John Strachey | The Hon'ble J F D Inglish
The Hon'ble J Fitzjames Stephen Q C | The Hon'ble W Robinson C S I
The Hon'ble B H Ellis | The Hon'ble F S Chapman
The Hon'ble F R Cockerell | The Hon'ble R Stewart

The Hon'ble J R Bullen Smith

SUNDRY BILLS

The Hon'ble Mr Stephen also moves that the Hon'ble Messrs *Chapman* Stewart and Bullen Smith, be added to Select Committees on the following Bills —

The next Bill, to which Mr Stephen had to refer, was the Evidence Bill He need not say anything more about it than that it was under the consideration of the Committee He however wished to make one or two remarks *In* the first place, although the Bill had been sent for the opinion of the Local Governments some time in June last with a request that their opinion on the subject might be forwarded in the course of the autumn, many of the Local Governments had not yet sent in any opinions whatever on the subject He earnestly hoped that these opinions might be received in order that they might be fully considered Some memorial had been received on the subject *from* individuals, specially from certain members of the Bar He did not wish *to* discuss them But he wished to say that he thought that the opinion of *some* persons, that the Council in General and Mr Stephen in particular *were* ... perfectly unfounded
p the President
... of Mr
Civil
wish to
had been said
ul *attention* in a
of making any
attack upon the independence or position generally of the honourable profession in question

The Council adjourned to Friday the 15th December, 1871,

CALCUTTA H S CUNNINGHAM,
The 8th December, 1871 *Offg Secretary to the Council of the Governor General for making Laws and Regulations*

SECOND REPORT OF THE SELECT COMMITTEE

Vide *the Gazette of India, February 17th 1872, Part V p 94*

The following ... ttled by them was prese ... the purpose of making L

Petition from certain Barristers and Advocates of Bombay, dated the 8th August 1871

From Officiating Secretary to Chief Commissioner of Coorg No 3?6/4, dated 4th October 1871, and enclosures

From certain pleaders of the High Court Bombay, dated 4th October 1871

From officiating Secretary to Chief Commissioner of Coorg No 400/6 dated 9th October 1871 and enclosures

From the Chief Secretary to Government of Fort Saint George No 166 dated 21st November 1871, and enclosures

From F J Ferguson Esq Barrister High Court Calcutta dated 8th December 1871 forwarding memorial from Barristers and Advocates High Court, Calcutta

From Secretary to Chief Commissioner Central Provinces No 2640/299 dated 6th December 1871 and enclosures

From Officiating Secretary to Government of Bengal No 6326 I dated 13th December, 1871 and enclosures

Memorial from certain members of the Madras Bar, dated 16th December 1871

We the undersigned, the members of the ... the Gover- ... purpose of ... which the ... have the honour to report that we have considered the Bill and the papers noted in the margin

1 We have made some alterations in the arrangement of the Bill

2 We have omitted the definitions of "proof and 'moral certainty' and the sections relating to inferences to be drawn by the Court as being suitable rather for a treatise than an Act

3 We have omitted the provisions relating to material evidence and have given a new and simpler definition of the difference between primary and secondary evidence

4 ... apply ... affidavi ... nor to proceedings in arbitration

5 As to the effect of an admission by one of several persons jointly tried for an ...

time, and an admission is proved against one of them which affects others of the accused besides himself it may be taken into consideration by the Court against all the persons whom it affects

... of oral by documen ... d complete We ... ject, freed from

7 Exception was taken to the Bill in several quarters on the ground that it did not sufficiently dispose of the matter of presumptions We have reconsidered this subject with attention and have provided for it as follows —

Some presumptions have the effect of laying the burden of proof on particular persons, in particular cases These we have dealt with in sections 103 to 111 of the new Bill

... that the existence of one ... This we have provided

We have substituted the term 'conclusive proof' in these instances for that of "necessary inference,' which was employed for th... draft of the Bill.

3. Other presumptions are ... re maxims by which the Court ... Theoretically they are regarded ... to say, as artificial rules which ... cally ... pres ... is country and likely to produce ... have accordingly, by section ... mere presumptions of fact with ...

We have provided in the Chapter on the Burden of Proof that a Notification in the Gazette that a territory has been ceded to a Native State shall be conclusive proof of a valid cession at the date mentioned in the notification The object of this section is to set at rest questions which, as we are informed, have arisen on this subject.

The subject of presumptions as to documents is a very special matter, and appears to us to belong to the subject of documentary evidence, under which head we have placed it in chapter V

Lastly many subjects are treated by English writers under the head of presumptions which appear to us to belong rather to different branches of the ... e law, is in reality ... presumptions as ... to the subject and ... because many of them are fictitious

8. The chapter on oaths has been omitted, as they form the subject of a separate Bill now under discussion

... to 145 of the old draft, ... nd the substitution of ... such questions, should ... uestion is improperly asked, to report the circumstance to the authority to which the person asking it is subject

10 We have amended the wording of section 166 as to the Judge's power to ask questions The section as originally drawn might have been taken to authorize him to found his judgment upon irrelevant matter, such as loose rumours The intention of the section was to give him the fullest possible power of inquiry for the discovery of relevent matter Section 164 as now drawn makes this clear

11. We have omitted the chapter as to the duties of Judges, and Juries, which will, we think, be more properly placed in the Code of Criminal Procedure We have also omitted the provisions as to appeal in the first draft, and have substituted for them section 57 of Act II of 1855 which provides for the cases in which the improper admission or rejection of evidence shall be ground for a new trial or a reversal of a decision

12 ... e passed, but we als... ette, and that this ... be date of its publication

J. F. STEPHEN.
J. STRACHEY.
J. F D INGLIS.
W ROBINSON.
T S. CHAPMAN.
R. STEWART.
J. R. BULLEN SMITH.
F. R. COCKERELL.

The 30th January, 1872.

Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict. Cap 67.

The Council met at Government House on Tuesday, the 12th March, 1872.

PRESENT.

His Excellency the Viceroy and Governor General of India, K. T, *presiding.*

His Honour the Lieutenant Governor of Bengal.

His Excellency the Commander in Chief, G C B, G C S I

Maj Genl the Hon'ble H. W. Norman, C B

The Hon'ble J F D. Inglis.

The Hon'ble W Robinson, C S I

The Hon'ble F S Chapman.

The Hon'ble R Stewart

The Hon'ble J. R Bullen Smith.

The Hon'ble F R. Cockerell

The Hon'ble Mr. Stephen in moving that the Report of the Select Committee on the Bill to define and amend the Law of Evidence be taken into consideration, said "My Lord,—Just a year ago, in submitting the Report of the Committee to the Council, I explained at very considerable length the ... they proposed, and which is now ... I need not revert to what I then said ... My best course I think will be to ... place in relation to the Bill since I last

... consideration of its various details, the Bill ... for opinion. ... Government ... h ago, with a ... made in it; ... Council The Committee has fully considered all the papers with which it has ... favoured, but with one or two exceptions, I cannot say that it has received any very consider... made some important

... prepared with the advice and ... We have received no public expression of ... Courts, except the High Court of Bombay ... on minor points ... at all on the matter.

... to do so I ... Barrister J... have informed me that they approve generally ... The Local Governments, ... ne which is much needed, ... th intelligible to persons not ... legally trained, and complete in essential ...

"Upon this point, I would specially refer to the valuable papers already referred to, which have been received from Madras It is impossible, in reading them, not to see that their ... do not like the Bill They find every fault they can with it, someti... I do not in the ... more fully in ... tion have pointed ... tled to say that

... last two highly competent ... the matter careful consideration ...

a few remarks as I go on I refer to them now for the sake of showing the importance of the opinions which I am about to read

" The letter of the Madras Government says —

"' I [illegible] nce as to present [illegible] w practi cally suff [illegible] ll in its scheme and general arrangement appears to furnish an adequate outline of such a Code,' but it is observed that the Bill ' in its present state is far from complete'

"Mr Norton expresses the same opinion at greater length and each of these authorities agrees in the statement that the Bill is only a skeleton, which will have to be completed by a greater number of judicial decisions

' Mr Norton criticises the Bill, section by section, and in order to show how fully, he has done so, he observes —

'' I have, however compared it, section by section, with Taylor, Roscoe Best and other text writers, with Civil and Criminal Procedure Codes so far as they apply to the subject of evidence, with some of the existing Acts which regulate judicial evidence and such judicial decisions as I have access to illustrating the principles which at present are generally supposed by the profession to obtain in the Courts of India'

"He could hardly, I think, have submitted it to a more searching test. Further on he observes —

"' The process by which this Bill has been, in the main, built up, appears to me to have been by following Mr Pitt Taylor's work on evidence and arbitrarily selecting certain sections or portions of sections'

"He then criticises the Bill in detail, and concludes by saying—

"' Such are the observations that have occurred to me in the most careful study I can give the Bill, and I think that, with some omissions a little rearrangement here and there, and considerable extension and enlargement, it promises to prove a great step in advance and improvement in the present uncodified Law of Evidence, and likely to afford very valuable aid and facilities to the Mofussil Judges, and all concerned in the practice of the law in the Mofussil

[illegible]

goes [illegible]
'arbit [illegible]
and t [illegible]
Bill [illegible]
be, a [illegible]
of su [illegible]
has o [illegible]
[illegible] to pages, refers to all [illegible] ect has brought to [illegible] are no doubt just [illegible] ission with which he charges the Bill are the following—

' 1 —Its provisions as to the effect of judgments are 'meagre'

' 2 —It does not deal fully enough with the subject of presumptions

"He also suggests slight additions to or enlargements upon four sections of very subordinate importance, which I will not trouble the council by referring to

' The letter from the Madras Government, which describes the Bill as 'far from complete' specifies no omission whatever, except in reference to the subject of presumptions more of which it affirms, should be included ' in a Code aiming at completeness'

' The charge of incompleteness, then comes to this, that the Bill does not deal fully enough with the two subjects of judgments and presumptions I will refer to those points hereafter, but I will first with Your Lordship's permission say a few words on the positive grounds on which I assert that the Bill does

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form a complete Code,
English text writers
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Evidence 'arbitrarily c
about as much truth,
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before his time by Gilbert, Phillips, Starkie and others, and as analogous posi
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distinction between the relevancy of facts and the proof of facts or any, even
the faintest perception of
showed in the observations
thrown over the whole subje
define with precision the
words 'fact' and 'evidence' As to the notion that bits of Taylor have been
'arbitrarily' put together in the Bill, I will only say that, at a proper time and
place, I would undertake to assign the reason why every section stands where it
does Upon the question of completeness, however, I will make this remark
I assert that every principle applicable to
which is contained in the 1,598 royal
contained in the 167 sections of this Bill ;
carefully compared, section by section, with the last edition of Mr Norton's
work upon evidence, and that it disposes fully of every subject of which Mr
Norton treats

"As to the specific instances of incompleteness which are alleged against
the Bill two only are of any importance, and upon each of them I will say a few
words.

The first is, that the Chapter on judgments is meagre My answer is,
that it may appear meagre to those who take their notions of the law of
Evidence from works like Mr Taylor's, but that it contains every thing
which properly belongs to the subject Its utter absence of arrangement
and classification on every subject is the great reproach of the law of
England, and one of the strongest instances of it is to be found in the
way in which provisions of an essentially different character are frequently
comprised under the same head, I might give many illustrations of this;
but the law of evidence, I think, supplies more glaring illustrations than any
other department of law Many English writers have treated the subject in
such a manner as to make it comprise the whole body of the law Thus, for
instance,
law and
rules ab
the sort
an actio
such an action It is obvious that the law of evidence thus
include nearly the whole of the substantive law, and it follows, I think that
it is of great importance to draw the line distinctly between what properly
belongs to the subject and what does not. It is for this reason that the sections
about judgments are
nected with judgments,
omitted from the Bill.
explain it in a few words.

"The second section of the Code of Civil Procedure enacts that —

"The civil Courts shall not take cognizance of any suit brought on a ause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim'.

"The Code of Criminal Procedure enacts that a man shall not be tried ... or convicted It is a matter of great ... of these provisions, and to ... arise Mr Broughton's ... large pages, in very small ... n the second section of the print of notes of the cases which have been ... number of decisions have been given on ... Criminal Procedure; and it is because ... ns that it is described as meagre My ... of the two Codes in question were ... It ro ... h are ... sanity ... connected with it There are, ... If a man defends ... st as he must ... to sue if he ... it would be as ... sibility as a ... be necessary ... of a previous ... e, in certain judgment on a right to sue as part of the ... cases, it may be necessary to give evidence of the existence of a previous judgment

The only questions connected with judgments, which do appear to me to form part of the Law of Evidence properly so called, are dealt with in sections 40—44 of the Bill. These sections provide for the cases in which the fact that a Court has decided as to a given matter of fact relevant to the issue may be proved for the purpose of showing that that fact exists This, no doubt, is a branch of the Law of Evidence, and the provisions referred to dispose of it fully.

"As to the subject of presumptions, my answer to the critics of the Bill is partly to the same effect, though their criticisms were perhaps better founded I must admit that the Bill as introduced dealt less fully with the subject than was thought desirable on further consideration and some additions to it have accordingly been introduced, though the general principle on which the matter was dealt with is maintained The subject of presumptions is one of some ... It was a favourite enterprise on the part of con... ... which ... f ... e ... s ... e as to the value and import of a particular ... a variety of ways ... were irrebuttable, ... *raesumptiones facti* ... evidence; so much ... of, a little less was ... way into English ... ate effect, and give ... umptions ... subjects ... onclusive ... essary in ... ished for ... xpressing ... of ... ds ... n- law where they p ... nected, to criminal law to which it properly belongs

'I will not ... though I could ... the remarks o ... says— ...tails of the subject ..., answer specifically ... That Government

'S... ...ances of presumptions, selected from a ...s fills 111 sections It is ... are chosen'

'In general terms the answer is this, large parts of Mr Taylor's chapter relate to topics which have nothing to do with the Law of Evidence Those ... (a few ... ls —1st ... shall be conclusive proof of another, for various obvious reasons—the inference of legitimacy from marriage is a good instance 2ndly—There are several cases in which Courts would be at a loss as to the course which they ought to take under certain circumstances without a distinct rule of guidance After what length ...ad? ...ght ...rent ...den ...pter ...to this chapter, which deserves special notice Its substance was ... ...plied in the original draft of the Bill, but it has been inserted in order to put the matter beyond all possibility of doubt It is in the following words —

114 The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case.

Illustrations

The Court may presume—

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession,

(b) that an accomplice is unworthy of credit unless he is corroborated in mater... ...rsed, was accepted or endorsed ... been shown to be in existence ...ch such things or states of things ...egularly performed ... has been followed in particular cases,

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it,

(h) that if a man refuses to answer a question which he is not compelled to answer by law ... ...ld be unfavourable to him,

obli... obligation is in the hands of the ... ard to such facts as the following in considering whether such maxims do or do not apply to the particular case before them

As to ... marked rupee soon after it was ... specifically, but is continually

As to ... *character, is tried for* causing a m... certain *machinery* B, a person ... in the arrangement describes precisely what was done and admits and explains the common carelessness of A and himself

As to illustration (b)—A crime is committed by several persons. A B and C, three of the criminals are captured on the spot and kept apart from each other Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable

As to illustration (c)—A, the drawer of a bill of exchange, was a man of business B, the acceptor, was a young and ignorant person, completely under A's influence

As to illustration (d)—It is proved that a river ran in a certain course five ... there have been floods since that time which

... judicial act the regularity of which is in question, was performed under exceptional circumstances

As to illustration (f)—The question is, whether a letter was received It is shown to have been posted, but the usual course of the post was interrupted by disturbances

As to illustration (g)—A man refuses to produce a document which would ... he is sued, but which might

... er a question which he is not ... matters

... it the

... stolen it

... general repealing clause at ... lear that Courts of Justice are ... of the effect of ... s whatever ... f what in ... effect of ... however, to ... apply, but ... e, whether,

which will be swept away by ... unworthy of credit, unless in strictness of speech the rule that an accomplice is unworthy of credit, unless he is confirmed, can be called a presumption of law, though, according to a ... Barnes Peacock's it has at all events, ... may

... subject ... ion, in ... stances ... though ... borated

... with ... he Bill,

... ject of

"I may observe that many topics closely connected ... dealt with by express law. It would ... the whole subject rests, and the ... hould be used in practice I think, ... present occasion I have

however, ... subjects and I propose to therefore ... upon, or introduction to, publish ... use to the Civil Servants the Act ... who are preparing for their Indian career, and to the law students in Indian

Universities The subject is one which reaches far beyond law; for the Law of Evidence is nothing unless it is founded upon a rational conception of the manner in which truth as to all matters of fact whatever ought to be investigated

"I ... the Bill by His Honour the Lieutenant ... be somewhat dissatisfied with the manner ... of relevancy, which, as he says is a question of degree.

"The L... that the law, clearing up the ...

Judges in some degree masters in the ...
His princi...
relevant ...
of degree, ...
It may b...
to the issu...
be occupi...
and what ...
were, metaphysical If it were allowed to argue the question whether any piece of evidence is, or is not admissible under such rules, the Lieutenant Governor would fear that ... If howev...
regarding relevanc...
for the guidance ...
can, but that they ...
it, the Lieutenant Governor has no doubt that the rules in the draft are admirably suited to the purpose, and would be extremely useful It does not seem to him very clear in the draft whether or no counsels are to be entitled to take object...

...vancy will be endless

"I cannot altogether agree ...
I do not feel that horror of then ...
think, abundantly clear that ...
vancy of evidence, and as to the propriety of proof, and I do not see how a law can be laid down at all upon which counsels are never to argue No one, I think, will seriously ass...
tration of justic...
but if they are to ...
subjects. I must, however, observe that every precaution has been taken to prevent ... In the first place, if the Judge wishes to kno...
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in England is the great cause of the enormous intricacy and technicality of English law on this point. If, in the Tichborne case, one single question had been permitted after being objected to, and if the Court had afterwards been of opinion that it had been wrongly permitted, then, however trifling the matter might have been the party whose objection had been wrongly overruled would have been ... expense of the first trial w...
will it be ...
useful principally as guides to the Judges and the parties, and, in particular ... rules ... relevant matter which ...

...ever, as it may, and taking a view, not indeed less practical, but more immediately and obviously practical, I would make the following observations — I am quite aware that relevancy is, as His Honou...

As to illustration (b)—A crime is committed by several persons A B and
n the spot and kept apart from each
crime implicating D, and the accounts
as to render previous concert highly

As to illustration (c)—A, the drawer of a bill of exchange, was a man of business B the acceptor, was a young and ignorant person, completely under A s influence

As to illustration (d)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course

As to illustration (e)—A judicial act the regularity of which is in question was pr

r a letter was received It i
shown the post was interrupted by disturbances

As to illustration (g)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family

As to illustration (h)
compelled by law to answer
unconnected with the matter

As to illustration (i)—A bond is in possession of the obligor but the circumstances of the case are such that he may have stolen it

'The effect of this provision coupled with the general repealing clause at the beginning of the Bill is to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging of the effect of particular facts and that they are to be subject to no technical rules whatever
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and frequent failure of ju
is not illegal because it proceeds on the uncorroborated evidence of an
plice, on the other hand, it seems to be also law that in cases tried by a jury
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High Court
mself that
ems to me

it may not be corroborated or although the evidence by wh
is itself suspicious

As I have already observed, I do not wish to trouble the Council with technicalities but I hope this explanation will show that this part of the Bill at all events, is not incomplete

'I may observe that many topics closely connected with the subject of
dealt with by express law It would
whole subject rests and the
ld be used in practice I think
the present occasion I have
n these subjects and I propose to
entary upon, or introduction to
some use to the Civil Servants
who are preparing for their Indian career and to the law students in Indian

Universities The subject is one which reaches far beyond law; for the Law of Evidence is nothing unless it is founded upon a rational conception of the manner in which truth as to all matters of fact whatever ought to be investigated

"... His Honour the Lieutenant ... not dissatisfied with the manner ... relevancy, which, as he says is a question of degree.

"The Lieutenant Governor ... that the law, clearing up the ... protecting our Courts from the ... *applicable to and rendering the* Judges in some degree masters in their own Courts, will be highly beneficial His ...

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of evidence is, or is not admissible under such rules, the Lieutenant Governor would ... If however the rules reg...
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think, abundantly clear that counsel will be permitted to argue as to the relevancy of evidence, and as to the propriety of proof, and I do not see how a law can be laid down at all upon which counsels are never to argue No one, I think, will seriously ...
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but if they a...
subjects. I ...
prevent ... In the first place, if the Judge wishes ... which is under debate, he can cut the ... under section 165 In the second place, ... improper evidence is not to be a ground for ... a new ... opposite is the rule in En... and technicality of Engl... single question had been ... afterwards been of opinion ... trifling the matter might ...
have ...
first tr...
will it ...
use ... the Judges and the ... which ...

I am quite aware that relevancy is, as ... degree

and for that reason the Bill gives definitions of it so wide and various, that I think they will b
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most facts which have any real connection with the matter to be proved would fulfil several of them Take, for instance, this fact—A man is charged with theft, and it is proved that he was seen running away immediately after the theft with the stolen goods in his hand This is (1) a fact so connected with a fact in issue as to form part of the same transaction, and is therefore relevant under section 6, (2) it is the effect of a fact in issue, and is therefore relevant under section 7, (3) it is the conduct of a party to the proceeding subsequent to a fact in issue, and is so relevant under section 8; (4) it is a fact which in itself renders a fact in issue highly probable, and is therefore relevant under section 11 This fact, therefore, is relevant under no less than four sections, each of which would admit a great number of facts which would not be admitted by the other sections Indeed, the latitude of the definition of relevancy will be best appreciated by negativing the conditions which the Act imposes Suppose that you are able to assert of a fact that it is neither itself in issue, nor forms part of the same transaction, nor is its occasion, cause or effect, immediate or otherwise, that it shows no motive or preparation for it, that it is no part of the *previous or subsequent conduct of any person connected* with the matter in question, that it does not explain or introduce any fact which is so connected with the
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negatives can be affirmed I think we may say, without much risk of error, that the one fact has nothing to do with the other, and may be regarded as irrelevant

1 'I now come to a matter which has excited a good deal of discussion, though it relates to a subordinate and not very important part of the Bill—that which concerns the examination of witnesses by counsel The Bill as originally drawn provided, in substance, that no person should be asked a question which reflected on his character, as to matters irrelevant to the case before the Court without written instructions, that if the Court considered the question improper, it might require the production of the instructions; and that the giving of such instruction should be an act of defamation, subject of course, to the various rules about defamation laid down in the Penal Code To ask such questions without instructions was to be a contempt of Court in the person asking them but was not to be defamation

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and myself amongst the rest, that the sections proposed would be inexpedient, and others have accordingly been substituted for them which I think will in practice be found sufficient The substituted sections are as follows —

Questions lawful in cross examination

146 When a witness is cross examined, he may, in addition to the questions hereinbefore referred to be asked any questions which tend—

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture

When witness to be compelled to answer

147 If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto

Court to decide when question shall be asked and when witness compelled to answer.

148 If any such question relates to a matter not relevant to the suit or proceeding except in so far as it affects the credit of the witness by injuring his character the Court shall decide whether or not the witness shall be compelled to answer it, and may if it thinks fit warn the witness that he is not obliged to answer it In exercising its discretion, the Court shall have regard to the following considerations —

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies

(2) such questions are improper if the imputation which they convey

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable

Question not to be asked without reasonable grounds

149 No such question as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded

Illustrations.

(a) A barrister is instructed by an attorney or vakil that an important witness is a dakait This is a reasonable ground for asking the witness whether he is a dakait

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Procedure of Court in case of question being asked without reasonable grounds

150 If the Court is of opinion that any such question was asked by any reasonable grounds it may, if it was asked by any

Indecent and scandalous questions

151 The Court may forbid an as indecent or inquiries may before the Court, unless they or to matters necessary to be known in order to determine whether or not the facts in issue existed

and for that reason the Bill gives definitions of it so wide and various, that I think they will be found to include every sort of fact which has any di t nct assignable connection with any matter in issue The sections which define relevancy are, indeed enabling sections Any fact which fulfils any one of the many conditions which they declare to constitute relevancy will be relevant and most facts which have any real connection with the matter to be proved would fulfil several of them Take, for instance, this fact—A man is charged with theft, and it *is proved that he was seen running away immediately* after the theft with the stolen goods in his hand This is (1) a fact so connected with afact

other sections Indeed, the latitude of the definition of relevancy will be best appreciated by negativing the conditions which the Act imposes Suppose that you are able to assert of a fact that it is neither itself in issue, nor forms part of the same transaction, nor is its occasion, cause or effect, immediate or otherwise, that it shows no motive or preparation for it, that it is no part of the

negatives can be affirmed I think we may say, without much risk of error, that the one fact has nothing to do with the other, and may be regarded as irrelevant

it might require the production of the instructions; and that the giving of such instruction should be an act of defamation, subject of course, to the various rules about defamation laid down in the Penal Code To ask such questions without instructions was to be a contempt of Court in the person asking them, but was not to be defamation

the worst kind, that it is of the greatest importance that the characters of witnesses should be open to full inquiry These reasons satisfied *the committee*, and myself amongst the rest, that the sections proposed would be inexpedient, and others have accordingly been substituted for them which I think *will in* practice be found sufficient The substituted sections are as follows —

Questions lawful in cross examination

146 When a witness is cross examined, he may, in addition to the questions hereinbefore referred to be asked any questions which tend—

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

(3) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture

When witness to be compelled to answer

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto

Court to decide when question shall be asked and when witness compelled to answer

148. If any such question relates to a matter not relevant to the suit or proceeding except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:—

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies

(2) such questions are improper if the imputation which they convey re ... tri ... de ... on the matter to which he testifies

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

Question not to be asked without reasonable grounds

149 ... 148 ought ... has reason ... tion which it conveys is well founded

Illustrations

(a) A barrister is instructed by an attorney or vakil that an important witness is a dakait. This is a reasonable ground for asking the witness whether he is a dakait

(b) A pleader is informed by a person in Court that an important witness is a dakait, the informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dakait

(c) A witness of whom nothing whatever is known, is asked at random whet ... as ... is ... to hi ... may ... it

Procedure in case of question being asked without reasonable grounds

150 ... was asked by any ... y, report the circum- ... other authority ... or attorney is ... which it regards

Indecent and scandalous questions

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed

152 The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, although proper in itself, appears to the Court needlessly offensive in form

Questions intended to insult or annoy

— . . . n to lay down, in the most distinct manner, ... ing witnesses with a view to shaking ... I trust that this explicit statement of the principles according to which such questions ought or ought not to be asked will be found sufficient to prevent the growth in this country, of that which in England has o ... I think that the sections so far as their ... that they will be admitted to ... ie public I can ... remarks on the memorials which the sections ... th from the Bar in various parts of the country ... have made any further remarks on the Bill ... amended form about a month ago I sup ... have removed the main objection which ... those parts of their memorials which ... from the

sections which have been giv ...

part proper, though it cont ... een omitted The memorial of the Bombay Barristers contains similar passages, expressed more fully and less temperately, and I shall accordingly confine myself to noticing such of their remarks as appear to me to deserve notice

... general, that I have read in the news ... an only mean that I individually ... the Bar, indeed, the Bombay ... (meaning ... profession ... ment they ... ds from the

report of the Select Committee —

'The English system, under which the Bench and the Bar act together and play their respective parts independently and the professional organization on which it rests does not as yet exist in this country, and will not for a very long course of time be introduced"

'Before I made the remarks which this suggests let me ask your Lordship and the Council whether a charge that I, of all people wish for the extinction of the profession of Barristers at law in India, is not upon the face of it absurd? I am myself a Barrister of eighteen years' standing and a Queen's council of four years' standing I believe that there is no Barrister in British India of whom I should not be entitled to take precedence, professionally, if I chose to practising here, and so strong is my connection with my profession, that I am at this moment on the point of resigning one of the most responsible offices which a Barrister can hold for the purpose of returning to the ordinary routine of professional practice How is it possible to imagine ... on? When this Bill ... power to ... good name ... led as an ... have been appropriate remedy for a great and crying evil— ... much impressed by my own observations in England and which is likely to extend in India as the habit of cross examination becomes more general and when the rights which a cross examining advocate has are explicitly defined The remedy, I will admit, was to some extent inappropriate, but for merely proposing it, for merely recognizing the existence of the evil against which it was directed I am charged with wishing to extinguish my own profession

... which I am fully ... tand how the memo- ... they could never ... system, under which

the Bench and the Bar act together and play their respective parts independently, and the professional organization on which it rests, does not as yet exist in this country and will not for a very long course of time be introduced'

"Yes', say the memorialists, it does exist, to wit in the Presidency towns' This is as much as if the water works of Calcutta were referred to, to contradict a statement that India is wretchedly supplied with drinking water I make a statement about an Empire as large as Europe without Russia, and am told that it is incorrect, because there are three English Courts, and three knots of, perhaps, a dozen or so English Barristers, to be found at towns which are in the nature of English settlements The reason why the statement complained of was not qualified by excepting these towns and Courts was simply that the exception was not important enough to be stated It would, indeed, have been matter of great indifference to me personally, whether the Bill extended to the High Courts sitting on the original side or not It is a mistake to make exceptions without a necessity for them, but the question, what rules of evidence should apply in the Presidency towns is one of very little real importance The great and vital importance of the matter lies in the effect which it will have on the administration of justice throughout the country at large It is framed in order to meet the wants, and lighten the labours, of district officers, by giving them a short and clear view of a subject which has been converted into a sort of professional mystery the knowledge of which was confined to a knot of persons specially initiated in it Now, as regards the Mofussil, I repeat the expressions complained of. I assert that they are absolutely true and state a fact notorious to every one I say that, throughout India generally nothing like the English system under which the Bench and Bar act together and play their respective parts independently, does now exist, or can for a length of time be expected to exist Let me just recall for a moment the nature of that system In the first place the Bench and the Bar in England form substantially one body The Judges have all been Barristers, and the great prize to which the Barristers look forward is to become Judges

"That is not the case in India nor anything like it The great mass of Indian Judges are not, and never have been, lawyers at all, the great mass of Indian lawyers have no chance or expectation of becoming Judges, and many of them have no wish to do so [illegible] the whole organization of the profession differs fro[illegible] I do not think it necessary to refer to [illegible] I may, however, observe that the position of an English Barrister who practises in the Mofussil, whether he is habitually resident in the Presidency town or not, is alt[illegible] practice in [illegible] Sessions, [illegible] rules which do not, and can not apply to practice in the Mofussil in this country He acts under the eyes of a public which takes great interest in his proceedings, and p[illegible] He practises in important cases before Judges [illegible] al superiors, and to wh[illegible] ks applies to Ba[illegible] sults of this sta[illegible] impossible to discuss the su[illegible] lists consider it eminently satis[illegible] se, is formed upon grour[illegible] f little importance, I sha[illegible]

[illegible] to the case of pleaders and [illegible] ppeal to every one [illegible] s referred to are not str[illegible] provision founded upon it there—the p[illegible] uestions it pleases—is not e[illegible] g that the Bench and the B[illegible] ntly, what I mean is that, in England cases are fully prepared for trial before they come into Court so that the Judge has nothing to do but to sit still and weigh the evidence produced before him In India in an enormous mass of cases, this neither is nor can be so It is absolutely necessary that the Judge should not only hear what is put

before him by others, but that he should ascertain by his own inquiries how the facts actually stand In order to do this it will frequently be necessary for him to go into matters which are not themselves relevant to the matter in issue but may lead to something that is, and it is in order to arm Judges with express authority to do this that section 165 which has been so much objected to, has beed framed

'I have now referred to the main points in the Bill which have been attacked, and as I fully explain the principles on which it was founded more than a year ago, I have only to move that it may be taken into consideration

The motion was put and agreed to

H S CUNNINGHAM
Offg Secy to the Council of the Governor General for making Laws and Regulations

CALCUTTA
The 12th March, 1872

APPENDIX C

Act II of 1855

An Act for the further improvement of the Law of Evidence

Preamble

Whereas it is expedient further to improve the Law of Evidence, It is enacted as follows

Act repealed

I Act No X of 1835 is hereby repealed

Judicial notice to be taken of all Acts and Regulations

II Within the territories in the possession and under the Government of the East India Company, all Courts of Justice, and all persons having by law or consent of parties authority to take evidence shall take judicial notice of all Regulations and Ordinances, made before or on the 22nd day of April 1834 by the Governor General in Council of the Presidency of Fort William in Bengal by the Governor in Council of the Presidency of Fort St George or by the Governor in Council of the Presidency of Bombay and having the and regulations and of this Act be made by the purpose of making Laws and Regulations whether the same be of a public or of a private nature

Judicial notice to be taken of public Act of Parliament What shall be prima facie proof of a private Act

III All Courts and persons aforesaid shall take judicial notice of all public Acts of Parliament and of all local and personal Acts declared by Parliament to be public and to be judicially noticed and shall admit as prima facie evidence of any private Act of Parliament any copy thereof purporting to be printed by the King's Printer

Judicial notice to be taken by Court of its own officers etc

IV Every Court shall take judicial notice of its own members and officers respectively, and of their deputies and subordinate officers or Assistants, and also of all officers acting in execution of its process and of all Advocates Attorneys Proctors, Vakeels, Pleaders, and other persons authorized by Law to act before it.

Judicial notice to be taken of the names, titles, etc, of certain persons

V All Courts and persons aforesaid shall take judicial notice of the names, titles and authorities of the persons filling for the time being any one of the following offices in any

Bishop Member of Cou

Courts or of any Sudder Court or of any Court of Judicature hereafter to be constituted in the said territories to or in which the powers of any of Her Majesty's Supreme Courts may be transferred or vested

VI Any such Courts and persons aforesaid shall take judicial notices of all divisions of time of the geographical divisions of the world, of the territories under the dominions of the British Crown of the commencement continuation, and termination of hostilities between the British Crown, and any other state and also of the existence title and national flag of every sovereign or state recognised by the British Crown In all the above cases, such Court or person may resort for its aid to appropriate books or documents of reference

Judicial notice to be taken of divisions of time, place, etc

VII Any Government Gazette of any country, colony, or dependency under the domain of the British Crown, may be proved by the bare productions thereof before any of the Courts or persons aforesaid

Proof of Government Gazette

VIII All proclamations, Acts of state, whether Legislative or Executive, nominations, appointments, and other official communications of the Government appearing in any such Gazette, may be proved by the production of such Gazette, and shall be *prima facie* proof of any fact of a public nature which they were intended to notify

Proof of Proclamations Acts, state, etc Proclamations, etc when to be prima facie proof of fact

IX. Any recital contained in any Act of the Governor General of India in council, constituted for the purpose of making Laws and Regulations, hereafter to be passed, of any fact of a public nature, shall be deemed, before all such Courts and persons, to be *prima facie* evidence of the truth of the fact recited

Recital in Act of a public nature to be prima facie proof

X The Gazette or Newspaper containing any advertisement purporting to be published by virtue of any public Statute, Act, Regulation, or Ordinance or of any Rule or order of a Court of Justice or of any Board or Office of Revenue, may be received by any such Courts or persons as aforesaid as *prima facie* evidence that such advertisement was published duly under the authority from which it purports to proceed

Gazette, etc, containing advertisement purporting to be published by authority to be prima facie evidence of such authority

XI All C[illegible] may on matters of public history, [illegible] r the purposes of [illegible] maps or charts, as [illegible] to be of authority

Books, ma[illegible] be evidence[illegible] of public hi[illegible]

XII Books printed or published under the authority of the Government of a foreign country, and purporting to contain the Statutes, Code, or other written Law of such country, and also printed and published books or reports of decisions of the Courts of such country, and books proved to be commonly admitted in such Courts as evidence of the law of such country, shall be admissible before any such Courts or persons as aforesaid as evidence of the law of such foreign country

What books, etc shall be evidence of Foreign Law

XIII All maps made under the authority of Government or of any public municipal body and not made for the purpose of any litigated question, shall *prima facie* be deemed to be correct, and shall be admitted in evidence without further proof

Government or public maps when to be prima facie proof,

XIV The following persons only shall be incompetent to testify —

Person incompetent to testify

1 Children under seven years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly

Children

Insane persons not to be summoned without leave or Court

2 Persons of unsound mind who at the time of their examination, appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly, and no person who is known to be of unsound mind, shall be liable to be summoned as a witness without the consent previously obtained, of the Court or person before whom his attendance is required

Children and persons of defective religious belief to testify on simple affirmation

XV Any person who by reason of immature age or want of religious belief, or who by reason of defect of religious belief ought not, in the opinion of such Court or person to be admitted to give evidence on oath or solemn affirmation shall be admitted to give evidence on a simple affirmation, declaring that he will speak the truth, the whole truth, and nothing but the truth

Provisions as to witness to apply to affidavits etc

XVI Th… section … iven by … stimony orally delivered

Punishment for giving false evidence

XVII Any such witness wilfully giving false evidence shall be subject to be proceeded against in like manner, and to suffer if convicted the same punishment as if he had been sworn and had committed wilful and corrupt perjury The indictment or charge shall be varied so as to meet the case

No incompetency from interest in suit

XVIII No person shall, by reason of any interest in the result of any suit or of any interest connected therewith, or by reason of relationship to any of the parties thereto, be incompetent to give evidence in such suit

Party to suit may be examined as a witness

XIX Any party to a civil suit or other proceeding of a civil nature shall be competent, and may be compelled, to give evidence as a witness therein, either on his own behalf or on behalf of any other party to the suit or proceeding and also to produce any … nner as if he were not a part… or … eme

Proviso

… of … ose of giving evidence ther… in that behalf in Act XIX of 1853

Husband or wife giving evidence

XX A husband or wife shall in every civil proceeding be competent to give evidence for or against each other Provided that any communication made by husband or wife to the other during their marriage shall be deemed a privileged communication, and shall not be disclosed without the consent of the person making the same, unless such communication shall relate to a matter in dispute in a suit pending between such husband and wife

Proviso

Witness, etc., not bound to produce document relating to state affairs

XXI A witness wheth… any … of wh… docur… woul… possession

Party to suit not bound to produce certain documents

XXII A witness being a party to the suit shall not be bound to produce any document in his possession or power which is not relev… or … f the party requiring … spon … legal professional adviser If a … all be … or correspondence … f relevant or material … its production

Unless he offer himself as a witness

Witness summoned to produce a document must bring it into Court

XXIII. Every witness summoned to produce a document shall, if the same be in his custody possession or power, be bound to bring it, or cause it to be brought into Court although there be a valid objection to the right of the party calling for it to compel its production, or to the reading or putting it in as evidence or to the disclosure of the contents thereof

Mode of determining objection to production

The validity of any such objection made by the person producing the document shall be determined by the Court, and for the better determination thereof, it shall be lawful for the Court to receive any admissible evidence which the person producing the document may give respecting it, and it shall also be lawful for the Court except in the case of any document relating to the affairs of state to inspect the document, and if necessary to call to its assistance any person whom it may appoint to interpret the same Such person however shall be previously sworn truly to interpret the same to the Court alone, and not to disclose the contents thereof except to the Court, unless the Court shall order the document to be given in evidence

Documents relating to affairs of state

Professional communications,

XXIV A Barrister, Attorney, or Vakeel shall not without the consent of his client, disclose any communication made by the client to him in the course of his professional employ- ... professionally to his client, nor ... of which he shall hav... The privilege, ho... shall give evidence the... waived his privilege ... Attorney, or Vakeel, of ... which the Barrister, A... ut for the privilege of ... be bound upon examin...

Person present in Court to give evidence, etc, though not summoned

XXV Any person present in Court whether a party or not may be called upon and compelled by the Court to give evidence and produce any document then and there in his ... document, and may be ... order of the Court

Person summoned to produce a document not bound to attend personally

XXVI Any person whether a party to the suit, or not, may be summoned to produce a document without being summoned to give evidence, and any person summoned merely to produce a document, shall be deemed to have complied with the summons if he cause such document to be produced instead of attending personally *to produce* the same.

Rules of evidence in Supreme Courts on Ecclesiastical sides and Admiralty

XXVII The rules of evidence in Her Majesty's supreme Courts as to matters of Ecclesiastical or Admiralty civil jurisdiction, shall be the same as they are on the Plea side of the Courts

Evidence of one witness sufficient proof Proviso

XXVIII Except in ... evidence of one witness, wh... be sufficient for pro... before any such per... ot affect any rule of practice of any Court that requires corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury

Dying declarations when admissible

XXIX Where dying declarations are evidence, they shall be received, if it be proved that the deceased was, at the time of making the declaration and then thought himself to be, in danger of approaching death, though he entertained at the time of making it hope of recovery.

Party allowed to cross-examine and discredit his own witness

XXX. The party at whose instance a witness is examined may with the permission of such Court or person, cross examine such witness to test his veracity, in the same manner as if he had not been called at his instance, and may be allowed to show that the witness has varied from a previous statement made by him

Former statement admitted to corroborate a witness.

XXXI In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, shall be admissible, and for that purpose a copy of any deposition or statement taken before any Court, Judge, Justice of the Peace, Magistrate, or person lawfully exercising the powers of a Magistrate or before a Commissioner or Superintendent for the suppression of Thuggee or Dacoity, in the discharge of his duty, shall, if certified by such Court, Judge or other officer above mentioned, under his hand or the official seal of the Court or under the hand or official Seal of such Judge, to be a true copy of such deposition or statement without further proof, be received as *prima facie* evidence that such deposition or statement was made, and that it was made at the time and place, and under the circumstances, if any, which shall be stated in the certificate or on the face of deposition or statement

Witness bound to answer criminating question

XXXII A witness shall not be excused from answering any question relevant to the matter as issue in any suit, or in any Civil or Criminal proceeding, upon the ground that the answer to such question will criminate, or may tend, [illegible] witness, or that it will expose, or [illegible] penalty or forfeiture of [illegible] [illegible]ess shall [illegible] [illegible]rpose of

Proviso

punishing such person for [illegible] false evidence upon such examination, subject him to any arrest or prosecution, or be used as evidence against such witness in any criminal proceeding

Witness may be examined as to conviction for felony

XXXIII A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanour, and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction

Cross examination as to previous written s[illegible]

XXXIV A witness may be cross examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without such being shown to him but if it is intended to contradict [illegible] attention must before [illegible] of the writing [illegible]vided always, [illegible] rial, to require [illegible] ction, and be [illegible] se of it for the purposes of

Proviso

the trial as he shall think fit

Copy of a document made by a copying machine to be deemed correct

XXXV. An impression of a document made by a copying machine shall be taken without further proof to be a correct copy.

XXXVI

Admission of se[illegible] ary evidence whe[illegible] ginal document i[illegible] of the reach of pr[illegible]

[illegible] of the reach of the process [illegible] rt, on appli[illegible] and on notice [illegible] e before the [illegible] of secondary

When attested document may be proved as if unattested.

XXXVII An attested document may be proved as if unattested unless it be a document to the validity of which attestation is requisite

Admission prima facie proof of an attested document

XXXVIII The admission of a party to unattested instrument of its execution by himself shall be as against him sufficient *prima facie* proof of such execution of it, though it be an instrument which is required by law to be attested

Entry made against interest, or in course of business when admissible in life time of person making it

XXXIX An entry or statement which would be admissible in evidence after the death of the person who made it, on the ground of its having been made against the interest of the person making it, or on the ground of its having been made in the ordinary course of business, shall be admissible, though the person who made it be not dead, if he is incapable of giving evidence by reason of his [illegible] time of the trial or hearing [illegible] process of the Court, and [illegible]

Entry in course of business when admissible for purpose of identification

XL Any entry in any books proved to have been regularly kept in the course of business or in any public office, so far as such entry merely refers to and tends to identify by name, description, number, or otherwise, any bank-notes or other securities for the payment of money, or other property and the payer in or receiver of them, shall, in any case where such identification is necessary to be proved, be admissible in evidence for [illegible] limited purpose if it shall appear to have been made at or about the [illegible] of the transaction to which it relates, though the person who made it, or [illegible] on whose information it was made, is alive and capable of being produced as a witness

Receipt when evidence against person other than the giver

XLI. Any receipt in writing, acknowledging the receipt of any money, valuable securities of goods, shall, on proof of the execution thereof, be admissible in evidence before such Court or person aforesaid, not only against the party giving it, but also against any person in whose favour such receipt would operate as a discharge, or to whom it would render the person giving it, liable for the money, security, or goods acknowledged to have been received

Receipt of Agent

XLII Whenever [illegible] would be admissible under the preceding section [illegible] agent or [illegible] be evi- [illegible] receipt

Books kept in the course of business or in a public office admissible as corroborative evidence

XLIII Books proved to have been regularly kept in the course of business or in any public office, shall be admissible as corroborative but not as independent proof of the facts stated therein

XLI[illegible]

Documer[illegible] ble as c[illegible] evidence [illegible]

be proved [illegible]

Refreshing [illegible]

XLV A [illegible] ting made by [illegible] time when the [illegible] or at any time of [illegible]

wh[illegible]

C. stated in the writing In such case the writing shall be produced and may be given by the adverse party, who may if he choose, cross examine the witness upon it

Court may permit a copy of document to be used to refresh memory

XLVI Whenever a witness may refresh his memory by reference to any document, he may with the permission of the Court, refer to a copy o[illegible] person, under th[illegible] is sufficient rea[illegible] original

Declarations of illegitimate persons etc, admissible in questions of pedigree

XLVII In case of pedigree, the declarations of illegitimate members of the family, and also of persons, who, though not related by blood or marriage to the family, were intimately acquainted with its members and state, shall be admissible in evidence after the death of the declarant, in the same manner and to the same extent as those of deceased members of the family

Comparison of handwriting, etc.

XLVIII On an enquir[illegible] any [illegible] whose [illegible] comp[illegible] writing or seal be an instrume[illegible]

Proof of Power of Attorney

XLIX Any power of attorney, which has been executed at a place distant more than one hundred miles from the place wherein an action, suit or proceeding is depending may be proved by the production of it, without further proof where it purports, on the face of it, to have been executed before and authenticated by a Notary Public, or any Court, Judge, Consul or Magistrate

Proof of despatch of letter by Letter Book

L Whenever it is proved that a Letter Book is kept, and that according to the usual course of business, letters are copied into book and despatched, and the letter book is produced, and it is proved that the letter was despatched according to th[illegible] of the witness, having [illegible] ay presume the despat[illegible]

What to be prima facie proof of receipt of letter

LI Any book pr[illegible] usual course of business, be *prima facie* evidence of the receipt of such letter

Repeal of part of section VI of Act XV of 1852

LII So much of section VI of Act XV of 1852 as provides that any such application as therein mentioned shall be made before issue joined in any such action, or twenty one days before the trial or hearing of any other legal proceeding as therein mentioned, is hereby repealed

Extension of section XVI of Act V of 1854

LIII The provision contained in the 16th section of Act VI of 1854 that affidavits of particular witness or affidavits as to particular facts or circumstances, may, by consent of the parties, or by leave of the Court obtained upon notice, [illegible] Court [illegible] ourts [illegible] upon [illegible] eding [illegible] upon [illegible] of its [illegible] oral [illegible] may [illegible] and may

LV. The 33rd section of Act No VI of 1854 which applies only to proof of accounts on the Equity side of the said Supreme Courts shall extend to and embrace all accounts directed to be taken on any side of the said Court

Section XXXIII of Act VI of 18 extended

LVI Whenever by any Statute or Act, Regulation or Ordinance now in force, or any Statute or Act to be hereafter in force, any certificate, certified copy, or other document, shall be receivable in evidence of any particular in any Court of Justice, the same if it is substantially in form and purports to be executed in the manner directed by the Statute, Act, Regulation, or Ordinance which makes it evidence shall be prima facie evidence, where it is rendered admissible without proof of any stamp signature character, or authority, which it is directed to have, or from which it is directed to proceed.

Proof of official documents

LVII The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case ... which such obj... the evidence obj... cient evidence to justify the decision, or the... received, it ought not to have varied the decision.

No new trial for rejection or improper reception of evidence

LVIII Nothing in this Act contained shall be so construed as to render inadmissible in any Court any evidence which but for the passing of the Act, would have been admissible in such Court.

Act not rendered inadmissible now admitted in the Company's Courts

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APPENDIX D.

LIABILITY TO DAMAGES FOR REFUSING TO GIVE EVIDENCE

The following section appears alike in Act XIX of 1853 applying to Bengal, and in Act X of 1855 applying to Madras and Bombay.

Act XIX of 1853, Section 26.

26 Any person, whether a party to the suit or not, to whom a summons to attend and give evidence or produce a document, shall be personally delivered, and who shall, without lawful excuse, neglect or refuse to obey such summons, or who shall be proved to have absconded, or kept out of the way to avoid ... served with such summons and any person who, being produc... give e... sion, sh... at whc... shall be required to give evidence or ... which he may sustain in consequence of such neglect, or refusal, or of such absconding, or keeping out of the way as aforesaid, to be recovered in a civil action

Liability to damages for refusing to give evidence.

APPENDIX E.

AMENDING ACTS

Act XVIII of 1872

OBJECTS AND REASONS

"The primary object of this Bill is to continue certain rules which it is believed have been inadvertently repealed by the Indian Evidence Act, 1872.

E. At the some time opportunity is taken to correct some clerical and other accidental errors to which attention has been drawn

"Section 32 clause (5) renders admissible certain statements as to the existence of relationship' As there are many relations other than those intended by the Act the Bill makes the clause precise by adding the words 'by blood marriage or adoption'

"In sections 41 and 45, some words which should have been repeated have

The same thing

92 to clear

or

notice of the

'rules of the road' It must have been intended to include the rules of navigation The Bill therefore adds the words 'on land or at sea'

"Section 66 contains rules as to notice to produce documents It only mentions notice to the *party* in whose possession or power a document is To

mofussil the Bill inserts the words

Wills under the Indian Succession Act may be proved by the probate But other Wills are admitted to probate, and the same mode of proof is made applicable to all such, as doubtless was intended

"Of sections 107 and 108, the latter was clearly intended to be a qualification of the former The language is altered to produce this effect

"Section 126 relates to professional communications and provides that when made "in furtherance of any criminal purpose they shall not be protected from disclosure As every fraud though illegal is not 'criminal' the Bill

er word for the latter, thus

the same principle for the

t of a witness may be impeached by proof that he has had the *offer of a bribe*' The Bill, for obvious reasons, for 'had' substitutes accepted' In India still more than in England the mere offer of a bribe if unaccepted, should not prejudice the character of the person to whom it is made

"Act XV of 1852, section 12 provides that Her Majesty's Courts and Judges and all officers, Commissioners, Arbitrators etc, authorised to receive evidence with respect to proceedings, in such Courts may administer oaths to witnesses The Evidence Act repeals this section and puts nothing in its place (VI of 1872) or any npower those C ners to examine 12"

12th August 1872

REPORT OF THE SELECT COMMITTEE

"The Hon'ble Mr Hobhouse also presented the Report of the Select Committee on the Bill to amend the Indian Evidence Act, 1872 He said that in considering the Bill the committee had proceeded on the principle that under the circumstances it was no part of their duty to alter any part of the Act on the score of principle but only to effect such alterations as they believed the draftsman would have made if his attention had been called to them The principal reason for passing the present Bill into law before the 1st September was this —

Act I of 1872 repealed *in toto* a prior Act, XV of 1852, and one of the sections of that Act was as follows —

XII All Her Majesty's Courts within the British territories under the Government of the East India Company, and every Judge and Justice of such Courts and every officer, Commissioner, Arbitrator or other person now or hereafter having by law or by consent of parties, authority to hear receive and examine evidence, with respect to or concerning any suit action, or other proceeding in any of such Courts, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively

Now, that was a positive enactment in the clearest possible terms, purporting to confer upon certain tribunals and officers power to administer oaths. *Prima facie* if that power were removed from the Statute Book, and nothing put in its place, it would cease to exist. The question then was whether the power could be derived from any other quarter. For the purpose of determining this question it had been necessary to read five Acts of Parliament and ten charters, and to read some of these documents very carefully, since they were framed on the most perplexing of all principles, the principle of declaring void all previous inconsistent provisions. So that you had to read through the whole document to see what was and what was not inconsistent. The result was that the power of administering an oath would remain with the High Courts, but would not remain

therein mentioned. It was, therefore in

as clear and extensive an authority as

simplest way of doing that in the present emergency was by continuing the existence of that section. When the time came for dealing with the matter finally, the proper place for it would be found in an Act relating to the subject of oaths and affirmations, rather than in one relating to the general subject of evidence.

'Previously to this year, the incapacity to administer an oath would have vitiated many legal proceedings. But in the present year, an Act (No VI of 1872) was passed, which had two objects—one was to respect and bind the conscience of witnesses, and the other, to prevent the entire vitiation of legal proceedings by omissions and irregularities in the administration of oaths. The first object had nothing to do with the present question. An oath was an oath, whatever might be the form of it, and the person who administered it must be duly qu

the misc

an oath

person f

upon being ... would deal with the case. Certainly,

many a Co

made by

have, by ex

go on with

of perjury to the giving of false testimony under such circumstances. On this point Sections 178 and 179 of the Penal Code showed the importance attached to the legal adm ... For the foregoing reasons ... of judicial proceeding ... ber, on which day Act I of 1872 was to come into force, whereas no possible ... jury would be done by continuing the section in question the only suggestion against its h

...ts they would not be remarked upon in ...lves and were intended to cover obvious ...printing or of drafting. We had now received several criticisms on Act I of 1872, and there was little doubt that, after it had been tested in actual practice it would, like most laws of great magnitude and difficulty and especially those passed on subjects new to legislation, require amendment in several particulars.'

29th August 1872

Act III of 1887

OBJECTS AND REASONS.

'The object of this Bill is to prevent officers of any department concerned with any branch of the public revenue from being compelled to say whence ... of any offence. In England

information as to frauds on the revenue (See *Russel on Crimes*, 5th Ed Vol III, p 553);

The law on the subject is further stated in Bell's Laws of Excise as follows — It is a rule of evidence applicable to criminal cases and the same rule has always been held to apply to penal informations at the suit of the Revenue, that a witness is not permitted to disclose privileged communications brought to his knowledge for th
of the witness, but may be ju
on a principle of public policy
272) Hence those questions which tend to the discovery of the
which the disclosure was made to the officers of justice are not permitted to be asked (*Rex* v *Hardy* 24 How St Tr 753—*per Eyre C J*) If the name of the informer were to be disclosed
would be defeated (Ibid p 81
v *Bryant* it was held that a
give the information? (15 M & W 169) It cannot be ascertained from the records why the English law was not incorporated in the Indian Evidence Act The omission has caused much inconvenience'

11th August 1886

REPORT OF THE SELECT COMMITTEE

'We the undersigned members of the Select Committee to which the Bill to amend the Indian Evidence Act 1872 was referred have considered the Bill and have the honour to submit this our Report

'We have so altered the section which it was proposed to substitute for section 125 as to
following the plan
an *Explanation* to

11th January 1886

Act III of 1891

OBJECTS AND REASONS

"The principal object of this Bill is to amend section 54 of the Indian Evidence Act 1872 so as to render the previous conviction of an accused person irrelevant when it is sought to prove the conviction with the object merely of showing that the accused is a man of bad character and is therefore more
The fact that a
probative
it is not
proposed
ings the
fact that the accused person has been previously convicted of any offence is relevant The result of this amendment of the law will be that the rule as to the relevency of a previous conviction will be contained in section 43 of the Act The existence of the judgment convicting the accused will be relevant only if the fact of the conviction is a fact in issue or is relevant under some provision of the Act

It seems necessary also to amend the Act so as to show first that in criminal
evant to
relevant
owledge
planation
planat on
to show

In English law for the purpose of proving guilty
dence of other acts of a nature similar to that charged may be given in cases of uttering false coins or disposing of forged bank notes (1 Russel, 233) On the whole

evidence of this nature has been confined to cases of coining and forgery, but there is one case, *Reg. v Francis*, (13 L. J M C 97) in which evidence was admitted on a charge of obtaining money on false pretences In that case *Lord Coleridge C J* said 'It seems clear upon principle that when the fact that the prisoner has done the thing charged is proved, and the only remaining question is, whether at the time he did it he had guilty knowledge of the quality of his act, or acted under a mistake, evidence of the class received must be admissible' This case probably goes further than any other case, and the amendment which has been proposed of section 1 seems to provide sufficiently for the class of cases in which the peculiar nature of the offence makes this question the crucial test'

"As regards the admission of evidence of other similar acts to prove guilty knowledge, it is thought that such evidence might be admitted in cases in which an accused person is charged ... Pro Code, with and tried ... That is to say it is proposed ... the three offences to be ...

as the acc...

an opportu...

not raised ...

"Briefly stated the amendments proposed to be made by the Bill are as follows.—

(1) the provision allowing a previous conviction to be proved in all cases will be repealed;

(2) a previous conviction will be relevant under section 43 when it is a fact in ... the Act;

... relevant as evidence or bad character wh...

... a previous conviction will be relevant to prove guilty knowledge or intention,

(5) the fact that an act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, will be relevant to prove guilty knowledge or intention'

4th July 1890

REPORT OF THE SELECT COMMITTEE.

"We the ... which the Bill was referred, ... our to submit this our report with ... consider that the

We generally approve the Bill ... object can be attained by adding to section 14 an Explanation suggested by the High Court

We consider it desirable to indicate more particularly the classes of persons exercising magisterial functions who are not to be held to be magistrates for the purpose of section 26

We have added a clause to remove a difficulty which has been experienced in the construction of the words 'for the same offence' in section 30 of the same Act"

6th February, 1891.

Act V of 1899

OBJECTS AND REASONS

"It has been ... the case of *Queen Empress* v. ... 1896 that the

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ob...

'The opportunity has been taken to suggest the amendment of two other sections Section 37 fails to render relevant statements as to the facts of a public nature made in the Acts of certain legislatures Cl 2 will remove what is now an obvious lacuna The remaining amendment is of a purely formal character'

8th October, 1898

REPORT OF THE SELECT COMMITTEE

"We, the undersigned members of the Select Committee to which the Bill to further amend the Indian Evidence Act, 1872 was referred, have considered the Bill and have now the honour to submit this our Report with the Bill as amended by us annexed hereto

We have added a sub section making a consequential amendment in section 73 of the Act'

1st February, 1899

APPENDIX F.

THE BANKERS' BOOKS EVIDENCE ACT

Act XVIII of 1891

Received the assent of the Governor-General on the 1st October, 1891

An Act further to amend the Law of Evidence with respect to Bankers' Books

Whereas it is expedient to amend the Law of Evidence with respect to Bankers' Books, It is hereby enacted as follows —

Title extent and commencement

1. (*1*) This Act may be called the Bankers' Books Evidence Act, 1891

(2) It extends to be whole of British India

(3) [*Repealed by Act X of 1914 Schedule II*]

Notes This Act is primarily intended for the convenience of bankers and to facilitate proof of their transaction—*R* v *Bono*, 29 T L R 635, *Arnott* v *Hayes*, 36 Ch D 731, *Kissan* v *Lank*, (1896) 1 Q B 574, *Pollock* v *Earle* (1898) 1 Ch 1

Definitions

2 In this Act, unless there is something repugnant in the subject or context,—

(*1*) 'Company" means a company registered under any of the enactments relating to companies for the time being in force in the United Kingdom or in any of the Colonies or Dependencies thereof or in British India or incorporated by an Act of Parliament or of the Governor-General in Council, or by Royal Charter or Letters Patent.

(*2*) "bank" and 'banker' mean—

(*a*) any company carrying on the business of bankers

(*b*) any partnership or individual to whose books the provisions of this Act shall have been extended as hereinafter provided ,

(c) any post office savings bank or money order office, A

(3) "bankers' books' include ledgers day-books, cash-books, account-books, and all other books used in the ordinary business of a bank,

(4) "legal proceeding" means any proceeding or inquiry in which evidence is, or may be given and includes an arbitration

(5) 'The Court" means the person or persons before whom legal proceeding is held or taken,

(6) "Judge' means a Judge of a High Court,

(7) "trial means any hearing before the Court at which evidence is taken, and

(8) "certified copy" means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank, and was made in the usual and ordinary course of business; and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title

Origin This Act is based on the English Bankers' Books Evidence Act, 1879, (42 & 43 Vict C 11)

Cc— ... which do not come within ... ubsection (1), though certifie... t are not admissible in evid... *Patrick*, 4 C W N 430 (F B)

Ban... 'bank" and 'banker' mean any ... on the business of bankers and ... of Inland Revenue and also ... ting to Savings Banks and also ... k' connotes the business of utilising money received for purposes of profit The mere fact that a Government Treasury receives money from a District Board and respects orders issued to it for payment does not constitue the Treasury a Bank *Rangasuami* v *Sankaralingam*, 43 M 816=39 M L J 327=58 Ind Cas 893, *Tolsey* v *Hill*, 2 H L C 28, (43) per *Lord Brougham*

Banker In *Halifax Union* v *Wheelright* 10 Ex 183=44 L J Ex 121, *Baron Cleasby* said "First, it is said that taking that statute together with several ... subject the word banker' was not to be restricte... any per... to the... upon hi... of that ... who in the ordinary course of his business, ... persons from and for whom he receives money' *Hart's Law of Banking*

Power to extend provisions of Act

3. The Local Government may, from time to time, by notification in the official Gazette, extend the provisions of this Act to the books of any partnership or individual carrying on the business of bankers within the territories under its administration, and keeping a set of

not less than three ordinary account-books, namely, a cash book, a day book, a journal, and a ledger, and may in like manner rescind any such notification

Mode of proof of entries in bankers' books

4 Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall, in all legal proceedings, be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions, and accounts therein recorded in every case where, and to the same exent as, the original entry itself is now by law admissible, but not further or otherwise

Origin This section is based on section 3 of the English Bankers' Books Evidence Act, 1879, which runs as follows "Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded"

Principle "Then if they are not removable, on the ground of public inconvenience, that is upon the same footing in point of principle as in the case of that which is not removable by the physical nature of the thing itself .. The necessity of the case in the one instance, and in the other case the general public inconvenience which would follow from the books being removed, supplies the reason of the rule" *Per Alderson B* in *Mortimer* v *McCallan*, 6 M & W 58, 67

Scope and object of the section "The Act was passed mainly for the relief of bankers to avoid the serious inconvenience occasioned to them by their having to produce books which were in constant use in their business" *Parnell* v *Wood*, (1892) P 137 "Banks are subject to the performance of duties to the public which might be seriously interfered with if they were compelled to carry the books needed in their business into every Court or tribunal where testimony is to be introduced concerning them. Books belonging to public offices cannot be removed from their legal custody without some strong necessity for their production While bank-books are not public to the same extent, yet the business which the corporations are required to transact cannot be done unless the books are usually preserved where they belong' *Per Campbell C J* in *People* v *Hurst*, 41 Mich 328 (Am) This Act makes copies of such entries evidence against any one thus the entries in a defendant's banker's books are made evidence against the plaintiff *Harding* v *Williams*, 14 Ch D 197, see also *London & W Bank* v *Bolton*, 51 Sol Jo 466 The Act applies to all books kept by the bank, even although not in daily use, and applies to the successors of a bank by whom the entries were made *Asylum for Idiots* v *Handysides*, (1906) 22 T L R 573 The main object of this Act is to enable evidence to be procured and given [*Arnott* v *Hayes*, (1887) 36 Ch D at 737, *Emmott* v *Star Newspaper Co*, 62 L J Q B 77, *R* v *Bono and Another*, (191[illegible] [illegible] of attending and [illegible] *mott* v *Star New*[illegible] It enables a party [illegible] to compel bankers to produce their books and to attend and to be examined on them, to obtain an order for leave to inspect and take copies of them *Re Marshfield*, 32 Ch D 499

Case in which officer of bank not compellable to produce books

5. No officer of a bank shall in any legal proceeding to which the bank is not a party be compellable to produce any bankers' book, the contents of which can be proved under this Act, or to appear as a witness to

prove the matters, transactions, and accounts therein recorded unless by order of the Court or a Judge made for a special cause

Scope This section corresponds to section 6 of the English Bankers' Books Evidence Act, 1879 (42 & 43 Vict 11) By this section a banker is exonerated from personal attendance in Court See also *Emmott* v *Star News paper Co* 62 L J K B 77.

Inspection of books by order of Court or Judge

6. (*1*) On the application of any party to a legal proceeding, the Court or Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceeding, or may order the bank to prepare and produce, within a time to be specified in the order, certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceedings and such further certificate shall be dated and subscribed in manner hereinbefore directed in reference to certified copies.

(2) An order under this or the preceding section may be made either with or without summoning the bank, and shall be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the Court or Judge shall otherwise direct.

(3) The bank may, at any time before the time limited for obedience to any such order as aforesaid, either offer to produce their books at the trial, or give notice of their intention to show cause against such orders and thereupon the same shall not be enforced without further order.

Scope This section corresponds to section 7 of the English Act A magistrate before whom criminal proceedings are pending is a Court within the mean [illegible] to make an order under this section *R.*

[illegible]

but the Judge ought [illegible] *Co* 62
C A ; *L' Amie* v [illegible] per *Lord*
L J. Q B 77, *Sout*[illegible] nder the
Esher. But as a r[illegible], 53 L
summons for directic[illegible]
J Q B 275 The[illegible]
the application on [illegible]
could be resisted *Yearly Practice,* (1921) 4[illegible]
necessary, but the Judge must be satisfied t[illegible]
admissible in evidence in the action, and f[illegible]
required *Arnott* v *Hayes*, 36 Ch D 731, *Pou*[illegible] 36 Ch D 731, [illegible]
give any new power of discovery (*Arnott* v *Hayes*, 36 Ch D 731, [illegible] of law or the practice with
Another, 29 T L R 635), or alter the principles [illegible] or take away any previously
regard to discovery (*Pollock* v *Earle*, 1898, 1 Ch 4) *Tramways Co* v *Ebbs Smith*,
existing ground of privilege [*South Staffordshire Tramways Co* (1892) P 139] An order under this
(1895) 2 Q B 669 C A ; *Parnell* v *Wood*, (1892) P ground only *Perry* v *Phosphor Bronze*
section should be made on sufficient ground only Where a defendant applied for inspection to assist
Co, (1894) 71 L T. 854. Where a defendant applied for inspection to assist

him to justify a libel imputing pecuniary embarrassment inspection was refused *Emmot* v *Star Newspaper Co* 62 L J Q B 77 Similarly in *Pollock* v *Earle*, (1898) 1 Ch 1 the C A refused to make an order in the case of third persons who were neither actual nor constructive parties to the case, *e g*, as to the bank ' its directors for inducing as to such balance *Phip* he Court should take care n " The order should only be made where the entries of which inspection is sought will be admissible in evidence at the trial *Howard* v *Beall* 23 Q B D at p 2

It seems that the Court has jurisdiction to order inspection of the accounts of third parties *Howard* v *Beall* 23 Q B D 1, *South Staffordshire* v *Ebbsmith*, (1895) 2 Q B 669, *M' Gorman* v *Kierans* 35 Ir L T R 84, *Agra Bank* v *Kashi Ram*, P L R 1900, p 237 But this power should not be exercised ordinarily *Pollock* v *Earle* (1898) 1 Ch 1 But when order for inspecting the accounts of third parties is sought a notice should be given to him *South Staffo*

not i ... nk, even when they are were ... bank by whom the entries doubt ... T L R 573 But it is mea ... Books come within the ... 31 C 284 ... ok in his ... iting an order to inspect the banker's book, and in a fit case an order will be made *Perry* v *Phoshpor Co*, (1894) 71 L T 854, *Yearly Practice*, (1921) 459 The qualifications of the co... and customer are (a) ... re there is a duty to th ... k ... or

Provincial Banks, (1924) n order under section 6 behalf, the Court ought party the Court ought *Tricumlal* v *Lakhmi*

7 (*1*) The costs of any application to the Court or a Judge, under or for the purposes of this Act, and the costs of anything done or to be done under an order of the Court or a Judge made under or for the purposes of this Act, shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the bank.

Costs

(*2*). Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

(*3*) Any order under this section awarding costs may, on application to any Court of Civil Judicature designated in the order, be executed by such Court as if the order were a decree for money passed by itself

Provided that nothing in this sub section shall be construed to derogate from any power which Court or Judge making the order may possess for the enforcement of its or his discretions with respect to the payment of costs.

APPENDIX G.

THE INDIAN OATHS ACT.

ACT X OF 1873

Received the assent of the Governor General on the 8th April, 1873

An Act to consolidate the law relating to Judicial oaths, and for other *purposes.*

Preamble.

Whereas it is expedient to consolidate the law relating to judicial oaths, affirmations and delarations and to repeal the law relating to official oaths, affirmations and declarations; It is hereby enacted as follows :—

1 PRELIMINARY

Short title

1. This Act may be called "The Indian Oaths Act 1873".

Local extent.

It extends to the whole of British India, and so far as regards subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty ;

[Commencement]—*Repealed by the Repealing Act, 1873 (II of 1873).*

History ... "takes our history ... all primi tive civ ... it part in the adminis ... as only a single ... the general resort to oaths The early Germanic modes of ... *'Judicia* ... his plea ...

The progress from this ... the 1800 s in some of the common modes of procedure) to the second stage of a test of security for credibility ... stage of ... come full ... marked ... of compete ... applicatio ... feature by ...

Theory ... modern common law, may be termed ... be termed objective ... swearing whereby wh ... they know

1. , Applicability The provisions of the Indian Oaths Act are not intended as we ... is ... not the ... will not make it admissible. *Shekh Jar* ... R 1926 Nag 194

2. [Repeal of Enactment] *Repealed by Act XII of 1873*

Saving of certain oaths and affirmations

3. Nothing herein contained applies to proceedings before Courts Martial or to oaths, affirmations or declarations prescribed "by or under any instructions under the Royal Sign Manual of His Majesty or"* by any law which, under the provisions of the Indian Councils Act, 1861, the Governor General in Council has no power to repeal.

II AUTHORITY TO ADMINISTER OATHS AND AFFIRMATIONS

Authority to administer oath and affirmation

4. The following Courts and persons are authorized to administer, by themselves, or by an officer empowered by them, in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law :—

(a) all Courts and persons having by law or consent of parties authority to receive evidence;

(b) the commanding officer of any military station occupied by troops in the service of Her Majesty.

Provided :

(1) that the oath or affirmation be administered within the limits of the station, and

(2) that the oath or affirmation be such as a Justice of the Peace is competent to administer in British India.

Scope ... as to the fitness of a surety has power to rec... xercise of the power and duty conferred upon hi... 371 = A W. N. 1901, 52 There is no provisio... the fact that an oath was administered S... A L J 933 = 35A 575 Under the rules f... Emperor v Lal... s 4 of the ... e evidence ... the duties, or in exercise of the powers imposed or conferred on them by law *King Emperor* v. *Palisi*, 2 L B R 272 A Sub-magistrate acting under ch XIV of the Criminal Procedure Code is a Court acting in the discharge of a duty imposed on him by law and ... oath under this section *Tevan* v *Emperor*, ... nesses examined before a Commissioner ... 1850 to hold an enquiry into the behaviour of a certain Judicial officer, are bound to state the truth and render themselves liable to be punished under s 193 I P C

*Inserted by s 2 of Act VI of 1919

if they testify falsely *Gobind Ram* v *Empress*, 18 P R 1898 Cr The procedure of the arbitrator is not governed by the Oaths Act *Bhagirath* v *Ram Ghulam*, 4 A 283 = A W N 1882, 31 A Magistrate is not competent to administer oath in the course of a non-judicial inquiry *Allahu arayo* v *Crown*, 17 Cr L J 368 = 35 Ind Cas 672

III PERSON BY WHOM OATHS OR AFFIRMATIONS MUST BE MADE

Oaths or affirmations to be made by—

5 Oaths or affirmations shall be made by the following persons :—

Witnesses

(*a*) All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence;

Interpreters

(*b*) interpreters of questions put to, and evidence given by, witnesses;

Jurors.

(*c*) jurors.

Nothing herein contained shall render it lawful to administer in a criminal proceeding, an oath or affirmation to accused person. or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

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Persons subjected to the oath This section [illegible] n that oaths or affirmations shall be made by the three following classes of persons, namely (1)

witnesses (2) interpreters, and (3) jurors So oath or affirmation is requisite in all testimonial statements made in Court An interpreter is a kind of witness and must be sworn *Wigmore* § 1824, *R* v *Douglas*, 13 Q B D 42, 59, 66, 72 A juror should also be sworn *Queen* v. *Ramsodoy*, 20 W. R Cr 19

Accused person. "Originally an accused person was allowed to produce no witnesses; later, he might produce them, but they testified without oath, and finally ... allowed to be sworn" *Wigmore* § 1824 This section as well as sec ... ode lays down that no oath shall be administered ... in sub section (4) that no oath shall be admin ... reference only to the statement made by him ... under this section It has no ... can make ... case under ... also *Reg* v ... *mperor* 22 ... 0, *Alladal* ... *Emperor* v

v *King Emperor*, 9 P R 1906; ... 20 Cr L J. 342, *Q E* v. *Tribuni*, 20 *Durant*, 23 B 213, *Nga Nque* v *K E*, 20 Cr L J. 342 ... A 426; *Joseph* v *Emperor*, 3 Bur L J 265; *K E* v *Annya*, 3 Bom L R 437 The term "accused" means a person under trial *Hinanda* v *Emperor*, 2 C L J 149, see also *Emperor* v *Govind*, 18 ... *Corporation of Calcutta*, 31 C. W N 506= ... no power to administer an oath or affirm ... records under s 164 Cr Pro Code *Lalu* ... 10 C P L R Cr 16.

Scope of the section. The direction in s 164 Cr Pro Code that the ... shall be recorded in one of the manners prescribed for recording ... procedure The statement itself is one which ... re the Court by a witness, and is therefore ... of the Evidence Act The person making it ... is Act *Queen Empress* v *Alagu*, 16 M ... trate might examine a person for the sake ... some person ... person is not a ... 49 Whether a ... examined as a ... *reoratan* S C ... regard to the ... s any option, ... as evidence, but to ... the case may be ... 4, *Queen Empress* v ... J 161=22 Ind ... is Act is imperative,

... e interpreter under ... or the prosecution to ... *al* v *King Emperor*, ... prove that the interpretation was made accurately, 9 C L J 690=13 C W. N 942.

An enquiry on an application under s 100 Cr Pro Code, 1898, to issue a search warrant is judicial inquiry and proceedinds preliminary to the issue of a search warrant under s 100 are judicial proceedings In the course of such ... to examine persons jud ... 5 of the Oaths ... *Abdul Aziz* on ... Ac. ... v

6. Where the witness, interpreter or juror is a Hindu or Muhammadan,

Affirmation by natives or by persons objecting to oaths

or has objection to making an oath, he shall, instead of making an oath, make an affirmation.

In every other case, the witness, interpreter, or juror shall make an oath

Hindu and Mahomedan law on the subject ' If we turn to India even prior to the introduction of English rule, we find that the Laws of *Menu* had their oath too, and in point of form, that prescribed by *Menu* is not very different from the English one —The imprecatory part too of the oath of *Menu*, if not framed exactly in conformity with the varying Code of the religious belief of the swearer, was nevertheless in a form adopted to the peculiarities of the influences by which each individual might be presumed to be most affected 'Let the Judge cause a Priest to swear b
elephant and his weapons, a Merchant by
or servile man imprecating on his owr
crimes The meaning is he shall adjure t
falsely your truth will be destroyed, a *Cashetrye* by saying your horse or elephant and weapon become useless, a *Vaisya* 'your cattle, seeds and gold will be unproductive ' A *Sudra* he shall adjure by saying, 'if you speak falsely all sins will b
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IV FORM OF OATHS AND AFFIRMATIONS

Forms of oaths and affirmations

7. All oaths and affirmations made under section 5 shall be administered according to such forms as the High Court may from time to time prescribe.

And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use

Explanation—Repealed by the Lower Burma Courts Act (VI of 1900) s. 48. Schedule II.

swear according to his own notion of the oath In the same case *Harawicke L C.* said. "The next thing is the form of the oath It is laid down by all

1 Leach Cr L 4th Ed 412, *Walker's Case* N Pleas 23, *R* v *Extrehan*, C & M 248, ... the usual form of oath in criminal cases ... the form at the assizes or sessions is, for the clerk of arraigns or of the peace to desire the witness to take the book in his hand and, that done to say to him 'The evidence you shall give between ... prisoner at the bar shall be the truth, the ... truth; So help you God', upon which the ... usual form of words in civil cases differred ... shall give to the Court and Jury, touching the ... truth, the whole truth, and nothing but the truth So help you God ... 18 ... of the administration of the oath is immaterial, provided that it ... bringing to bear of this apprehension of ... ds or ceremonies are used in imposing ... as binding by his belief *Indar Prosad* ... Ind Cas 314

... children ... ubt ... he ... ive ... he ... ale ... od beginnings of capacity for various ... *Nisi Prius*, 293, *Young* v *Slaughterford* ... Pl Cr I, 302, 634 *Buller, Nisi Prius*, 293, ... But this view was finally repudiated in *R* v ... 228, *R* v *Travers* 1 Stra 700 But this view was finally repudiated, where the *Brasier*, East Pleas of the 'Crown, 1, 443 After much deliberation, where the Court said 'An infant, though under the age of seven years may be sworn in a criminal prosecution, provided such infant appears on strict examination by ... of the nature and consequences of ... the time within which infants ... depends upon the ... falsehood, which ... to them by the ... their testimony ... take an ... *Braddon's Trial* Court, but if they ... cannot be received' See also *R* v *Perkins* 2 Moo Cr, C 139; *Braddon's Trial* 9 How St Tr 1127, *R* v *Holmes* 2 F & F 788, *Wigmore* § 1821, *Nafar* v *Emperor*, 18 C W N 147=41 C 406, *Talu* v *Emperor*, 6 Pat L J 147=61 Ind Cas 705 Evidence of child witnesses can be admitted without oath or affirmations *In re Chinnavenal adu*, 38 M 550, *Hussain* v *Emperor*, 76 Ind Cas 1037, *Hari Ramji* v *Emperor*, 20 Bom L R 365=45 Ind Cas 497 In the case of a child witness the Judge is bound first to ascertain by questioning the child whether it is by tender years prevented from understanding the questions or from giving rational answers to those questions Then if the Judge intend ... should proceed to administer ... so doing, on the ground ... solemn affirmation under ... child will be admissible section 13 of ... *Emperor* v *Kusha*, 5 Bom L R 551

8 If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst or held binding by, persons of the race or persuation to which he belongs, and not repugnant to justice or decency and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.

Power of Court to tender certain oaths

Scope ... the parties ... should come from ... 39 Ind Cas 836=56 C L J 77= ... the term 'party to any judicial proceedings in this section does not include the complainant in a

criminal proceeding nor the accused Sections 8 11 of the Oaths Act do not apply to criminal proceedings *Queen Empress* v *Muraru* 13 B 389, *Imperator* v. *Haji Alu*, 5 S L R 129=13 Ind Cas 215=13 Cr L J 23, 1 Weir 822, *Emperor* v *Chiman* 22 Bom L R 893=58 Ind Cas 147 Under the provisions of this Act, an oath proposed in a form which could affect a third party can not under . . *Ram Narain* v *Babu Singh*, 18 A 4 . . 1916=7 Ind Cas 479=111 P L : . as 448 23 A L J 513 . . . called upon false, which . . . justified in . . false, the Cc . . 1873 *Issu Meah* v *Kalaram*, 2 C L R 176, *Ulagappa* v *Peria*, 15 Ind Cas 195. But where defendant also refuses no presumption arises *Sukdeo* v *Ganesh*, 10 Ind Cas 472=7 N L R. 50

Where in a suit, the parties put in a joint application evidencing an agreement to abide by the statement on oath of a certain person, but one of the part . . ked them to withdraw from the reference on the . . with the other party and no collusion was . . allowed to do so *Chiddu* v *Kuar Sen*, 2

An agreement to a case decided on the evidence of a third person given on oath, is in . . . Code, and would . . join in it The . . such a case *La* . . .

Neither an invocation nor an oath or affirmation in the technical sense of the words is in any way an essential part of the special oath or solemn affirmation provided for in section 8 of the Indian Oaths Act of 1873 The . . o in section 8 of the Act is . .

the first from its very nature, and must be in the form held deponent belongs The special is a complete substitute for the o supplemented by it or any p used in respect of the special procedure provided for in section 8 are merely descriptive of the nature and suggestive of the consequences of the ritual—linking it up with ordinary oaths and affirmations—but are in no way connected with what its form should be *Indar Prasad* v *Jogmohan Das*, 31 C W. N 1053=54 I A 301=2 Luck 316=46 C L J 13=39 M L. T. 618=53 M L J. 1 (P C)=54 I A 301.

. . . endant on behalf of the minor to abide . . very d . . Code . . guardian although given without the leave of the Court, provided there is no fraud or gross negligence on the part of the guardian *Muhammad* v. *Behary Lal*, A I R 1930 Cal 463.

Court may ask party or witness whether he will make oath proposed by opposite party.

9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation

G. Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

Scope Under ss 8 and 9 of the Act, it is not necessary that the form of oath should be specified before it can be held binding on the parties agreeing to be bound by it It is sufficient if the oath is common among, and held binding by the class to which the parties belong *Ahmad Ali* v *Hanuman*, 29 P R 1887 If in the course of a suit, the plaintiff offers to bind himself by the oath of a witness and the witness, after consenting to the offer, refused afterwards to take oath, the Court cannot decree the suit in the plaintiff's favour, even though the defendant had agreed to it in case the witness refused to take the oath Such an act on the part of the Court is not sanctioned by the Oaths Act *Bawa Suchat* v *Ratna*, 31 P R 18 ... appointed to record evidence in a case cannot ...

... tion between Court and ... s not include persons authorised to ... *Puran Chand* v *Chabar*, 89 P R, 1909 Pleader has no power to bind client by oath *Perag* v *Ram*, 75 P R 1900 Ordinarily, it is the party himself that can make an offer contemplated under this section If, however, a party specially authorises his pleader, or an agent, to make an offer to be bound by a particular oath he might be estopped from retracting the step he had taken if his offer were acted on *Sadasiv* v *Maruti*, 14 B 455 A offer by ... tak... or ... absence of the Court's sanction to the agreement under s 462, the minor defendant is barred by the consent of his guardian, if there is no fraud or ... 27 C 229=4 ...

... fendant offered ...

... Oaths Act, agrees to be bound by an ... o be bound by an oath is in effect, an ... der the oath as the evidence in the ... If the party who has agreed to be bound prevents the oath being taken, the other party is entitled to a decree ... the result of ... on is that there ... M L J. 99, ... *Thoyi Ammal* v ...

Where the defendant takes oath proposed by the plaintiff, the oath is ... J 244=31 A. 315=2 Ind ...

bound by the oath of the other party and to have the case decided in accordance

therewith. *Wasi uz zaman* v *Faiza Bibi*, 14 A L. J 38=38 A 131=32 Ind Cas 348

Where the agreement proves abortive, a suit can be decided on evidence taken *Seshagiri* v *Sankayy Setti*, 4 L W 258=1917 M W N 101=36 Ind Cas 1001 Where an offer is made by plaintiff to be bound by oath the Court has full discretion to call upon the defendant to accept or refuse the offer, and, subject to the exercise of that discretion, the offer once made stands, and if the defendant eventually accept it, the plaintiff is bound by the result *Khawaj Din* v *Mt. Nur* [illegible]
it seems that under [illegible]
to refuse to refer [illegible]
A 65, but see *Muth* [illegible]
596=74 Ind Cas [illegible]
1926 Lah 240

Ordinarily a party cannot resile from his offer, but he can do so with the permission of the Court *Ram Bhaj* v *Dhuni* 92 Ind Cas 813; *Narayan* v *Srikantha* 4 Mys L J 217, *Salik* v *Hali*, 49 A 388=25 A L J 297=A. I R. 1927 All 590 If a party after agreeing to abide by an oath satisfies the Court that there is good ground for retracting, the Court would exercise a wise discretion in refusing to administer the oath and it is only when a party puts forward frivolous reasons for retracting that the Court would be justified in administering the oath notwithstanding the retraction *Ramdeo* v *Naipal*, A. I. R 1933 All 184

Where in certain divorce proceedings among Mahomedans the pleader for the wife applied that both parties should be put on special oath and the Court granted the application directin [illegible]
prescribed for 'Lann' under Mahon [illegible]
that the other party agreed to abide b [illegible]
not be conclusive because of secti [illegible]
Umar Saheb, 52 B 295=110 Ind Cas 131=30 Bom L R 447=A I R 1928 B 268

The word "party" in this section includes a duly authorised representative such as a pleader and that he can make the offer contemplated by the section *Amir* v *Mohammad* 5 O W N 10, see also *Hata* v *Samail* 137 Ind Cas 810=33 P L R 470=A I R 1932 Lah 414

A party cannot add new condition to his original offer and the other party can take the oath in accordance with the original offer. *Kinhi* v *Kunnath*, 1928 M W N 113=A I R 1928 Mad 488=109 Ind Cas 758

Administration of oath if accepted

10 If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it or, if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

[illegible]

the oath itself, must issue a Commission to some person to administer it and [illegible] to be sworn and return it to [illegible], see also *Dar Bux* v. *Dar Meah*, [illegible]

11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated.

Evidence conclusive as against person offering to be bound

Scope of the secti ... ed at ... ler the provi sions of the Act is ... y future proceedings *Keshava* ... to the ... examined under the usual form of oath of ... *Jaladar* v *Ke* ... ler

person who offered to be bou d by ... stated *Maddhogir* v *Gopal Bhaskar*, 7 C P L R 122, ... 1898, *Hamid* v *Naqui* 84 Ind Cas 729, *Gramathil* v *Sidlayya*, 90 Ind Cas 577 (2)—49 M L J 379 A statement by a witness that a party is in possession is in point of law admissible evidence of the fact that such party was in possession under section 11 of the Oaths Act, it is conclusive proof of the matters stated The expression "conclusive proof" in s 11 is to be understood in the sense in which it is defined by s 4 of the Indian Evidence Act 1872 *Vithu* v *Pamji* 8 Bom L R 19=1 M L T 63

The parties to a suit agreed to be bound by the deposition of a referee in the manner contempla ... decree was passed in favour of one ... The referee died afterwards ... on did not fully cover the ques ... case was, therefore to be ... to the usual procedure *Mahc* ... 143

There is nothing in the Indian Oaths Act constraining a Court to pass a decision in favour of a particular party If a party to a suit says that he would be bound by the oath of a particular person under the provisions of section 11 of the Act, it means no more than this that *pro tanto* he will be bound, that is to say, in so far as the matter of that evidence is concerned, and that evidence will be conclusive as to its truth, and the truth of such evidence will be conclusive as against him throughout the whole of the litigation But it does not, in any way, compel the ... hat evidence as conclusive *Muhammad Zahu* ... 2, 3

An attorney empowered ... fically to ... ond him ... suit to be decided accordingly ... P R 1903; see also *Gharib* v

Under this section the oath is not conclusive to the suit but is so only ... na v *Bala Sheka*, 3 M L T 163

... e bound by whatever statement might be made by the plaintiff upon oath as prescribed by law The plaintiff accordingly was examined on oath administered in the usual manner *Held*, that though the statement then made by the plaintiff might not be binding ... 1873, nevertheless ... decision of the ... *Muhammad*, A

W N 1899, 200 ... eding under the provisions of sections 8 11 of ... subsequent proceeding *Badiaddin* v *Nizam* ... 01

... t confirms the decree of the first Court on the strength of the oath of a party to the suit on a question of fact, the decree of the Court is none the less a final adjudication *Ahmed* v *Moidin*, 24 M 441

Where the plaintiff originally agreed to be bound by the oath of the defendant, if taken in a particular form and subsequently varied the agreement by attaching further conditions as to the way in which the oath should be made,

opportunity must be given to the defendant to take the oath in the manner originally agreed upon between the parties If the defendant does so, the evidence so given will be
the defendant refuses t
on the merits *Thul ku*

An adjudication by a Court on an oath ... suit would make the matter or issue covered by the adjudication *res judicata* in a subsequent litigation between the same parties, though the subject matter of the suit is different *Sanyari* v *Artu Suaro*, 13 M L T 261=24 M L J 321=36 M 257=18 Ind Cas 835

An oath is under s 11 of the Oaths Act conclusive only as against the ... against one who never joined ... right of appeal against the ... =50 P W R 1918=45 Ind. Cas 230

Where the agreement was to take the oath on a particular day but the oath was taken on a later day the burden lies on the person who relies on the oath to show : ... the contract *Athermankuthi* v *Chandroth*, 1

When ... by the defendant, the Court is bound to decide in favour of plaintiff *Jamna* v *Nanda*, 118 P. R 1919=57 P L R 1919=49 Ind Cas 1005

... guardian of the minor defendant to the ... ain fact, the minor defendant is bound ... er specified oath *Porbhu* v *Jamil*,

... bound by the statement made by the acc... steps towards the Ganges and ... conditions, the statement being made on oath was conclusive proof of the facts set forth in it. *Dilsukh* v. *Ram Rama* L R 5 A 147

... open to the ... gave false evi... ...das *In re*, 26

There is nothing in the Oaths Act which says that the reference to the referee comes to an end as soon as the referee has once been examined The referee can be re examined if all the points which would be necessary to be ... *Kishen* v *Kashi Nath*, 48 A 276=A I. R

... that the ... contro- ... A I. R. 1927 All 670

... taken by a party ... not afterwards say that ... Ind Cas 861=A.

... the oath of a witness, Where ... though the other parties do not agree to be so bound, he will be bound and the case must be tried only as against the others *Ram Ratan* v *Ramlall*, 27 A. L J 1095=118 Ind Cas 188=A I. R 1929 A 759

Procedure in case of refusal to make oath

12 If the party or witness refuses to make the oath or solemn affirmation referred to in section 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts

. that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal.

Scope of the section Under section 12 of the Act, it is only when a party refuses to make the oath proposed that the Court is bound to record that he was asked if he would make it and that he refused to do so *Madhogir* v *Gopal*, 7 C P L R 122 This section directs the Court to record, as part of the proceedings, the nature of the oath proposed, the fact that the party was asked to make the oath and refused, together with any reason assigned for the refusal The section seems to contemplate that the Court shall give such weight, as it may think fit, to the fact that a party has offered to make an oath, and has afterwards refused to make it, whilst it negatives the view that the refusal to make the oath is, in itself a ground for dismissing the suit or giving the plaintiff a decree, as the case may be *Mayan* v *Pathu Kutti*, 17 M L J 545=31 M 1, per *White C J* It may be doubted whether this section was intended to apply to a case, in [illegible] agreement that one of them shall take an [illegible] ent between the parties to a suit, the [illegible] h, and that, on his failure to do s [illegible] the failure of the plaintiff to take the proposed oath, that the agreement could not be recorded as an adjustment of the suit, and the suit should be proceeded with *Mayan* v *Patthakutti*, 17 M L J 545=3 M L T 91=31 M 1.

[illegible] 1 by the [illegible] n the part [illegible] take an oath, or refusal to be bound by an oath *Amirchand* v. *Govind Sahai*, 5 P R 1903=37 P. L R 1903

A Court is not entitled to presume because a party refuses to take a special [illegible]

Where the plaintiff after agreeing to abide by the oath of a [illegible] subsequently declined to abide by it, the Court has no power to dismiss the plaintiff's suit on account of the plaintiff not having taken the oath but must either proceed to administer the oath and decide the case in accordance therewith or accept the plaintiff's refusal to abide by the oath drawing such inference from the refusal as is permissible and then proceed with the trial of the case in accordance with law *Babu Ram* v *Nathu Ram*, 99 Ind Cas 283=A I R 1927 Lah 78.

V. MISCELLANEOUS

Proceeding and evidence not invalidated by omission of oath or irregularity

13. No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place or shall affect the obligation of a witness to state the truth.

Scope The evidence of a boy aged 10, to whom no oath or affirmation was advisedly administered, was held admissible *Budha* v *Empress*, 31 P. R 1889 Cr [illegible] any omission and is not limited to [illegible] *press* v *Sanbhai*, 11 C P. L R Cr. 16; [illegible] 105, *per Parker J*, *Golli Chinna* v. [illegible] 737; *Queen* v. *Sheo Bhogta*,

23 W R Cr 12, *Emperor* v *Kusha* 5 Bom L R 551; *Queen Empress* v *Shava* 16 B 359, *Queen* v *Ananta*, 22 W R Cr 1, *Q* v *Perumal*, 1 Weir 827 (F B), *Queen* v *Itwarya*, 22 W R Cr 11, *Bulchand* v *Tarak Nath*, 18 C W N 1523, *Nafar* v *Emperor*, 18 C W N 147 = 41 C 406, *Dhani* v *Emperor*, 13 A L J 1072, *Emperor* v *Hari*, 20 Bom L R 365 *Emperor* v *Sashi*, 24 C W N 767, *Palu* v *Emperor*, 6 Pat L J 147, *Hussain* v *Emperor*, [illegible] *Laaperumal* 16 M 105, *per Collins* [illegible] W N 1888, 86, *Pan Nyun* v *King* [illegible] Bur L T 133 = 36 Ind Cas 468

If the jury [illegible] one which could be covered [illegible] R Cr 19 This section has [illegible] on *commission in* a foreign [illegible] = 7 C W N 806 This sectio[illegible] of the Presidency Court of [illegible] *Nath*, 18 C W N. 1323.

[illegible] not [illegible] v [illegible]

14. Every person giving evidence on any subject before any Court or person hereby authorised to administer oaths and affirmations shall be bound to state the truth on such subject.

Person giving evidence bound to state the truth

Scope Section 132 of the Evidence Act, read with s 14 of the Oaths Act compels a *witness* to answer criminating questions, and he is protected by the proviso to s 132 from a criminal prosecution for any offence for which he criminates himself directly or indirectly by his answer, except a prosecution for giving false evidence by such answer *Queen Empress* v *Ganu Singh*, 12 B 440

15. The Indian penal Code, sections 178 and 181 shall be construed as if, after the word "oath" the words "or affirmation" were inserted

Amendment of Penal Code ss 178 and 181

16. Subject to the provisions of sections 3 and 5, no person appointed to any office shall, before entering on execution of the duties of his office, be required to take any oath, or to make or subscribe to any affirmation or declaration whatever.

Official oaths abolished

SUBJECT INDEX.

B

him to justify a libel imputing pecuniary embarrassment, inspection was refused *Emmot* v *Star Newspaper Co* 62 L J. Q B 77 Similarly in *Pollock* v *Earle*, (1898) 1 Ch 1 the C A refused to make an order in the case of third persons who were neither actual nor constructive parties to the case, *e g*, as to the bank

inst one of its directors for inducing
epresentation as to such balance *Phip*
R said 'The Court should take care
of oppression" The order should only
be made where the entries of which inspection is sought will be admissible in evidence at the trial *Howard* v *Beall* 23 Q B D at p 2

It seems that the Court has jurisdiction to order inspection of the accounts of third parties *Howard* v *Beall* 23 Q B D 1, *South Staffordshire* v *Ebbsmith*, (1895) 2 Q B 669, *M' Gorman* v *Kierans*, 35 Ir L T R 84, *Agra Bank* v *Kashi Ram*, P L R 1900, p 237 But this power should not be exercised ordinarily *Pollock* v *Earle*, (1898) 1 Ch 1 But when order for inspecting the accounts of third parties is sought, a notice should be given to him *South* … B 669

kept by the bank, even when they are
e successors of the bank by whom the entries
… But it is
doubtful whether the … thin the
meaning of the Bankers … *b*, 31 C
284=8 C W N 125 … book in
his affidavit of documen… getting
… fit case an order will be made
… *Yearly Practice*, (1921) 459 The
implied in the relation of banker
and customer are (a) where disclosure is under compulsion by law, (b) where there is a duty to the public to disclose, (c) where the interest of the bank required disclosure, and (d) where the disclosure is made by the express or implied consent of the customer *Tournier* v *National Provincial Banks*, (1924) 1 K B 461=93 L J K B 449 Where a party desires an order under section 6 of the Bankers' Books Evidence Act, 1891 on his own behalf, the Court ought to grant it *ex parte*, but where he applies against the other party the Court ought not to make the order without notice to the other party *Tricumlal* v *Lakhmichand*, 5 Bom L R 865

Costs

7. (*1*) The costs of any application to the Court or a Judge, under or for the purposes of this Act, and the costs of anything done or to be done under an order of the Court or a Judge made under or for the purposes of this Act, shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the bank.

(*2*). Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

(*3*) Any order under this section awarding costs may, on application to any Court of Civil Judicature designated in the order, be executed by such Court as if the order were a decree for money passed by itself :

Provided that nothing in this sub-section shall be construed to derogate from any power which Court or Judge making the order may possess for the enforcement of its or his discretions with respect to the payment of costs.

APPENDIX G.

THE INDIAN OATHS ACT.

ACT X OF 1873

Received the assent of the Governor General on the 8th April, 1873

An Act to consolidate the law relating to Judicial oaths, and for other purposes.

Preamble.

Whereas it is expedient to consolidate the law relating to judicial oaths, affirmations and delarations and to repeal the law relating to official oaths, affirmations and declarations; It is hereby enacted as follows :—

I. PRELIMINARY

Short title

1. This Act may be called "The Indian Oaths Act 1873".

Local extent.

It extends to the whole of British India, and so far as regards subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty;

[Commencement]—*Repealed by the Repealing Act, 1873 (II of 1873).*

History ... "takes our history ... all primitive civ... part in the adminis... as only a single and subordinate phase of the general resort to oaths. The early Germanic modes of ... *Judicium* ... his plea ... sworn ... made wi... was att... notions of the oath at large (which left its traces as late as the 1800's in some of the common modes of ...

marked injustice, an... of competent witnesse... application of the c... feature by rendering ...

... modern common law may ...

him to justify a libel imputing pecuniary embarrassment, inspection was refused *Emmot* v *Star Newspaper Co* 62 L J Q B 77 Similarly in *Pollock* v *Earle*, (1898) 1 Ch 1, the C A refused to make an order in the case of third persons who were neither actual nor constructive parties to the case, e g, as to the bank balance of a company, in an action against one of its directors for inducing a purchase of its shares b ... ich balance *Phip Ev* 332 In the above cas ... should take care that this section is not ... e order should only be made where the entries of which inspection is sought will be admissible in evidence at the trial *Howard* v *Beall* 23 Q B D at p 2

... on of the accounts of th ... rdshire v *Ebbsmith*, (1895 ... 84, *Agra Bank* v *Kash* ... uld not be exercised ordin ... for inspecting the accou ... iven to him *South*

... s kept by the bank, even when they are ... entries were made *Asylum f* ... it is doubtful whether the ... in the meaning of the Banker ... 31 C 284=8 C W N 125 ... ook in his affidavit of docume ... etting an order to inspect the ... made *Perry* v *Phoshpor C* ... The qualifications of the contractual duty of secrecy implied in the relation of banker and customer are (a) Where disclosure is under compulsion by law, (b) where there is a duty to the public to disclose, (c) where the interest of the bank required disclosure, and (d) where the disclosure is made by the express or ... *Banks*, (1924) ... nder section 6 ... Court ought ... Court ought ... v *Lakhmi*

7. (*1*) The costs of any application to the Court or a Judge, under or for the purposes of this Act, and the costs of anything done or to be done under an order of the Court or a Judge made under or for the purposes of this Act, shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the bank.

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[Commencement]—*Repealed by the Repealing Act, 1873 (II of 1873).*

History. 'The employment of oaths" says *Prof. Wigmore* "takes our [illegible] back to the origins of Germanic law and custom, whereas in all primi[illegible]

[illegible]

in store for false swearing, [illegible] to speak the truth as he saw it" *Wigmore* § 1816

I. Applicability The provisions of the Indian Oaths Act are not intended to be utilized in such a manner as would abrogate the provisions of the Evidence ... is evidence, but if what is deposed to is not the Evidence Act the fact of a special oath will *Jamu* v *Muhammad*, 90 Ind Cas 378=A I R

2. [Repeal of Enactment] *Repealed by Act XII of 1873*

Saving of certain oaths and affirmations

3 Nothing herein contained applies to proceedings before Courts Martial or to oaths, affirmations or declarations prescribed "by or under any instructions under the Royal Sign Manual of His Majesty or"* by any law which, under the provisions of the Indian Councils Act, 1861, the Governor General in Council has no power to repeal.

II AUTHORITY TO ADMINISTER OATHS AND AFFIRMATIONS

Authority to administer oath and affirmation

4 The following Courts and persons are authorized to administer, by themselves, or by an officer empowered by them, in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law —

(a) all Courts and persons having by law or consent of parties authority to receive evidence,

(b) the commanding officer of any military station occupied by troops in the service of Her Majesty

Provided .

(1) that the oath or affirmation be administered within the limits of the station, and

(2) that the oath or affirmation be such as a Justice of the Peace is competent to administer in British India.

Scope A Magistrate holding an enquiry as to the fitness of a surety has power to record evidence on oath in the exercise of the power and duty conferred upon him *Emperor* v *Ghulam*, 26 A 371=A W N 1904 52 There is no provision of law which requires a Court examining a witness to record the fact that an oath was administered *Syed Ahmed* v *King Emperor* 11 A L J 933=35A 575 Under the rules framed under the Steam Vessels Act, a ... *Emperor* v *Lal Meah*, ... 4 of the Indian ... Evidence are aut... duties or in exercise of the powers imposed or conferred on them by law *King Emperor* v *Pakisi* 2 L B R 272 A Sub magistrate acting under ch XIV of the Criminal Procedure Code is a Court acting in the discharge of a duty imposed on him by law and is therefore authorized to administer oath under this section *Tevan* v *Emperor* 29 M 89=3 Cr L J 370 Witnesses examined before a Commissioner appointed under Act XXXVII of 1850 to hold an enquiry into the behaviour of a certain Judicial officer are bound to state the truth and render themselves liable to be punished under s 193 I P C

*Inserted by s 2 of Act VI of 1910

if they testify falsely *Gobind Ram* v *Empress*, 18 P R 1893 Cr The procedure of the arbitrator is not governed by the Oaths Act *Bhagirath* v *Ram Ghulam*, 4 A 283 = A W N 1882, 31 A Magistrate is not competent to administer oath in the course of a non-judicial inquiry *Allahwarayo* v *Crown*, 17 Cr L J 308 = 35 Ind Cas 672

App

III PERSON BY WHOM OATHS OR AFFIRMATIONS MUST BE MADE

Oaths or affirmations to be made by—

5 Oaths or affirmations shall be made by the following persons :—

Witnesses

(*a*) All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence,

Interpreters

(*b*) interpreters of questions put to, and evidence given by, witnesses;

Jurors

(*c*) jurors

Nothing herein contained shall render it lawful to administer in a criminal proceeding, an oath or affirmation to accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Nature of the
universally establist
it is sufficient, for
L C J in *Omict*
said "Nothing bu
according to our des
L C added "All that is necessary to an oath is an appeal to the Supreme Being, as thinking him the rewarder
Miller v *Salomons*, 7 Exch 535, *M*
Omichand v *Barker*), was that the es
Supreme Being in whose existence
whom he also believed to be a rewarder of truth and an avenger of falsehood"
exis-
R.
that

Supreme Being as thinking him the rewarder of truth and the avenger of falsehood *Indar* v *Jog Mohan* 1924 Oudh 412

Persons subjected to the oath. This section lays down that oaths or affirmations shall be made by the three following classes of persons, namely (1)

G witnesses (2) interpreters and (3) jurors So oath or affirmation is requ s te in all testimonial statements made in Court An interpreter is a kind of witness and must be sworn *Wigmore* § 1824, *R* v *Douglas* 13 Q B D 42 59 Cb 72 A juror should also be sworn *Queen* v *Ramsodoy* 20 W R Cr 19

Accused person Originally an accused person was allowed to produce no witnesses, later he might produce them but they testified without oath and finally they were allowed to be sworn' *Wigmore* § 1824 This section as well as section 342 (4) of the Cr Pro Code lays down that no oath shall be adm nis tered to the accused The provision in sub section (4) that no oath shall be administered to the accused has reference only to the statement made by him in answers to questions put to him by the Court under this section It has no reference to any other act of the accused, and therefore the accused can make an affidavit on oath in sup of the case under section 526 *Ghulam* v 399, se also *Reg* v *Hanmantha*, 1B 610, *Emp* ni v *Emperor* 2? C W N 740 *Akshoy* v *K E* 45 C 720, *Q E* v *Dalgua*, 10 B 190, *Alladal* v *King Emperor* 9 P R 1906, *Banu* v *Emperor*, 33 C 1353, *Emperor* v *Durant* 23 B 213 *Nga Ngue* v *K E* 20 Cr L J 342 *Q E* v *Tribhuni* 20 A 426, *Joseph* v *Emperor* 3 Bur L J 265, *K E* v *Annya*, 3 Bom L R 437 The term accused means a person under trial *Hinanda* v *Emperor* 2 C I J 149 see also *Emperor* v *Govind* 18 Bom L R 266, *Krishna Dojal* v *Corporation of Calcutta* 31 C W N 506=28 Cr L J 407 A magistrate has no power to administer an oath or affirmation to a person whose statements he records under s 164 Cr Pro Code *Lalu* v *Empress*, 2 P R 1893 Cr, see also 10 C P L R Cr 16

Scope of the section The direction in s 164 Cr Pro Code that the shall be recorded n one of the manners prescribed for recording procedure re the Cou of the Evid is Act *Qu* on for the sake of obtaining information upon son not before the Court he can ot a witness *Hari Charan* v *Quee* er a child understands the nature is a v *Sheoratu* C ving regard to the has any option as evidence but to the case may be *Queen Empress* v 1 16=22 Ind imperative reter under osecution to rately *Kalhai* v *King Emperor* 100 Cr Pro Code, 1898, to issue linds preliminary to the issue of oceedings In the course of such empowered to examine persons take oath under s 5 of the Oaths Act and under s 14 of th d to state the truth *Abdul A* v *Crown*, 34 P R 1916 Cr = 17 Cr L J 491 = 36 Ind Cas 171

Affirmation by natives or by persons objecting to oaths

6 Where the witness, interpreter or juror is a Hindu or Muhammadan, or has objection to making an oath, he shall, instead of making an oath, make an affirmation.

In every other case, the witness, interpreter, or juror shall make an oath.

Hindu and Mahomedan law on the subject "If we turn to India even prior to the introduction of English rule, we find that the Laws of *Menu* had their *oath too*, and in point of form, that prescribed by *Menu* is not very different from the English one —The imprecatory part too of the oath of *Menu*, if not framed exactly in conformity with the varying Code of the religious belief of the swearer, was nevertheless in a form adopted to the peculiarities of the influences by which each individual might be presumed to be most affected 'Let the Judge cause a Priest to swear by his veracity, a Soldier by his horse or elephant ... or servil ... , grain, and gold, a Mechanic ... crimes ... if he speak falsely all possible ... falsely y ... by saying, if you speak ... saying your horse or elephant and weapon become useless, a *Vaisya* 'your cattle, seeds and gold will be unproductive.' A *Sudra* he shall adjure by saying, 'if you speak falsely all sins will be on your head (*Macnaughten s Hindu Law* Vol I, 248) A course of imprecation though, by the way, which seems to address itself rather to the punishment of a present life, than a future one This however appears not to have been the only cause of swearing According to *Mr Beaufort*, the form of swearing by the water of the *Ganges*, and by copper and *toolsy* is virtually sanctioned by many *shastras*, but other prescribed forms are of equal validity; and all oaths, made by laying the hand on any symbol or image of the Diety have ... In ... cas ... Hi ... tio ... exe ... R. ... per ... 19 ... 305.

IV FORM OF OATHS AND AFFIRMATIONS

Forms of oaths and affirmations

7. All oaths and affirmations made under section 5 shall be administered according to such forms as the High Court may from time to time prescribe.

And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use

Explanation—Repealed by the Lower Burma Courts Act (VI of 1900) s. 48. Schedule II.

Forms of oath In *Omichund* v *Barker* 1 Atk 45 *Willes L C J.* said. "Th ... tion ... *On* ... be ... swe ... *L* ... bind his own con ... v. *Solomons*, 7 I ...

... 1 Leach Cr L 4th Ed 412, *Walker's Case* ... N Pleas 23, *R* v *Extrehan*, C & M 218, ... ie usual form of oath in criminal cases at common law was as follows The form at the assizes or sessions is, for the clerk of arraigns or of the peace to desire the witness to take the book in his hand, and, that done to say to him 'The evidence you shall give between our sovereign lord the king and the prisoner at the bar shall be the truth, the whole truth, and nothing but the truth; So help you God', upon which the witness kisses the book' The usual form of words in civil cases differred slightly "The evidence that you shall give to the Court and Jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth ... *Wigmore* § 1818 ... provided that it ... n of ... ing ... sad

v *Lala Jogmohan*, 11 O L J ...

Capacity to take oath—Children It was formerly thought that for children there was an age below which the incapacity to take the oath was beyond doubt and was to be regarded as always wanting This notion was probably due to the unwarranted transfer into the law of Evidence of some principles of substantive law, by which certain ages, specially seven years, were thought to mark the beginnings of capacity for various purposes Vide Co Litt 6 b, 2476, Hale Pl Cr I, 302, 634 *Buller, Nisi Prius*, 293, *Young* v *Slaughlerford* 11 Mod 228, *R* v *Travers* 1 Stra 700 But this view was finally repudiated in *R* v *Brasier*, East Pleas of the Crown, 1, 443 After much deliberation where the Court said 'An infant, though under the age of seven years may be sworn in a criminal prosecution, provided such infant appears on strict examination by the Court to possess a sufficient knowledge of the nature and consequences of an oath For there is no precise or fixed rule as to the time within which infants are excluded from giving evidence, but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court, but if they are found incompetent to take an oath, their testimony cannot be received See also *R* v *Perkins* 2 Moo Cr, C 139, *Braddon's Trial* 9 How St Tr 1127, *R* v *Holmes* 2 F & F 788, *Wigmore* § 1821, *Nafar* v *Emperor*, 18 C W N 147=41 C 406, *Fatu* v *Emperor*, 6 Pat L J 147=61 Ind Cas 705 Evidence of child witnesses can be admitted without oath or affirmations *In re Chinnaienal adu*, 38 M 550, *Hussain* v *Emperor*, 76 Ind Cas 1037, *Hari Ramji* v *Emperor*, 20 Bom L R 365=45 Ind Cas 497 In the case of a child witness the Judge is bound first to ascertain by questioning the child whether it is by tender years prevented from understanding the questions put or from giving rational answers to those questions Then if the Judge intend ... he should proceed to administer ... so doing, on the ground ... solemn affirmation under ... child will be admissible section 13 of the Oaths Act the depos... *Emperor* v *Kusha*, 5 Bom L R 551

Power of Court to tender certain oaths

8 If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuation to which he belongs, and not repugnant to justice or decency and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.

Scope of the section Under ... should come from the parties and not from the Cour... Cas 836=56 ... C L J 77=36 C W N 786=A. I ... 'party' to any judicial proceedings in this ... plainant in a

criminal proceeding nor the accused Sections 8 11 of the Oaths Act do not apply to criminal proceedings *Queen Empress* v *Murari* 13 B 389, *Imperator* v. *Haji Alu*, 5 S L R 129=13 Ind Cas 215=13 Cr L J 23, 1 Weir 822, *Emperor* v *Chiman*, 22 Bom L R 898=58 Ind Cas 147 Under the provisions of this Act, an oath proposed in a form which could affect a third party can not under any circumstances be lawfully administered *Ram Narain* v *Babu Singh*, 18 A 46, *Nabi Bakhsh* v *Ram Jauaya*, 66 P R 1910=7 Ind Cas 479=114 P L R 1910, *Tulsi Ram* v *Dayaram*, 88 Ind Cas 448 23 A L J 513 Where the lower appellate Court at the instance of the defendant, calle[illegible]
fals[illegible]
just[illegible]
fals[illegible]
187[illegible]
195. But where defendant also refuses no presumption arises *Sukdeo* v *Ganesh*, 10 Ind Cas 472=7 N L R 50

Where in a suit, the parties put in a joint application evidencing an agreement to abide by the statement on oath of a certain person, but one of the parties thereto subsequently, asked them to withdraw from the reference on the ground of collusion of that person with the other party and no collusion was proved *Held*, he could not be allowed to do so *Chiddu* v *Kuar Sen*, 3 A L J 654=29 A 49

[illegible] vidence of a third person given on [illegible]
Cod[illegible]
join[illegible]
such a case *Lakhraj Singh* v *Dulhma*, [illegible]

Neither an invocation nor an oath or affirmation in the technical sense of the words is in any way an essential part of the special oath or solemn affirmation provided for in section 8 of the Indian Oaths Act of 1873 The [illegible] in section 8 of the Act is [illegible] ths and affirmations referred to [illegible] the High Court prescribes, [illegible]

and must be in the form held [illegible]
deponent belongs The special [illegible]
is a complete substitute for the o[illegible]
supplemented by it or any part of it The words "oath" and "affirmation" used in respect of the special procedure provided for in section 8 are merely descriptive of the nature and suggestive of the consequences of the ritual— [illegible] way connected [illegible] *Das*, 31 C W N [illegible] 618=53 M L [illegible]

[illegible] A [illegible]

The offer of the guardian of a minor defendant on behalf of the minor to abide by the deposition to be given by a plaintiff on a special oath stands on a [illegible] compromise contemplated by C P. [illegible] the consent of his [illegible] rovided there is no [illegible] *ammad* v. *Behary* [illegible]

9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation.

Court may ask party or witness whether he will make oath proposed by opposite party.

i. Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

Scope. Under ss 8 and 9 of the Act, it is not necessary that the form of oath should be specified before it can be held binding on the parties agreeing to be bound by it It is sufficient if the oath is common among, and held binding by the class to which the parties belong *Ahmad Ali v Hanuman*, 29 P R. 1887 If in the course of a suit, the plaintiff offers to bind himself by the oath of a witness and the witness, after consenting to the offer, refused afterwards to take oath, the Court cannot decree the suit in the plaintiff's favour, even though the defendant had agreed to it in case the witness refused to take the oath Such an act on the part of the Court is not sanctioned by the Oaths Act. *Bawa Suchat v Ratna*, 31 P R 1888 A local commissioner appointed to record evidence in a case cannot administer an oath to one of the parties, [illegible] 8, 9 and 10 of the Oaths Act As the [illegible] tion between "Court" and persons [illegible] s not include persons authorised to [illegible] *Puran Chand v Chabar*, 89 P R, [illegible] to bind

client by oath *Perag v R* [illegible] party himself that can make an [illegible] vever, a party special[illegible] e an offer to be bound by a [illegible] racting the step he had taken if h[illegible] B 455 A offer by the guar[illegible] taken in a pa[illegible] or comprom[illegible] absence of the Court's sanction to the agreement under s 462, the minor defendant is barred by the consent of his guardian, if there is no fraud or negligence on the part of the latter. *Sheo Narain v. Sukh Lal*, 27 C 229=4 C W N 327, *Chengal Reddi v Venkata*, 12 M 483

[illegible] fendant offered [illegible]

A person, who under s 9 of the Oaths Act, agrees to be bound by an oath cannot retract The agreement to be bound by an oath is in effect, an agreement to treat the evidence given under the oath as the evidence in the case, and to dispense with other evidence If the party who has agreed to be bound prevents the oath being taken, the other party is entitled to a decree [illegible] the result of [illegible] on is that there [illegible] M L J. 99, [illegible] *Thoyi Ammal v Subbaraya*, 22 M. 231

Where the defendant takes oath proposed by the plaintiff, the oath is conclusive *Chhedi Lal v Jawala Prasad*, 6 A L J 241=31 A. 315=2 Ind Ca[illegible] proceeding to t[illegible] the [illegible] of [illegible] by [illegible] matter stated in the agreement is sufficient as the ground of a decision, a judgment may be passed, for then it would be conclusive evidence [under the Oaths Act. *Vasudeva v. Narama*, 2 M 356 A duly authorized agent holding a special power-of-attorney from a party to a suit enabling him to conduct it in a manner he may deem fit can make an offer under s 9 of the Oaths Act, to be bound by the oath of the other party and to have the case decided in accordance

therewith. *Wasi uz-zaman* v. *Faiza Bibi,* 11 A L. J 38=38 A. 131=32 Ind Cas 318 **App**

Where the agreement proves abortive, a suit can be decided on evidence taken *Seshagiri* v *Sankaya Setti,* 4 L W 258=1917 M W N 104=36 Ind Cas 1001. Where an offer is made by plaintiff to be bound by oath the Court

it seems that under
to refuse to refer
A 65; but see *Mith*
596=74 Ind Cas
1926 Lah 240

Ordinarily a party cannot resile from his offer, but he can do so with the permission of the Court *Ram Bhaj* v *Dhuni* 92 Ind Cas 813, *Narayan* v *Srikantha,* 4 Mys L J 217, *Salik* v *Wali,* 49 A 388=25 A L J 297=A I R. 1927 All 590 If a party after agreeing to abide by an oath satisfies the ... the Court would exercise a wise ... is only when a party puts ... e Court would be justified in administering the oath notwithstanding the retraction *Ramdeo* v *Naipal,* A I. R 1933 All 184

Where in certain divorce proceedings among Mahomedans the pleader ... and the ... and the other party agreed to abide by ... not be conclusive because of section 11 of the Oaths Act *Ahalya Bibi* v *Umar Saheb,* 52 B 295=110 Ind. Cas. 131=30 Bom L R 447=A I. R 1928 B 268

The word "party" in this section includes a duly authorised representative such as a pleader and that he can make the offer contemplated by the section *Amir* v *Mohammad,* 5 O. W N 10, see also *Hata* v *Samail* 137 Ind Cas 810=33 P L R 470=A I R 1932 Lah 414

... offer and the other party
Kunnath, 1928

10 If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it or, if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

Administration of oath if accepted

... ment to take an oath
s to be adminis-
h in any form
he requirements
, J. 618 The
is only when
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iminary to the
administer the oath proposed The ... *Krishna Rao* v. *Srinivasa Rao,* 7 M L T. agreement must be adopted ... Under this section, the Court if it does not administer ... ission to some person to administer it and ... e person to be sworn and return it to ... L R 122, see also *Dar Buz* v. *Dar Meah,*

Evidence conclusive as against person offering to be bound

11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated.

Scope of the section The decision of an issue arrived at, under the provisions of the Act is not an adjudication operating as an estoppel in any future proceedings *Keshava* v *Rudram*, 5 M 259 This section does not apply to the evidence of a defendant who has been examined under the usual form of oath and not under any oath or form of affirmation under s 8 *Ram Jaladar* v *Ram Kishen*, 22 W R 387, see also *Kashiram* v *Bhulu* A W N 1885 188

Under *section* 11, it is "the evidence so given' which shall, as against the person who offered to be ' ' ' the matter stated *Maddhogir* v *Gopal* 45 P R 1898, *Hamid* v *Naqui* 84 Ind Cas 577 (2)=49 M L J 379 A possession is in point of law admissible *evidence of the fact that* such party was in possession under section 11 of the Oaths Act, it is conclusive proof of the matters stated The *expression* 'conclusive proof' in s 11 is to be understood in the sense in which it is *defined* by s 4 of the Indian Evidence Act 1872 *Vithu* v *Ramji* 8 Bom L R 19=1 M L T 63

The parties to a suit agreed to be bound by the deposition of a referee in the manner *contemplated* by ss 10 and 11 of the Oaths Act, and a decree was passed in *favour of one* of the parties on the strength of that deposition The referee died *afterwards* not fully cover *the quest* was, therefore, to be r usual procedure *Maha*

There is nothing in the Indian Oaths Act constraining a Court to pass a decision in *favour of* a particular party If a party to a suit says that he would be bound by *the oath of a* particular person under the provisions of section 11 of the Act, *it* means no more than this that *pro tanto* he will be bound, that is to say in *so far* as the matter of that evidence is concerned and that evidence will be *conclusive* as to its truth, and the truth of such evidence will be litigation But it does to accept that evidence as =A W N 1892, 3 case and specifically to s client may bind him by *offering* the opposite party to take oath and the suit to be decided accordingly *Ganga Bishen* v *Matna*, 143 P L R 1903=85 P R 1903; see also *Gharib* v *Karim* 72 P R 1874

Under this section the oath is not conclusive to the suit, but is so only as to the *facts* deposed to in the oath *Jattauma* v *Bala Sheka*, 3 M L T 163 *Abdul Hussein* v *Badruddin*, 1 Bom, L R 531

A defendant to a civil suit agreed to be bound by whatever statement *might* be made by the plaintiff upon oath as prescribed by law The plaintiff accordingly was examined on oath administered in the usual manner *Held*, that though the statement then made by the plaintiff might not be binding

The oath taken in one proceeding under the provisions of sections 8 11 of the Act is not binding in any subsequent proceeding *Badruddin* v *Nizamuddin*, 33 C 386=10 C W N 501

Where an appellate Court confirms the decree of the first Court on the strength of the oath of a party to the suit on a question of fact the decree of the Court is none the less a final adjudication *Ahmed* v *Moidin*, 24 M 444

Where the plaintiff originally agreed to be bound by the oath of the defendant, if taken in a particular form and subsequently varied the agreement by attaching further conditions as to the way in which the oath should be made,

opportunity must be given to the defendant to take the oath in the manner originally agreed upon between the parties If the defendant does so, the evidence so given will be conclusive evidence of the facts to which it relates If the o
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suit
a subsequent litigation between the same parties though the subject matter of the suit is different *Sanjari* v *Artu Suaro,* 13 M L T 261=24 M L J 321=36 M 287=18 Ind Cas 83

only as against the one who never joined of appeal against the W R 1918=45 Ind

Cas 230

Where the agreement was to take the oath on a particular day but the oath was taken on a later day the burden lies on the person who relies on the oath t the contract *Athermankuthi* v *Chana*

by the defendant, the Court is bound to decide in favour of plaintiff *Jamna* v *Nanda,* 118 P R 1919=57 P L R 1919=49 Ind Cas 1005

Where an offer is made by the guardian of the minor defendant to the plaintiff as regards the truth of a certain fact the minor defendant is bound by the statement of the plaintiff made under specified oath *Porbhu* v *Jamil,* 19 A L J 911

acc
anc
being made on oath was conclusive proof of the facts set forth in it *Dusak* v *Raja Rama,* L R. 5 A 147

This section does not provide that the evidence given on oath shall be

There is nothing in the Oaths Act which says that the reference to the referee comes to an end as The referee can be re examined if to be established are not put to him I R 1926 All 266=24 A L J 241

For the application of section 11 of the Oaths Act it is necessary that the "evidence" of the fact in contro- *rdewa,* 103 Ind Cas 348=A I R.

de by the oath taken by a parti fterwards say that Ind Cas 864=A

oath of a witness, though the other parties do not agree to be bound and the case must be tried only as against the others *Ram Ratan* v *Ramlall,* 27 A L J 1095=118 Ind Cas 188=A I R 1929 A 759

12 If the party or witness refuses to make the oath or solemn affirmation referred to in section 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or aff proposed, the facts

Procedure in case of refusal to make oath

that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal

Scope of the section Under section 12 of the Act, it is only when a party refuses to make the oath proposed that the Court is bound to record that he was asked if he would make it and that he refused to do so *Madhogir* v *Gopal*, 7 C P L R 122 This section directs the Court to record as part of the proceedings the nature of the oath proposed, the fact that the party was asked to make the oath and refused, together with any reason assigned for the refusal. The section seems to contemplate that the Court shall give such weight as it may think fit, to the fact that a party has offered to make an oath, and has afterwards refused to make it, whilst it negatives the view that the refusal to make the oath is in itself a ground for dismissing the suit or giving the plaintiff a decree as the case may be *Mayan* v *Pathu Kutti*, 17 M L J 515=31 M 1, per *White C J* It may be doubted whether this section was intended to

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defendant as to his indebtedness in the plaintiff s book the failure on the part of the plaintiff to produce the account book was equivalent to failure to take an oath, or refusal to be bound by an oath *Amirchand* v *Govind Sahai* 5 P R 1003=37 P L R 1903

A Court is not entitled to presume because a party refuses to take a special oath that his case is false In the absence of anything on the record to show the reasons for the refusal, no inference can be drawn *Amantulla* v *Chhattoo*, 93 Ind Cas 830 ... to take a special oath is conduct ... vidence in the case bi ... t weigh positive evidenc ... I. R 1933 Nag 52

Where the plaintiff after agreeing to abide by the oath of a third person subsequently declined to abide by it, the Court has no power to dismiss the ... the oath but must ... ice there- ... inference ... case in ... I R 1927 Lah 78

V MISCELLANEOUS

Proceeding and evidence not invalidated by omission of oath or irregularity

13 No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place or shall affect the obligation of a witness to state the truth.

Scope The evidence of a boy aged 10, to whom no oath or affirmation was advisedly administered, was held admissible *Budha* v *Empress*, 31 P R 1889 Cr ... omission and is not limited to ... v *Sanbhai* 11 C P L R Cr 16, ... per *Parker J*, *Golla Chinna* v ... *Queen* v *Sheo Bhojo*,

23 W R Cr 12; *Emperor* v *Kusha* 5 Bom L R 551, *Queen Empress* v *Shaia*, 16 B 359; *Queen* v *Anunta*, 22 W R Cr 1, *Q* v *Perumal*, 1 Weir 827 (F B); *Queen* v *Ilwarya*, 22 W. R Cr 11; *Bulchand* v *Tarak Nath*, 18 C W. N. 1523; *Nafar* v *Emperor*, 18 C W N 147=41 C 406, *Dhanu* v *Emperor*, 13 A L J 1072, *Emperor* v *Hari*, 20 Bom L R 365, *Emperor* v *Sashi*, 24 C W N 767, *Tulu* v *Emperor*, 6 Pat L J 147, *Hussain* v *Emperor*, 1923 Lah 332, but see *Queen-Empress* v [illegible] ollins C J; *Queen* v *Masu*, 10 A 207=A [illegible] *King* *Emperor*, 2 L B R 322; *Daya* v *King*, 9 [illegible] 468 If the jury in a Sessions trial are not sworn [illegible] could be covered by this section *Queen* v [illegible] This section has no application to the evidence of a witness taken on commission in a foreign territory *Kadambini* v *Kumudini*, 30 C 931=7 C W N 806 This section applies to deposition taken by Registrar of the Presidency Court of Small Causes at Calcutta *Bulchand* v *Tarak Nath*, 18 C W N. 1323.

Asking whether a person would take oath and not recording the fact and not actually offering the oath are irregularities vitiating the trial *Afsar Kahan* v *Shabu*, 1922 Cal 148

14. Every person giving evidence on any subject before any Court or person hereby authorised to administer oaths and affirmations shall be bound to state the truth on such subject.

Person giving evidence bound to state the truth

Scope Section 132 of the Evidence Act, read with s 14 of the Oaths Act compels a witness to answer criminating questions, and he is protected by the proviso to s 132 from a criminal prosecution for any offence for which he criminates himself directly or indirectly by his answer except a prosecution for giving false evidence by such answer *Queen Empress* v *Ganu Singh*, 12 B 440

15. The Indian penal Code, sections 178 and 181 shall be construed as if, after the word "oath" the words "or affirmation" were inserted

Amendment of Penal Code ss 178 and 181

16. Subject to the provisions of sections 3 and 5, no person appointed to any office shall, before entering on execution of the duties of his office, be required to take any oath, or to make or subscribe to any affirmation or declaration whatever.

Official oaths abolished.

G. that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal.

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Patthakutti, 17 M L J 545=3 M L T 91=31 M 1.

Where the plaintiff offered to be bound by any statement recorded by the defendant as to his indebtedness in the plaintiff's book the failure on the part of the plaintiff to produce the account-book was equivalent to failure to take an oath, or refusal to be bound by an oath *Amirchand* v. *Govind Sahai*, 5 P R 1003=37 P. L R 1903

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